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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 BBK Tobacco & Foods LLP, an Arizona
10 limited liability partnership dba HBI
International,

11 Plaintiff,

12 v.

13 Juicy eJuice, a Canadian Business Entity;
14 Vapour Limited, a Seychelles Business
Entity; et al.,

15 Defendants.

No. CV-13-00070-PHX-GMS

ORDER

16 Pending before the Court are separate Motions to Dismiss from Defendants
17 Nikki's Vapor Bar, USA, Inc. (Doc. 55) and 1673030 Alberta, Inc. (Doc. 57). Also
18 before the Court is Plaintiff's Motion for Leave to File Supplemental Responses to the
19 Motions to Dismiss. (Doc. 81.) For the reason set forth below, the Motion for Leave is
20 denied and the Motions to Dismiss are both denied.¹

21 **BACKGROUND**

22 The Plaintiff, BBK Tobacco & Foods LLP ("BBK"), sells a variety of smoking
23 related products on its website including the liquid used in electronic cigarettes to create
24 vapor. BBK uses multiple trademarks, many of which incorporate the word "JUICY" as
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26 ¹ The parties' requests for oral argument are denied because the parties have
27 thoroughly discussed the law and the evidence, and oral argument will not aid the Court's
28 decision. *See Lake at Las Vegas Investors Grp., Inc. v. Pac. Malibu Dev.*, 933 F.2d 724,
729 (9th Cir. 1991).

1 an element such as JUICY JAYS and JUICY DROPS. Some of these trademarks are
2 registered with the United States Patent and Trademark Office (“USPTO”). BBK alleges
3 that Defendants have engaged in trademark infringement, trade dress infringement, and
4 unfair competition.

5 Defendant Nikki’s Vapor Bar, USA, Inc. (“Nikki’s Vapor”) sells similar products
6 under the name JUICY EJUICE on its website. Nikki’s Vapor is a Florida based
7 company that is incorporated in Delaware. It has no physical storefront but its website is
8 accessible from anywhere, including Arizona, and it allows customers to order and have
9 products shipped to Arizona. Arizona is one of many options available to select in a drop-
10 down menu that customers use to enter their mailing address. Nikki’s Vapor declares that
11 “through its website, [it] has not sold any Juicy eJuice products in Arizona nor has
12 Nikki’s shipped any Juicy eJuice products to Arizona.” (Doc. 56-1.) The website invites
13 visitors to contact Nikki’s Vapor for franchising opportunities. The website also has a
14 Terms and Conditions that govern the use of the site.

15 Defendant 1673030 Alberta, Inc., (“Alberta”) is a Canadian company. BBK
16 alleges that Alberta sells electronic smoking devices using the word mark JUICY
17 ESTICK and the e-liquids used in such devices. (Doc. 32 ¶¶ 95–96, 146.) BBK alleges
18 that one of the places where Alberta sells its e-liquids and e-sticks is on the JUICY
19 EJUICE website, JuicyeJuice.com. (*Id.* ¶¶ 101, 113.) Alberta points out that the website
20 JuicyeJuice.com is not registered to Alberta (Doc. 71 at 2), but also acknowledges that it
21 “conducts sales transactions through websites where customers from around the world
22 can purchase its products.” (Doc. 57-1 at 2). Alberta admits that it has sold products to
23 customers in Arizona, but states that in the past year those sales were “less than a third of
24 one percent of its online sales.” (*Id.*) BBK had a copy of the Second Amended Complaint
25 served or delivered to Alberta’s registered office in Canada. (*Id.*)

26 The online presence, marketing, and sales operations of Nikki’s Vapor and Alberta
27 are interconnected. The website for Nikki’s Vapor, NikkisVaporBar.com, is actually
28 registered to another defendant in this case, Vapour Ltd. (“Vapour”). (Doc. 55 at 2.) The

1 website JuicyeJuice.com, where Alberta’s products are sold, is also registered to Vapour.
2 (Doc. 32 at 12.) When a customer signs up for emails on JuicyeJuice.com, the customer
3 will receive promotional emails listing the name and address of Nikki’s Vapor. (Doc. 59-
4 1) Those emails originate from a third website, eStick.com, but they link customers back
5 to the website for Nikki’s Vapor. When a customer purchases an Alberta product on
6 JuicyeJuice.com, that customer then receives email confirmations and updates from the
7 third website, eStick.com. (Doc. 66-1.) The charge on the order from JuicyeJuice.com is
8 listed on the credit card statement as being from “NIKKI’S LIQUID” and the product
9 ordered arrives from the Florida address of Nikki’s Vapor. (*Id.*)

