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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Tanga.com LLC, et al.,

10 Plaintiffs,

11 v.

12 Christopher Gordon,

13 Defendant.

No. CV-14-01871-PHX-GMS

ORDER

14 Pending before the Court is Defendant Christopher Gordon’s Motion to Dismiss
15 for Lack of Personal Jurisdiction and Alternative Motion to Dismiss for Improper Venue
16 or to Transfer Venue. (Doc. 12.) For the following reasons, the Motion to Dismiss for
17 lack of personal jurisdiction is granted and the Alternative Motion to Dismiss for
18 Improper Venue or to Transfer Venue is denied as moot.

19 **BACKGROUND**

20 This suit arises from a copyright and trademark dispute between Plaintiff
21 Tanga.com LLC (“Tanga”) and Defendant Christopher Gordon. Gordon created a popular
22 Internet video by replacing the existing audio of a nature video about honey badgers with
23 his own comical narration. In the video, Gordon often uses the phrase, “Honey Badger
24 Don’t Care.” Gordon has allegedly copyrighted his narration in the video and
25 trademarked the phrase, “Honey Badger Don’t Care.”

26 Plaintiff Tanga.com LLC (“Tanga”) is a Delaware limited liability company with
27 its headquarters in Chandler, Arizona that sells merchandise over the Internet. Gordon
28 alleges that Tanga sells t-shirts and other merchandise bearing the “Honey Badger Don’t

1 Care” trademark and other expressions from Gordon’s copyrighted narration.

2 On July 25, 2014, Gordon sent Tanga a cease and desist letter, and on August 15,
3 2014, Tanga filed suit for declaratory relief, requesting a declaration of non-infringement
4 and cancellation of Gordon’s federal trademark registrations. Gordon, in response, filed
5 the current Motion, claiming that Gordon does not have sufficient contacts in Arizona to
6 support personal jurisdiction. Tanga has submitted affidavits and other evidence of
7 Gordon’s contacts in Arizona, which include travelling to a bookstore in Tempe to
8 promote a book about honey badgers, selling his book through that bookstore, placing a
9 phone call to a radio station to promote the book, creating a website that allows Arizona
10 residents to purchase memorabilia over the Internet, and sending the cease and desist
11 letter to Tanga.

12 DISCUSSION

13 I. Legal Standard

14 Because the Court is resolving this Motion without holding an evidentiary hearing,
15 Tanga “need make only a prima facie showing of jurisdictional facts to withstand the
16 motion.” *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995); *see Brainerd v.*
17 *Governors of the Univ. of Alberta*, 873 F.2d 1257, 1258 (9th Cir. 1989). That is, it “need
18 only demonstrate facts that, if true, would support jurisdiction over the defendant.”
19 *Ballard*, 65 F.3d at 1498. “Conflicts between parties over statements contained in
20 affidavits must be resolved in the plaintiff’s favor.” *Schwarzenegger v. Fred Martin*
21 *Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citing *AT&T v. Compagnie Bruxelles*
22 *Lambert*, 94 F.3d 586, 588 (9th Cir. 1996)).

23 To establish the prima facie case for personal jurisdiction, the plaintiff has the
24 burden of showing that: (1) the forum state’s long-arm statute confers jurisdiction over
25 the nonresident defendant; and (2) the exercise of jurisdiction comports with principles of
26 due process. *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir.
27 1995). Arizona’s long-arm statute confers jurisdiction to the maximum extent allowed by
28 the Due Process Clause of the United States Constitution. Ariz. R. Civ. P. 4.2(a); *Doe v.*

1 *American Nat'l Red Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997). Due process requires a
2 nonresident defendant to have “certain minimum contacts with [the forum] such that the
3 maintenance of the suit does not offend traditional notions of fair play and substantial
4 justice.” *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal citation
5 omitted). There are two types of personal jurisdiction, general and specific. *Burger King*
6 *Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.5 (1985). General jurisdiction allows a court to
7 entertain all actions against defendants because they have significant, continuous contacts
8 with a forum state, while specific jurisdiction allows only actions against defendants that
9 relate directly to their contacts with the forum state because the contacts are minimal. *See*
10 *id.* In its Response to Gordon’s Motion, Tanga makes no argument that this Court may
11 exercise general jurisdiction over Gordon. Rather it asserts that specific jurisdiction
12 exists.

