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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 LifeSuccess Productions LLC, a Nevada
limited-liability company,

10 Plaintiff,

11 v.

12 Paul Martinelli, husband; Kelly Dellasala,
13 wife; Martinelli & Associates, Incorporated,
a Florida domestic for profit corporation;
14 Cheryl Fisher, wife; Bo Fisher, husband;
and Dreams to Reality, Incorporated, a
15 Florida domestic for profit corporation,

16 Defendants.

No. CV-13-01272-PHX-GMS

ORDER

17 Pending before the Court are Defendants Paul Martinelli and Martinelli and
18 Associate, Inc.'s Motion to Dismiss (Doc. 25) and Defendants Cheryl Fisher and Dreams
19 to Reality, Inc.'s Motion to Dismiss the First Amended Complaint (Doc. 26). For the
20 following reasons, Martinelli and Martinelli Inc.'s Motion is granted in part and denied in
21 part and Defendants Fisher and Dreams to Reality, Inc.'s Motion is denied.¹

22 **BACKGROUND**

23 This case arises out of three contracts.

24 **I. Martinelli Separation Agreement**

25 Defendant Martinelli worked with Plaintiff LifeSuccess Productions LLC ("LSP")
26 as an officer and manager of LSP-related subsidiaries and as a consultant. (Doc. 23

27
28 ¹ Also pending are Defendants' Motions to Dismiss (Docs. 20–21) which regarded
Plaintiff's initial Complaint (Doc. 1). As the Complaint was superseded by the First
Amended Complaint (Doc. 23), the Court denies the initial Motions to Dismiss as moot.

1 (“First Amended Complaint”) ¶ 19.) In 2009, LSP decided to end its affiliation with
2 Martinelli. On October 29, 2009, LSP and its subsidiaries presented Martinelli with a
3 Separation Agreement (the “Martinelli Separation Agreement.”) LSP and one of its
4 subsidiaries agreed to pay Martinelli \$410,000 as consideration. (*Id.* ¶ 22.)

5 Under this agreement, Martinelli was required to resign from his positions within
6 LSP and agree to various restrictive covenants and other requirements. (*Id.* ¶ 21.) He
7 agreed to return LSP property containing confidential, proprietary, and trade secret
8 information as soon as practicable following execution of the agreement. (*Id.* ¶¶ 23, 26.)
9 Further, the agreement barred Martinelli from soliciting any LSP customers or employees
10 within two years of the agreement. (*Id.* ¶25.) LSP alleges that Martinelli entered into the
11 agreement and accepted the funds pursuant to the agreement without intending to honor
12 its obligations. (*Id.* ¶ 28.) Specifically, LSP alleges that Martinelli has failed to undertake
13 reasonable efforts to return LSP property, and thus that he remains in possession of
14 valuable LSP intellectual property and other materials. (*Id.* ¶ 29.) LSP further alleges that
15 Martinelli is currently attempting or will soon attempt to profit from LSP materials for his
16 own benefit and for the benefit of Martinelli and Associates, Inc. (“Martinelli, Inc.”). (*Id.*
17 ¶ 30.)

18 LSP asserts that Martinelli has thus materially breached the Martinelli Separation
19 Agreement through these actions (*Id.* ¶ 32) and by employing Defendant Fisher, despite
20 knowing she was an LSP agent at the time of the Martinelli Separation Agreement and
21 therefore within the ambit of its non-solicitation provision. (*Id.* ¶ 33.) LSP further asserts
22 that Martinelli has breached the agreement by participating in Fisher’s accessing of LSP
23 information through computers located at Martinelli, Inc.’s offices and by being
24 somehow involved in Fisher’s misappropriation of proprietary LSP information. (*Id.* ¶
25 34.)

26 LSP alleges breach of contract and breach of the implied covenant of good faith
27 and fair dealing against Martinelli and intentional interference with contract and
28 conversion against both Martinelli and Martinelli, Inc. (*Id.* ¶¶ 58–93.) LSP brings some

1 of these claims against both Martinelli and Martinelli Inc. as LSP alleges that the two
2 have such a unity of interest that Martinelli Inc. should be deemed the alter ego of
3 Martinelli. (*Id.* ¶¶ 51–52.)