10 The management and ownership of Nikki’s Vapor and Alberta also overlap. Allan
11 Mackintosh is the Chief Operating Officer of Nikki’s Vapor. (Doc. 56-1.) Trevor
12 Westlake is a Director of Alberta. (Doc. 57-1.) Allan Mackintosh and Trevor Westlake
13 are the only two voting shareholders for Alberta, each with a fifty-percent share. (Doc.
14 69-1 at 18.) Mackintosh declares that Nikki’s Vapor is incorporated in Delaware and has
15 a principle place of business in Florida, but he signed that declaration and had it notarized
16 in Canada. (Doc. 56-1.) Westlake declares that Alberta is incorporated and has its
17 principle place of business in Canada, most of its employees are “located” in Canada, and
18 it has no offices in America, but he signed that declaration and had it notarized in Florida.
19 (Doc. 57-1.) Nikki’s Vapor and Alberta are both represented by the same counsel in this
20 lawsuit. That counsel filed a joint motion (Doc. 86) by both defendants and motions by
21 Alberta (Docs. 57, 71) that repeatedly references and incorporates the motions by Nikki’s
22 Vapor (Docs. 55, 70).

23 BBK filed a proof of service with this Court indicating that it served Alberta at its
24 registered office in Canada on September 30, 2013. (Doc. 48.) Alberta acknowledges that
25 it “was served with a copy of the Second Amended Complaint at its registered address in
26 Alberta, Canada,” (Doc. 57-1) but contends that it did not accept service or that the
27 service was insufficient (Doc. 71 at 5). BBK also submitted a declaration from the
28 Canadian attorney who hired the process server. (Doc. 69-1 at 2–4.) In that declaration

1 the attorney describes the applicable rules governing service on Alberta and attests that
2 the service was performed in compliance with those rules. (*Id.*) Alberta does not contest
3 that issue, but instead argues that the relevant issue is whether the service complied with
4 the Federal Rules of Civil Procedure and the Hague Convention on the Service Abroad of
5 Judicial and Extrajudicial Documents (“Hague Convention”). (Doc. 71 at 4.)

6 DISCUSSION

7 I. Supplemental Responses and Discovery

8 BBK’s Motion for Leave to File and its requests for limited discovery on the issue
9 of personal jurisdiction are denied. This Court earlier granted a stipulation by BBK and
10 Nikki’s Vapor to allow BBK to file a supplemental response with respect to Nikki’s
11 Vapor. (Docs. 63, 66, 68.) BBK now seeks leave to file a supplemental response
12 concerning Alberta and a second supplemental response concerning Nikki’s Vapor. (Doc.
13 81.) Nikki’s Vapor and Alberta filed a joint response opposing that request. (Doc. 86.)
14 BBK’s request is denied because it has already had a full opportunity to brief its position.

15 In the Ninth Circuit, jurisdictional discovery should “ordinarily be granted where
16 ‘pertinent facts bearing on the question of jurisdiction are controverted or where a more
17 satisfactory showing of the facts is necessary.’” *Butcher’s Union Local No. 498 v. SDC*
18 *Invest., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (quoting *Data Disc, Inc. v. Sys. Tech.*
19 *Assocs., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977)). As explained below, discovery is
20 unwarranted because facts establishing jurisdiction have been sufficiently plead.

21 II. Service

22 Compliance with the Hague Convention is mandatory in cases involving service in
23 a signatory country and it determines in part the validity of service. *Brockmeyer v. May*,
24 383 F.3d 798, 801 (9th Cir. 2004). Alberta is a Canadian company and the Parties agree
25 that Canada is a signatory to the Hague Convention. The Hague Convention “regularized
26 and liberalized service of process in international civil suits.” *Id.* It did so principally by
27 requiring each country to set up a Central Authority which must effectuate service when
28 it is provided with documents that comply with its rules. *Id.*

1 In addition to establishing a new and uniform system of service, the Hague
2 Convention also “shall not interfere with” other enumerated types of service “[p]rovided
3 the State of destination does not object.” Hague Convention, art. 10. Those other types of
4 service include:

5 b) the freedom of judicial officers, officials or other
6 competent persons of the State of origin to effect service of
7 judicial documents directly through the judicial officers,
8 officials or other competent persons of the State of
9 destination,

10 c) the freedom of any person interested in a judicial
11 proceeding to effect service of judicial documents directly
12 through the judicial officers, officials or other competent
13 persons of the State of destination.