13 **A. Specific Jurisdiction**

14 Defendants’ contacts with the forum state are sufficient to subject them to the
15 state’s specific jurisdiction if (1) they purposefully directed tortious activities at the
16 forum or a resident thereof or performed some act by which they purposefully availed
17 themselves of the privileges of conducting activities in the forum, (2) the claims arise out
18 of or result from the defendant’s forum-related activities, and (3) the exercise of
19 jurisdiction is reasonable. *See Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d
20 1082, 1086 (9th Cir. 2000); *Brainerd*, 873 F.2d at 1259.

21 **1. Purposeful Availment and “Arising out of”**

22 The Ninth Circuit has held that the specific jurisdiction test “may be satisfied by
23 purposeful availment of the privilege of doing business in the forum; by purposeful
24 direction of activities at the forum; or by some combination thereof.” *Yahoo! Inc. v. La*
25 *Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (per
26 curiam) (applying this hybrid purposeful availment/direction test to a plaintiff’s claims
27 for declaratory judgment regarding the enforceability of orders issued by a French court).
28 Under either of these tests, plaintiffs must also show that their suit arises out of the

1 defendant's contacts in the forum state. See *Terracom v. Valley Nat. Bank*, 49 F.3d 555,
2 561 (9th Cir. 1995); *Bancroft & Masters*, 223 F.3d at 1088. This "arising out of"
3 requirement is met if, but for the contacts between the defendant and the forum state, the
4 cause of action would not have arisen. See *Omeluk*, 52 F.3d at 271.

5 Purposeful availment "requires that the defendant engage in some form of
6 affirmative conduct allowing or promoting the transaction of business within the forum
7 state. This focus on the defendant's affirmative conduct is designed to ensure that the
8 defendant is not haled into court as the result of random, fortuitous, or attenuated
9 contacts." *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir. 1990)
10 (citation omitted). A defendant has engaged in affirmative conduct and thereby
11 "purposely availed himself of the benefits of a forum if he has deliberately 'engaged in
12 significant activities within a State or has created 'continuing obligations' between
13 himself and the residents of the forum.'" *Gray*, 913 F.2d at 760 (quoting *Burger King*,
14 471 U.S. at 475-76); see *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417 (9th Cir.
15 1997) (stating that "the 'purposeful availment' requirement is satisfied if the defendant
16 has taken deliberate action within the forum state or if he has created continuing
17 obligations to forum residents") (citing *Ballard*, 65 F.3d at 1498).

18 In contrast, courts evaluate purposeful direction using the *Calder* "effects test."
19 See *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010).
20 Under the "effects test," the defendant must allegedly have: "(1) committed an intentional
21 act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is
22 likely to be suffered in the forum state." *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104,
23 1111 (9th Cir. 2002). All three elements of the test must be satisfied. *Schwarzenegger v.*
24 *Fred Martin Motor Co.*, 374 F.3d 797, 805 (9th Cir. 2004). "A finding of 'express
25 aiming' . . . does not mean 'that a foreign act with foreseeable effects in the forum states
26 always gives rise to specific jurisdiction.'" *Dole*, 303 F.3d at 1112 (quoting *Bancroft*, 223
27 F.3d at 1087). Under the causing harm requirement, the Ninth Circuit has made it clear
28 that any intentional conduct must be "targeted at a plaintiff whom the defendant knows to

1 be a resident of the forum state.” *Bancroft*, 223 F.3d at 1087.

2 Tanga has not met its burden of showing that Gordon purposefully availed himself
3 of the opportunity of doing business in Arizona, or that he purposefully directed activity
4 at this state or its occupants. As mentioned above, Gordon’s contacts include making a
5 trip to a bookstore in the Tempe to promote a book about honey badgers, selling his book
6 through that bookstore, making a phone call to a radio station to promote the book,
7 creating a website that allows Arizona residents to purchase memorabilia over the
8 Internet, and sending the cease and desist letter to Tanga. These activities, taken together,
9 would likely constitute purposeful availment of the opportunity of doing business in
10 Arizona if they were the events that gave rise to the current suit. *See Sher v. Johnson*, 911
11 F.2d 1357, 1363–64 (9th Cir. 1990) (finding that a partnership’s making phone calls and
12 sending letters into the forum state, visiting the state for business, and having a deed of
13 trust executed in favor of the partnership gave rise to the plaintiff’s suit and provided
14 sufficient evidence of purposeful availment). However, in this case the only activity of
15 Gordon’s that was the “but for” cause of Tanga’s suit against Gordon was the cease and
16 desist letter that Gordon sent to Tanga. *See Glencore Grain Rotterdam B.V. v. Shivnath*
17 *Rai Harnarain Co.*, 284 F.3d 1114, 1123–24 (9th Cir. 2002) (refusing to analyze
18 defendant’s contacts of shipping products into the forum state as purposeful availment
19 because they did not give rise to the suit and holding that there was no personal
20 jurisdiction over defendant); *Bryant v. Weintraub, Genshlea, Hardy, Erich & Brown*, 42
21 F.3d 1398 (9th Cir. 1994) (holding that a defendant’s brief unrelated trip did not give rise
22 to the plaintiff’s suit and was, thus, not considered in the personal jurisdiction analysis).
23 Thus, the cease and desist letter is the only contact that could give rise to personal
24 jurisdiction in this case.