4 **II. The Fisher/Dreams, Inc. Independent Contractor and Separation** 5 **Agreements**

6 Defendant Fisher served as Vice President of Operations of Dreams to Reality,
7 Inc. (“Dreams, Inc.”), a Florida corporation. (*Id.* ¶¶ 9–10, 35.) At some point in 2011,
8 Fisher, on behalf of Dreams, Inc., entered an Independent Contractor Agreement with
9 LSP (the “Independent Contractor Agreement”). (*Id.* ¶ 35.) Under this agreement, Fisher
10 agreed not to engage in any affiliation that would create a conflict of interest and not to
11 use LSP confidential, proprietary, or trade secret information for any purpose outside of
12 performing services for LSP. (*Id.* ¶ 36.) This information included the Infusionsoft
13 Database, a database of LSP client information. (*Id.* ¶ 37.)

14 LSP alleges that Fisher and Dreams, Inc. have such a unity of interest that Dreams,
15 Inc. should be deemed Fisher’s alter ego. (*Id.* ¶ 39.) As such, LSP brings claims against
16 Fisher, acting through Dreams, Inc. LSP alleges that Fisher and Dreams, Inc. breached
17 the Independent Contractor Agreement by rendering services to Martinelli and/or
18 Martinelli, Inc. that created an impermissible conflict of interest. (*Id.* ¶ 40.) Further, LSP
19 alleges that Fisher, acting through Dreams, Inc., misappropriated LSP information for use
20 in Martinelli’s business. (*Id.* ¶ 41.) Finally, LSP alleges that Fisher failed to return all
21 confidential, proprietary and trade secret protected information to LSP as required by the
22 agreement. (*Id.* ¶ 42.)

23 As of January 15, 2013, LSP terminated its affiliation with Fisher and Dreams,
24 Inc. through a Separation Agreement (the “Fisher/Dreams, Inc. Separation Agreement”).
25 (*Id.* ¶ 43.) Under this agreement, Fisher and Dreams, Inc. represented that they had not
26 improperly disclosed any LSP confidential, proprietary or trade secret materials. (*Id.* ¶
27 44.) Fisher and Dreams, Inc. also represented that they had returned all LSP property to
28 LSP and retained no copies of any LSP materials. (*Id.* ¶¶ 45–46.) LSP alleges that Fisher

1 and Dreams, Inc. breached the Fisher/Dreams, Inc. Separation Agreement by disclosing
2 confidential LSP information to Martinelli, by failing to return all confidential,
3 proprietary, or trade secret information to LSP, and by retaining copies of such
4 information. (*Id.* ¶¶ 47–50.)

5 LSP brings claims for breach of both the Independent Contractor Agreement and
6 Fisher/Dreams, Inc. Separation Agreement and breach of the Implied Covenant of Good
7 Faith and Fair Dealing under both contracts against Dreams, Inc. (*Id.* ¶¶ 94–119.)

8 Finally, LSP brings claims of trade secret misappropriation, unjust enrichment,
9 and for preliminary and permanent injunctive relief against all Defendants. (*Id.* ¶¶ 120–
10 43.) Defendants now move to dismiss all claims. (Docs. 25–26.)

11 ANALYSIS

12 I. Personal Jurisdiction

13 A. Legal Standard

14 “The party seeking to invoke the court’s jurisdiction bears the burden of
15 establishing that jurisdiction exists.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986)
16 (citing *Data Disc, Inc. v. Systems Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977));
17 *Cabbage v. Merchant*, 744 F.2d 665, 667 (9th Cir. 1984). “When a defendant moves to
18 dismiss for lack of personal jurisdiction, the plaintiff is ‘obligated to come forward with
19 facts, by affidavit or otherwise, supporting personal jurisdiction.’” *Id.* (quoting *Amba*
20 *Mktg. Sys., Inc. v. Jobar Int’l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977)). “The mere
21 allegations of a complaint, when contradicted by affidavits, are not enough to confer
22 personal jurisdiction over a nonresident defendant.” *Chem Lab Products, Inc. v.*
23 *Stepanek*, 554 F.2d 371, 372 (9th Cir. 1977) (citing *Taylor v. Portland Paramount Corp.*,
24 383 F.2d 634, 639 (9th Cir. 1967)); *Data Disc*, 557 F.2d at 1284 (citing *Taylor*, 383 F.2d
25 at 639).