14 *Id.* Alberta states that, according to Canada’s declaration at signing, the “normal
15 procedure” should be service by a sheriff and that only “on occasion” has Canada not
16 objected to the other forms of service. (Doc. 71 at 3.) In fact, the declaration quoted is
17 only describing what the “normal procedure” will be when the Central Authority is used
18 to affect formal service and Canada does not actually declare a preference or a
19 requirement for such formal service. *Text of the Declarations of Canada*, Hague
20 Conference on Private International Law, [http://www.hcch.net/index_en.php?act=status](http://www.hcch.net/index_en.php?act=status.comment&csid=392&disp=resdn)
21 [.comment&csid=392&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=392&disp=resdn) (last visited Apr. 10, 2014).

22 Canada has not objected to the other types of service permitted under Article 10.
23 *See id.* Alberta argues that those other forms of service have only been allowed “**on**
24 **occasion**,” when in fact the declaration states that “[o]n accession, Canada has not
25 declared to object to methods of service of Article 10, sub-paragraphs *b*) and *c*).” *Id.* The
26 word “accession” is not a typographical error or in any way a synonym for “occasion.”
27 Accession is defined as “the act by which one nation becomes party to an agreement
28 already in force between other powers.” *Accession - Definition*, Merriam-Webster,
<http://www.merriam-webster.com/dictionary/accession> (last visited Apr. 10, 2014). In
other words, Canada did not object to the methods of service in Article 10 when it
became a party to the Hague Convention.

1 Article 10 permits direct service and BBK asserts that its method of direct service
2 was in compliance with Canadian law. It corroborates that position by an affidavit from
3 the Canadian lawyer who facilitated the service. Alberta only argues that service should
4 have been through the Central Authority and does not argue that the service was
5 otherwise impermissible under Canadian law. In this case, the service was adequate
6 because it complied with Canadian law and was permissible under article 10 of the Hague
7 Convention.

8 Defendant's contention that the service is not permissible under the Federal Rules
9 of Civil Procedure is premised on the argument that the service was not in fact compliant
10 with the Hague Convention. The Federal Rules of Civil Procedure do allow service "by
11 any internationally agreed means of service that is reasonably calculated to give notice,
12 such as those authorized by the Hague Convention." Fed. R. Civ. P. 4(f)(1). BBK's
13 service on Alberta complied with that requirement by complying with the Hague
14 Convention.

15 The Motion to Dismiss will not be granted based on a failure of service because
16 BBK's service on Alberta was permissible under Canadian law, the Hague Convention,
17 and the Federal Rules of Civil Procedure.

18 **III. Personal Jurisdiction**

19 **A. Law**

20 In a motion to dismiss for lack of jurisdiction, the "party seeking to invoke the
21 court's jurisdiction bears the burden of establishing that jurisdiction exists." *Scott v.*
22 *Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). When the Court is resolving a motion to
23 dismiss without holding an evidentiary hearing, plaintiff "need make only a prima facie
24 showing of jurisdictional facts to withstand the motion to dismiss." *Ballard v. Savage*, 65
25 F.3d 1495, 1498 (9th Cir. 1995). "That is, the plaintiff need only demonstrate facts that if
26 true would support jurisdiction over the defendant." *Id.* A plaintiff's uncontroverted
27 allegations from the complaint are taken as true and conflicts in affidavits are resolved in
28 favor of the plaintiff. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008).

1 “Where, as here, there is no applicable federal statute governing personal
2 jurisdiction, the district court applies the law of the state in which the district court sits.”
3 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citing
4 Fed. R. Civ. P. 4(k)(1)(A)). Because Arizona’s long-arm statute is co-extensive with
5 federal due process requirements, the jurisdictional analyses under Arizona law and
6 federal due process are the same. *See* Ariz. R. Civ. P. 4.2(a); *Doe v. Am. Nat’l Red Cross*,
7 112 F.3d 1048, 1050 (9th Cir. 1997). “The due process clause of the Fourteenth
8 Amendment requires that the defendant must have minimum contacts with the forum
9 state ‘such that the maintenance of the suit does not offend traditional notions of fair play
10 and substantial justice.’” *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1194 (9th Cir.
11 1988) (quoting *Data Disc*, 557 F.2d at 1287).