25 It is well settled law that “a cease and desist letter is not in and of itself sufficient
26 to establish personal jurisdiction over the sender of the letter.” *Yahoo*, 433 F.3d at 1208;
27 *see also Cascade Corp. v. Hiab–Foco AB*, 619 F.2d 36, 38 (9th Cir. 1980); *Kransco Mfg.,*
28 *Inc. v. Markwitz*, 656 F.2d 1376, 1380 (9th Cir. 1981); *Douglas Furniture Co. of Cal.,*

1 *Inc. v. Wood Dimensions, Inc.*, 963 F. Supp. 899, 903 (C. D. Cal. 1997). In both *Yahoo*
2 and another recent case, *Bancroft & Masters*, the Ninth Circuit found specific personal
3 jurisdiction to exist over defendants who sent cease and desist letters into a forum state
4 because, beyond sending the letters, they had other forum related activities that gave rise
5 to the plaintiffs' claims. *See Yahoo*, 433 F.3d at 1208; *Bancroft & Masters*, 223 F.3d at
6 1087. (emphasis added). In *Yahoo*, the defendant had obtained orders from French courts
7 directing the plaintiff to perform actions in the forum state, which gave rise to the
8 plaintiff's claims in the forum state. 433 F.3d at 1208. In *Bancroft & Masters*, the sent a
9 cease and desist letter both to the plaintiff and to a third-party corporation, which had
10 competing claims to an Internet domain name, with the intent of triggering the dispute
11 resolution procedures of the third-party corporation. 223 F.3d at 1087. The court in
12 *Bancroft & Masters* found that this triggering of the dispute resolution procedures gave
13 rise to the plaintiff's suit and held that it constituted purposeful direction. *Id.*

14 In the present case, as noted above, Gordon has directed no activity at Arizona that
15 gave rise to Tanga's claims beyond sending a cease and desist letter to Tanga. This
16 differentiates the present case from both *Yahoo* and *Bancroft & Masters* and prevents this
17 Court from acquiring jurisdiction over Gordon.

18 **2. Reasonableness and Venue**

19 Because Tanga has not satisfied the first and second prongs of the personal
20 jurisdiction test, the Court need not consider the reasonableness of exercising jurisdiction.
21 *See Schwarzenegger*, 374 F.3d at 802. Because the Court lacks personal jurisdiction over
22 a defendant, the venue concerns in the present case have become moot. *See Bryant v.*
23 *Weintraub, Genshlea, Hardy, Erich & Brown*, 42 F.3d 1398 (9th Cir. 1994) (affirming a
24 district court's decision to dismiss for lack of personal jurisdiction and deny a motion to
25 transfer venue as moot).

26 **CONCLUSION**

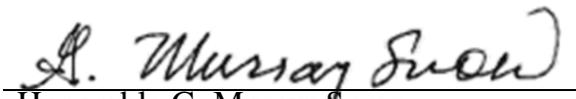
27 Tanga has failed to meet its burden of making a prima facie case of personal
28 jurisdiction over Gordon. Dismissal is appropriate, and the venue concerns raised by

1 Gordon have become moot.

2 **IT IS THEREFORE ORDERED** that Defendant Christopher Gordon's Motion
3 to Dismiss for Lack of Personal Jurisdiction is **GRANTED**, and the Alternative Motion
4 to Dismiss for Improper Venue or Transfer Venue, (Doc. 12.) is **DENIED AS MOOT**.

5 **IT IS FURTHER ORDERED** directing the Clerk of Court to terminate this
6 action and enter judgment accordingly.

7 Dated this 9th day of February, 2015.

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Honorable G. Murray Snow
10 United States District Judge

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