26 To establish a prima facie case for personal jurisdiction, the plaintiff has the
27 burden of showing that: (1) the forum state’s long-arm statute confers jurisdiction over
28 the nonresident defendant; and (2) the exercise of jurisdiction comports with principles of

1 due process. *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir.
2 1995). Arizona’s long-arm statute confers jurisdiction to the maximum extent allowed by
3 the Due Process Clause of the United States Constitution. Ariz. R. Civ. P. 4.2(a); *Doe v.*
4 *American Nat’l Red Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997). Due process requires a
5 nonresident defendant to have “certain minimum contacts with [the forum] such that the
6 maintenance of the suit does not offend traditional notions of fair play and substantial
7 justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal citation
8 omitted). There are two types of personal jurisdiction, general and specific. *Burger King*
9 *Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.5 (1985).

10 Specific jurisdiction is analyzed under a three-pronged test: “(1) [t]he non-resident
11 defendant must *purposefully direct his activities* or consummate some transaction with
12 the forum or resident thereof; *or* perform some act by which he *purposefully avails*
13 *himself* of the privilege of conducting activities in the forum, thereby invoking the
14 benefits and protections of its laws; (2) the claim must be one which arises out of or
15 relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must
16 comport with fair play and substantial justice, i.e. it must be reasonable.” *Mavrix Photo,*
17 *Inc. v. Brand Tech., Inc.*, 647 F.3d 1218, 1227–28 (9th Cir. 2011).

18 **B. Defendants Fisher and Dreams, Inc.**

19 Defendants Fisher and Dreams, Inc. move to dismiss all claims against them on
20 the grounds that the Court lacks personal jurisdiction. (Doc. 26.) LSP contends that the
21 Court may assert specific personal jurisdiction over Fisher and Dreams, Inc. under a
22 purposeful direction analysis. (Doc. 29 at 4.) LSP alleges that Dreams, Inc. breached its
23 contracts with LSP and breached the implied covenant of fair dealing in those contracts.
24 Further, LSP alleges that both Fisher and Dreams, Inc. misappropriated LSP trade secrets.
25 Thus, the claims against Fisher and Dreams, Inc. sound in both tort and contract.²

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27 ² Unlike the Martinelli Separation Agreement, neither the Fisher Separation
28 Agreement nor the Independent Contractor Agreement contain forum-selection clauses
selecting Arizona. Both agreements are governed by the laws of the State of Nevada.
(Doc. 23 ¶ 108.)

1 Under the first of the three prongs of specific personal jurisdiction analysis, the
2 Ninth Circuit typically uses a purposeful direction test for cases sounding in tort and a
3 purposeful availment test for cases sounding in contract. *Schwarzenegger v. Fred Martin*
4 *Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Although these tests are distinct, the Ninth
5 Circuit has also recognized that the first prong “may be satisfied by purposeful availment
6 of the privilege of doing business in the forum; by purposeful direction of activities at the
7 forum; or by some combination thereof.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*
8 *L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006). Additionally, if a court has
9 personal jurisdiction over a defendant with respect to one claim, it can also often exercise
10 jurisdiction over other claims, so long as they arise out of a common nucleus of operative
11 facts or form part of the same case or controversy. *Washington Shoe Co. v. A-Z Sporting*
12 *Goods Inc.*, 704 F.3d 668, 673 (9th Cir. 2012) (discussing pendent personal jurisdiction
13 and supplemental subject matter jurisdiction).

14 Here, where there are both contract and tort claims, either test can apply. The
15 Court will analyze personal jurisdiction under a purposeful availment analysis. To do so,
16 the Ninth Circuit uses the three-part “effects” test derived from the Supreme Court’s
17 decision in *Calder v. Jones*, 465 U.S. 783 (1984). *Id.* at 803. Under *Calder*, “purposeful
18 availment is satisfied even by a defendant ‘whose only ‘contact’ with the forum state is
19 the ‘purposeful direction’ or a foreign act having effect in the forum state.’” *Id.* The
20 “effects” test “requires that the defendant allegedly have (1) committed an intentional act,
21 (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is
22 likely to be suffered in the forum state.” *Id.* (citations omitted).

23 Here, each of the three prongs is satisfied. First, Fisher and Dreams, Inc. are
24 alleged to have committed the intentional act of misappropriating trade secrets. Next, in
25 the Ninth Circuit, the requirement that the intentional act was expressly aimed at the
26 forum state is “satisfied when the defendant is alleged to have engaged in wrongful
27 conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum
28 state.” *Bancroft & Masters, Inc. v. August Nat’l, Inc.*, 223F.3d 1104, 1111 (9th Cir.