12 A court lacking general jurisdiction may nevertheless exercise specific jurisdiction
13 over a party if: (1) the defendant purposefully avails himself of the privileges of
14 conducting activities in the forum, thereby invoking the benefits and protections of its
15 laws, or purposely directs conduct at the forum that has effects in the forum; (2) the claim
16 arises out of the defendant’s forum-related activities; and (3) the exercise of jurisdiction
17 comports with fair play and substantial justice, i.e., it is reasonable. *Bancroft & Masters,*
18 *Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (citing *Cybersell, Inc. v.*
19 *Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997), *holding modified by Yahoo! Inc. v. La*
20 *Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006)). If Plaintiff
21 succeeds in establishing the first two elements of this test, the burden shifts to Defendants
22 to “‘present a compelling case’ that the exercise of jurisdiction would not be reasonable.”
23 *Schwarzenegger*, 374 F.3d at 802 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S.
24 462, 476–78 (1985)).

25 **1. Purposeful Direction**

26 It has long been established, that to assert specific jurisdiction, there must be in
27 each case “some act by which the defendant purposefully avails itself of the privilege of
28 conducting activities within the forum State, thus invoking the benefits and protections of

1 its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). More recently, however, the
2 Supreme Court held that a court may also have specific jurisdiction over a defendant
3 where the intended effects of the defendant’s non-forum conduct were purposely directed
4 at and caused harm in the forum state. *Calder v. Jones*, 465 U.S. 783, 788–90 (1984); *see*
5 *also Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155–56 (9th Cir. 2006) (noting that
6 purposeful direction analysis is appropriate when “all of [the defendant’s] action
7 identified by [the plaintiff] is action taking place outside the forum”); *Sinatra*, 854 F.2d at
8 1195 (“[T]he decisions of this court have interpreted the holdings of *Calder* and *Burger*
9 *King* as modifying the purposeful availment rubric to allow ‘the exercise of jurisdiction
10 over a defendant whose only “contact” with the forum is the “purposeful direction” of a
11 *foreign* act having *effect* in the forum state.’”) (quoting *Haisten v. Grass Valley Med.*
12 *Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir. 1986)); *but see Cybersell*, 130 F.3d
13 at 420 (holding that the “effects” test did not “apply with the same force” in a trademark
14 infringement and unfair competition action against a business entity in which the
15 defendant’s contact with Arizona arose only from infringing use of the plaintiff’s
16 trademarks on a passive website on the Internet).

17 “A purposeful direction analysis, [rather than a purposeful availment analysis], is
18 most often used in suits sounding in tort.” *Brayton Purcell LLP v. Recordon & Recordon*,
19 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting *Schwarzenegger*, 374 F.3d at 802). A
20 purposeful direction analysis applies to this case because the underlying action,
21 trademark infringement, sounds in tort. *See Polar Bear Prods., Inc. v. Timex Corp.*, 384
22 F.3d 700, 720 (9th Cir. 2004).

23 Courts evaluate purposeful direction using the *Calder* “effects test.” *See Brayton*
24 *Purcell*, 606 F.3d at 1128. Under the “effects test,” the defendant must allegedly have:
25 “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing
26 harm that the defendant knows is likely to be suffered in the forum state.” *Dole Food Co.,*
27 *Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). All three elements of the test must be
28 satisfied. *Schwarzenegger*, 374 F.3d at 805. “A finding of ‘express aiming’ . . . does not

1 mean ‘that a foreign act with foreseeable effects in the forum states always gives rise to
2 specific jurisdiction,’” *Dole*, 303 F.3d at 1112 (quoting *Bancroft*, 223 F.3d at 1087); *see*
3 *also Cybersell*, 130 F.3d at 418 (“Creating a site, like placing a product into the stream of
4 commerce, may be felt nationwide—or even worldwide—but, without more, it is not an
5 act purposefully directed toward the forum state.”) (quotation omitted).

6 The “intentional” requirement is not a high bar, requiring only “an intent to
7 perform an actual, physical act in the real world.” *See Schwarzenegger*, 374 F.3d at 806.

8 The express aiming requirement is another way of saying that there must be
9 “something more” than a foreseeability of an effect in the forum state. *Brayton Purcell*,
10 606 F.3d at 1129. A passive website alone cannot confer personal jurisdiction, but
11 “operating even a passive website in conjunction with ‘something more’—conduct
12 directly targeting the forum—is sufficient to confer personal jurisdiction.” *Id.* (quoting
13 *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002)). The Ninth
14 Circuit has made it clear that any intentional conduct must be “targeted at a plaintiff
15 whom the defendant knows to be a resident of the forum state.” *Bancroft*, 223 F.3d at
16 1087; *see also Goldberg v. Cameron*, 482 F. Supp. 2d 1136, 1146 (N.D. Cal. 2007)
17 (holding that defendants who willfully infringed a plaintiff’s copyright and who acted
18 with the intent to produce movies for worldwide distribution, including in the forum
19 state, sufficiently satisfied the purposeful direction requirement); *Panavision Intern., L.P.*
20 *v. Toepfen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (holding that a defendant who “engaged
21 in a scheme to register Panavision’s trademarks as his domain names for the purpose of
22 extorting money from Panavision” was enough “to demonstrate that the defendant
23 directed his activity toward the forum state”).

24 The Ninth Circuit has noted that “the likelihood that personal jurisdiction can be
25 constitutionally exercised is directly proportionate to the nature and quality of
26 commercial activity that an entity conducts over the Internet.” *Cybersell*, 130 F.3d at 419
27 (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa.
28 1997)). In *Cybersell*, the court went on to note that “the essentially passive nature of [the

1 defendant's] activity in posting a home page on the World Wide Web that allegedly used
2 the service mark of [the plaintiff] does not qualify as purposeful activity invoking the
3 benefits and protections of Arizona," *id.* at 418–19. In making its ruling, the court
4 specifically noted that the defendant did nothing to encourage Arizona residents to visit
5 the website, did not conduct business in Arizona, entered no contracts with Arizona
6 residents, earned no income from Arizona, received no telephone calls from Arizona, and
7 did not maintain an 800 telephone number. *Id.* at 419. The court indicated that there must
8 be "something more" to "indicate that the defendant purposefully (albeit electronically)
9 directed his activity in a substantial way to the forum state." *Id.* at 418.

10 The third prong of the *Calder* effects test is foreseeable harm, which is satisfied
11 when the defendant "caused harm that it knew was likely to be suffered in the forum."
12 *Brayton Purcell*, 606 F.3d at 1131. The forum state does not have to be the principle
13 place of injury because this element can still be satisfied when the "the bulk of the harm"
14 occurs outside the forum." *Id.*

15 **2. The Claim Arises Out of the Forum-Related Activities**

16 After the plaintiff establishes purposeful direction under the three steps of the
17 *Calder* effect test, the second requirement for personal jurisdiction is that the claim must
18 arise out of the forum-related activities. This is a "but for" test that determines whether
19 defendant's forum-related conduct caused the injury to plaintiff. *Rio Properties*, 284 F.3d
20 at 1021.

21 **3. The Exercise of Jurisdiction is Reasonable**

22 Finally, jurisdiction must be reasonable, by "comport[ing] with traditional notions
23 of fair play and substantial justice." *Id.* Courts determine reasonableness by balancing
24 the following factors, none of which is individually dispositive:

- 25 (1) the extent of a defendant's purposeful interjection;
- 26 (2) the burden on the defendant in defending in the forum;
- 27 (3) the extent of conflict with the sovereignty of the defendant's state;
- 28 (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 interest in

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

3 *Id.*

4 In analyzing personal jurisdiction generally, and the reasonableness inquiry in
5 particular, the Ninth Circuit has noted that “litigation against an alien defendant requires
6 a higher jurisdictional barrier than litigation against a citizen from a sister state.” *Rano v.*
7 *Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993).