1 2002.) Here, the alleged trade secrets are the property of LSP, an entity with its principal
2 place of business in Scottsdale, Arizona. Defendants do not dispute that they knew the
3 location of LSP's principal place of business, and thus the second prong is satisfied.

4 Finally, the third prong of the *Calder* test is satisfied as defendants would have
5 known that LSP would likely suffer harm in Arizona from the alleged misappropriation
6 of trade secret information. Therefore, the Court finds that Fisher and Dreams, Inc. are
7 alleged to have purposefully directed their conduct at Arizona. The claims now brought
8 against them arise from this conduct, and the exercise of jurisdiction over these
9 Defendants is reasonable. Therefore, the Court finds that it may exercise personal
10 jurisdiction over Defendants Fisher and Dreams, Inc. and the Motion to Dismiss claims
11 against these Defendants is denied. The Court need not reach the issue of whether
12 personal jurisdiction is also available through the purposeful availment analysis used in
13 contracts cases as both tort and contracts claims are present.

14 **C. Claims Against Martinelli, Inc.**

15 LSP also brings both contract and tort claims against Martinelli, Inc. Defendant
16 moves to dismiss on the grounds that the Court lacks personal jurisdiction over
17 Martinelli, Inc. However, as above, Martinelli, Inc. is alleged to have intentionally
18 misappropriated trade secrets owned by LSP, an entity it knew to have its principal place
19 of business in Arizona. Further, under the third prong, Martinelli, Inc. can reasonably be
20 said to have known that the harm from this misappropriation would be felt in Arizona.
21 The claims against Martinelli, Inc. arise from this purposefully directed conduct, and the
22 Court finds that it is reasonable to exercise personal jurisdiction over this defendant. As
23 such, the Motion to Dismiss claims against Martinelli, Inc. is denied. The Court need not
24 reach the question of whether personal jurisdiction would also be available under the
25 purposeful availment analysis typically used in contract cases.

26 **II. Claims Against Martinelli**

27 Martinelli moves to dismiss LSP's claims for damages against him on the grounds
28 that those claims must be arbitrated under the terms of the Martinelli Separation

1 Agreement. In relevant part, the Martinelli Separation Agreement states that “[t]he parties
2 agree that should any dispute arise between parties relating to this Agreement, the issue
3 shall be submitted to arbitration . . . [n]otwithstanding the above, in the event either party
4 wishes to obtain equitable relief . . . enforcing this Agreement, it may bring a claim for
5 such relief in arbitration or in an action in an applicable court in Phoenix, Arizona.” (Doc.
6 6 at 40.) It is thus clear that Plaintiff must bring any damages claims against Martinelli to
7 arbitration, but that it need not do so with any claims for injunctive relief. Plaintiff does
8 not appear to contest this reading. (Doc. 28 at 5.)

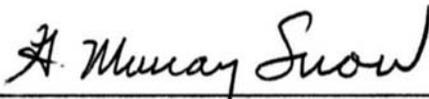
9 The only claims against Martinelli under the Martinelli Separation Agreement not
10 subject to this mandatory arbitration provision are any claims for equitable relief. Thus,
11 the Motion to Dismiss Plaintiff’s claims against Martinelli is granted to the extent the
12 remedy sought for any of the causes of action against Martinelli is damages. The Motion
13 is denied to the extent the remedy sought for any of these claims is equitable relief.

14 **IT IS THEREFORE ORDERED** that Defendants Cheryl Fisher and Dreams to
15 Reality, Inc.’s Motion to Dismiss the First Amended Complaint (Doc. 26) is **denied**.

16 **IT IS FURTHER ORDERED** that Defendants Paul Martinelli and Martinelli and
17 Associate, Inc.’s Motion to Dismiss (Doc. 25) is **granted in part and denied in part**.

18 **IT IS FURTHER ORDERED** that Defendants’ Motions to Dismiss Plaintiff’s
19 initial Complaint (Doc. 20, Doc. 21) are **denied** as moot.

20 Dated this 10th day of December, 2013.

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23 _____
24 G. Murray Snow
25 United States District Judge
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