8 **B. Application**

9 **1. Nikki’s Vapor**

10 Here, BBK has the initial burden to show that Nikki’s Vapor purposefully directed
11 its conduct at Arizona. BBK alleges that Nikki’s Vapor operates an interactive website
12 which advertises and makes sales of products that infringe on BBK’s trademark and trade
13 dress. In these sales and promotional activities, Nikki’s Vapor is directly competing with
14 BBK both in Arizona and throughout the country. BBK experiences this injury to its sales
15 and this infringement of its copyright in its home state of Arizona. In addition to the harm
16 experienced in Arizona as a result of this nationwide infringement by Nikki’s Vapor,
17 BBK has also shown how the Nikki’s Vapor has individually targeted its conduct toward
18 Arizona. BBK states that it has received promotional emails in Arizona from Nikki’s
19 Vapor advertising the sale of the allegedly infringing products. In its supplemental
20 motion, BBK showed how Nikki’s Vapor participated in a sale of the products on
21 JuicyeJuice.com. Specifically, Nikki’s Vapor charged BBK’s credit card for the sale and
22 shipped the products from its address in Florida to BBK in Arizona.

23 Turning to the elements of the *Calder* effect test, the conduct of Nikki’s Vapor is
24 intentional because it runs the websites, sends the advertising emails, and participates in
25 the billing and shipment. Under the second element, those actions must be expressly
26 aimed at Arizona and the case law shows that a passive website cannot support personal
27 jurisdiction. However, Nikki’s Vapor does not have a merely passive website with only
28 information, but rather uses interactive websites to collect customer information and send

1 advertising emails and to sell allegedly infringing products in a market in which Plaintiff
2 is its competitor. It also invites orders on the website with its name and at least
3 participates in the sales made on another website. Nikki's Vapor is actively reaching out
4 to and making sales through the internet, and that conduct is expressly aimed at Arizona
5 because BBK is an Arizona company that experiences the negative impact on its sales
6 and intellectual property here in Arizona. Furthermore, BBK has shown that Nikki's
7 Vapor is doing business with a customer that Nikki's Vapor knows is in Arizona. All of
8 this conduct meets the requirement of "something more," or express aiming at Arizona.
9 Under the third *Calder* element, Nikki's Vapor knew that it was selling and advertising
10 the contested products in Arizona. It also knew that any harm from its infringing
11 activities would be felt by BBK in Arizona because that is where BBK is located.

12 Nikki's Vapor argues that it does not have sufficient contacts. In fact, in its Motion
13 to Dismiss Nikki's Vapor originally asserted that it "has not sold any Juicy eJuice product
14 in Arizona" and that it "has no contacts with Arizona." (Doc. 55 at 3, 5.) Nikki's Vapor's
15 reply is more carefully worded. It does not deny that the emails or shipped products came
16 from it. Instead it argues that the email advertisements to plaintiffs in Arizona and the
17 shipment of Juicy eJuice products to Arizona should not be considered by this Court for
18 several reasons.

19 First, Nikki's Vapor argues that these contacts are somehow invalid because BBK
20 initiated them with the intent of establishing jurisdiction. As just addressed, all of the
21 infringing sales and marketing direct harm at BBK's home in Arizona. In regards to the
22 Arizona sales, Nikki's Vapor cites no authority for its position that they should be invalid
23 because BBK requested them. This is not a case of Nikki's Vapor being inadvertently
24 drawn into a market where it never intended to sell its product. Nikki's Vapor is involved
25 in a worldwide outreach to market and sell its products both by itself and through
26 franchises. It chooses to send marketing emails to target individuals who indicate an
27 interest in its products even when the customer is in Arizona. It charges customers who
28 buy products and ships products to them even when the customer is in Arizona. BBK has

1 made a prima facie showing that Nikki's Vapor is involved in nationwide sales that harm
2 BBK and that Nikki's Vapor advertised and sold products to at least one customer that
3 Nikki's Vapor knew was located in Arizona.

4 Second, Nikki's Vapor argues that these activities came from websites that do not
5 bear its name or are not registered to it. This point is immaterial. Neither JuicyeJuice.com
6 nor NikkisVaporBar.com is registered to Nikki's Vapor. However, it is plausible from the
7 facts alleged that Nikki's operates NikkisVaporBar.com. After BBK visited
8 JuicyeJuice.com, Nikki's Vapor allegedly sent BBK multiple promotional emails, and
9 later billed and shipped the products ordered during a sale. The websites are both
10 registered to a third defendant, but that does not mean that Nikki's Vapor Bar is not
11 responsible for the business that it conducts and the contacts that it makes using those
12 websites. Nikki's Vapor's conduct is relevant even if it is not the registered owner of the
13 website or does not have its name included in the website address.

14 BBK has made a prima facie showing that the Nikki's Vapor's conduct satisfies
15 the purposeful direction prong for specific jurisdiction by passing the *Calder* effects test.
16 Under the second prong, BBK has also shown that its claims of trademark and trade dress
17 infringement arise out of that conduct. There would be no injury to BBK but for Nikki's
18 Vapor advertising and selling products bearing an allegedly infringing mark.

19 The burden shifts to Nikki's Vapor to establish why the exercise of personal
20 jurisdiction over it would nonetheless be unreasonable. The seven factors do not support
21 a conclusion that jurisdiction would be unreasonable in this case. First, Nikki's Vapor
22 argues that it made no interjection into Arizona, but the Court has found that BBK made
23 a prima facie showing otherwise. Second, Nikki's Vapor has not demonstrated anything
24 that would make the typical burden of defending an out-of-state lawsuit exceptional in
25 this case. Third and Fourth, it does not raise an issue about conflict of sovereignties or
26 Arizona's interest in the case. The fifth element of efficient judicial resolution of the
27 controversy and the sixth element of convenient and effective relief both favor Arizona.
28 BBK is suing several entities with ties to various states and countries. It should not have

1 to file separate cases in each of those locations if this Court can exercise jurisdiction over
2 all defendants and resolve the matter entirely in one action. Seventh, there is no suitable
3 alternative forum. Nikki's Vapor suggests Delaware or Florida where it has citizenship,
4 but that does not resolve the issue that the other defendants may not have citizenship or
5 ties to those states.

6 BBK has met its prima facie burden of showing that Nikki's purposefully aimed
7 its conduct at Arizona and that BBK's claims arise out of that forum-related conduct.
8 Nikki's has not shown that the exercise of jurisdiction would be unreasonable. The Court
9 will not grant Nikki's Vapor's Motion to Dismiss based on a lack of personal jurisdiction.

10 **2. Alberta**

11 Alberta repeats many of the same arguments for a lack of personal jurisdiction and
12 explicitly references the arguments and law found in the Motion to Dismiss and Reply of
13 Nikki's Vapor. Although Alberta is in a somewhat different position than Nikki's Vapor,
14 the Court also has personal jurisdiction over Alberta.

15 One of the differences is that Alberta concedes that it makes sales to Arizona. It
16 states that these sales make up only a third of one percent of its total sales. However,
17 Arizona is one of fifty states, and the United States is one of hundreds of countries in the
18 world. It is unremarkable that Arizona would make up a small percentage of Alberta's
19 worldwide sales. Alberta chose not to inform the Court about how many sales it makes to
20 Arizona but admits to having "customers in Arizona." (Doc. 57-1.) The fact that Alberta
21 has sales throughout the world, or more sales in other states or countries, does not affect
22 the analysis here of whether Alberta has sufficient minimum contacts in order to support
23 jurisdiction in Arizona.

24 BBK alleges in its complaint that Alberta sells smoking products including an e-
25 cigarette and e-juice that are labeled with a "Juicy" mark. Alberta entirely avoids the
26 issue of what products it sells or where it sells them. BBK alleges that Alberta sells its
27 products through the website JuicyeJuice.com. Like Nikki's Vapor, Alberta points out
28 that the website is registered to another defendant. As explained above, not being the

1 registered owner of the website does not preclude personal jurisdiction for actions taken
2 through the website. Alberta repeatedly states in its Reply that BBK has not proven
3 anything alleged in the Second Amended Complaint, but Alberta does not actually deny
4 or contradict the allegations of that complaint. BBK only has the burden to make a prima
5 facie showing. BBK's allegations from its complaint will be taken as true because they
6 are not contradicted by Alberta.

7 Alberta's conduct qualifies as purposeful direction under the *Calder* effects test.
8 Its sales of products allegedly infringing on an Arizona trademark are intentional under
9 the first element. As to the second element, Alberta admits that it is involved in internet
10 sales and that some of those sales are with customers in Arizona. As noted, the Court
11 must accept as true the allegation in BBK's complaint that Alberta is selling its products
12 through the JuicyeJuice.com website. Alberta argues that BBK attributed this conduct to
13 Nikki's Vapor, but that does not mean that Alberta cannot be involved as well. The facts
14 indicate that Alberta and Nikki's Vapor are closely tied. Alberta's declaration was
15 notarized in Florida, the state where Nikki's Vapor is located and from where the
16 shipment was sent. Alberta is half owned by Allan Mackintosh, the Chief Operating
17 Officer of Nikki's Vapor. All of the websites are registered to another defendant. In the
18 Second Amended Complaint, BBK alleges that all of the Defendants "are related to each
19 other, are the alter egos of each other, are the agents of each other, or otherwise acted in
20 concert with a common purpose sufficient enough to make each liable for the acts of the
21 other." (Doc. 32 at 2.) Without making any specific findings regarding the exact status of
22 these various Defendants, the Court finds that BBK has made a prima facie showing that
23 both Alberta and Nikki's Vapor participated in the advertising emails and the sale to
24 Arizona. This is in addition to the unspecified customers in Arizona that Alberta
25 concedes to having. For all of these reasons, the second element of express aiming is
26 sufficiently established. Under the third element of the *Calder* effects test, Alberta also
27 knew that some of the harm from this conduct would be felt in Arizona because that is
28 where BBK is located.

1 After consideration of purposeful direction, the rest of the analysis also supports
2 the exercise of personal jurisdiction over Alberta. The second prong, “but for” test, is
3 satisfied because the injuries again arise out of the forum related contacts. Under the third
4 prong, Alberta fails to show why personal jurisdiction cannot reasonably be exercised in
5 Arizona. Although the Court is more mindful that the burdens on foreign defendants are
6 sometimes unique, they are not particularly strong in this case. Representatives from
7 Alberta will not be forced to travel any further than those from Nikki’s Vapor. As the
8 Court has noted, they already share the same counsel and some of the same ownership or
9 leadership with Nikki’s Vapor. Although another suit may have been filed in Canada, this
10 Court does not have the power to transfer this case there or consolidate both cases. As
11 noted above, Defendants fail to identify another venue with a similar interest in the
12 matter where all defendants would be subject to jurisdiction. Finally, the trademarks at
13 issue in this case are registered with the USPTO, making courts in the United States the
14 most reasonable, if not the only, place to seek their enforcement.

15 **IV. Venue**

16 Nikki’s Vapor makes a brief argument for dismissal based on improper venue that
17 Alberta also incorporates into its motion. Their legal argument is that it is plaintiff’s
18 burden to establish venue and that dismissal for improper venue is appropriate where
19 “plaintiff’s chosen forum imposes a heavy burden on the defendant or the court.” *Piper*
20 *Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981). Defendants failed to include the rest of
21 the sentence with the remaining requirement from *Piper Aircraft*. That case actually
22 approves of dismissal where there is both a heavy burden “and where the plaintiff is
23 unable to offer any specific reasons of convenience supporting his choice.” *Id.* The Court
24 goes on to explain that “dismissal may be warranted where a plaintiff chooses a particular
25 forum, not because it is convenient, but solely in order to harass the defendant or take
26 advantage of favorable law.” *Id.* n.15.

27 As described in the reasonableness analysis above, this case does not create an
28 unusual or heavy burden on either Defendant. Further, Defendants have not argued that

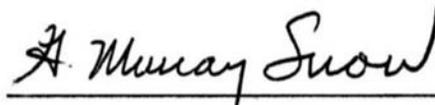
1 BBK has no reasons of convenience for bringing this suit in Arizona, BBK's home state.
2 It makes no argument that this was done to harass or take advantage of favorable law.
3 Their motions will not be granted because Defendants have not shown how *Piper*
4 *Aircraft* supports dismissal in this case.

5 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Leave to File
6 supplemental responses (Doc. 81) is **DENIED**.

7 **IT IS FURTHER ORDERED** that Defendant Nikki's Vapor Bar's Motion to
8 Dismiss (Doc. 55) is **DENIED**.

9 **IT IS FURTHER ORDERED** that Defendant Alberta's Motion to Dismiss (Doc.
10 57) is **DENIED**.

11 Dated this 29th day of April, 2014.

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14 G. Murray Snow
15 United States District Judge
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