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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ERIC GRANT,

NO. CIV. 08-00672 FCD KJM

Plaintiff,

MEMORANDUM AND ORDER

v.

KAMEHAMEHA SCHOOLS/BERNICE
PAUahi BISHOP ESTATE; J. DOUGLAS
ING, NAINOA THOMPSON, DIANE J.
PLOTTS, ROBERT K.U. KIHUNE, and
CORBETT A.K. KALAMA, in their
capacities as Trustees of the
Kamehameha Schools/Bernice Pauahi
Bishop Estate; JOHN DOE; and JANE
DOE,

Defendants.

JOHN DOE and JANE DOE,

Counter-Claimants,

v.

KAMEHAMEHA SCHOOLS/BERNICE
PAUahi BISHOP ESTATE; J. DOUGLAS
ING, NAINOA THOMPSON, DIANE J.
PLOTTS, ROBERT K.U. KIHUNE, and
CORBETT A.K. KALAMA, in their
capacities as Trustees of the
Kamehameha Schools/Bernice Pauahi
Bishop Estate; and ERIC GRANT,

Counter-Defendants

1
2 This matter is before the court on defendants/counter-
3 defendants' Kamehameha Schools/Bernice Pauahi Bishop Estate, J.
4 Douglas Ing, Nainoa Thompson, Diane J. Plotts, Robert K.U.
5 Kihune, and Corbett A.K. Kalama (collectively, the "Estate
6 defendants" or "Kamehameha") motion to dismiss for lack of
7 subject matter jurisdiction and personal jurisdiction, or, in the
8 alternative, to transfer venue pursuant to 28 U.S.C. § 1404.
9 Defendants/counter-claimants John Doe and Jane Doe (the "Does")
10 oppose the motions. Plaintiff/counter-defendant Eric Grant
11 ("Grant") also oppose the motions. For the reasons set forth
12 below,¹ the Estate defendants' motion to dismiss is DENIED and
13 motion to transfer is GRANTED.

14 **BACKGROUND**

15 **A. The Underlying Litigation**

16 The current litigation arises out of earlier litigation
17 between John Doe and the Estate defendants. In the underlying
18 litigation, plaintiff John Doe, a student with no Hawaiian
19 ancestry, applied for admission to Defendant Kamehameha Schools,
20 a private, non-profit K-12 educational institution in Hawaii.
21 Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d
22 827, 829 (9th Cir. 2006). Doe was denied entry. Id. The
23 Kamehameha Schools' admissions policy gave preference to students
24 of Hawaiian ancestry, and Doe alleged that he was denied entry
25 because of his race in violation of 42 U.S.C. § 1981. Id.

26
27 ¹ Because oral argument will not be of material
28 assistance, the court orders this matter submitted on the briefs.
See E.D. Cal. Local Rule 78-230(h).

1 Doe,² a Hawaiian resident, brought suit in the United States
2 District Court for the District of Hawaii against the Estate
3 defendants, also residents of Hawaii. Id. at 834. Doe retained
4 Grant, a California attorney, and John Goemans, a Hawaii
5 attorney, to represent him in the underlying litigation. (Ex. 1
6 to Defs.' Request for Judicial Notice in Supp. of Mot. to Dismiss
7 ("RJN"), filed July 9, 2008.) The Estate defendants also
8 retained counsel from both states. In addition to two Hawaii law
9 firms, the Estate defendants were represented by Kathleen
10 Sullivan, then Dean of Stanford Law School, who resided in
11 California. (Ex. 3 to RJN.)

12 In 2003, the parties filed cross-motions for summary
13 judgment. The District Court granted summary judgment to the
14 Estate defendants, and dismissed the case. Doe, 470 F.3d at 834.
15 On appeal, the majority of a three-judge panel reversed the
16 district court. Id. at 835. However, the Estate defendants
17 successfully petitioned for review *en banc*. (Ex. 6 to RJN.)
18 Sitting *en banc*, the Ninth Circuit upheld the Estate defendants'
19 admittance policy and affirmed the District Court's judgment.
20 Doe, 470 F.3d 827.

21 **B. The Settlement Agreement**

22 Following the Ninth Circuit's decision *en banc*, Doe
23 petitioned for certiorari in the United States Supreme Court.
24 (Decl. of Eric Grant in Opp'n to Defs.' Mot. to Dismiss ("Grant
25 Dismiss Decl."), filed Oct. 17, 2008, ¶ 9.) While the petition
26

27 ² John Doe, a minor, brought suit through his mother and
28 next friend, Jane Doe. Id. at 827. Both John Doe and Jane Doe
are plaintiffs in this action.

1 was pending before the Supreme Court, the two parties' California
2 counsel conducted settlement negotiations in California. (Id. ¶
3 11.) The parties' negotiations consummated in a written
4 settlement agreement, which was approved as to form in California
5 by the California counsel for the Estate defendants and the Does.
6 (Id. ¶ 13.) The parties then signed the agreement; most of the
7 signatories executed the contract in Hawaii, although two
8 trustees signed the agreement in California. (Defs.' Mem. Of
9 Points and Authorities in Supp. of Mot. to Dismiss ("Mot. to
10 Dismiss"), filed July 9, 2008, at 13-17; Decl. of Corbett A.K.
11 Kalama in Supp. of Mot. to Dismiss ("Kalama Decl."), filed July
12 9, 2008, ¶ 6; Decl. of Constance Lau in Supp. of Mot. to Dismiss
13 ("Lau Decl."), filed July 9, 2008, ¶ 6.)

14 The settlement agreement provided that the Does would
15 withdraw their petition for certiorari and dismiss all claims
16 against the Estate defendants in exchange for a substantial
17 monetary payment. (John and Jane Doe's Cross-Claim ("Cross-
18 Claim"), filed Apr. 3, 2008, ¶ 7.) The agreement also provided
19 that no signatory or releasee, including counsel, would disclose
20 the Does' names or any term of the Settlement Agreement. (Id.)

21 **C. The Doe/Grant Litigation and Agreement**

22 Shortly after the parties signed the settlement agreement,
23 Grant and the Does got into a dispute over the amount of fees
24 owed to Grant. Grant filed suit against the Does in district
25 court to recover his fees, and thereafter, the parties reached a
26 settlement agreement on the issue. Grant v. Doe, Civ. No. 2:07-
27 CV-01087-GEB-EFB (E.D. Cal. 2007). In addition to settling the
28 fee dispute, the agreement between Grant and the Does obligated

1 Grant to defend and indemnify the Does against liability up to
2 \$100,000, and contained a forum selection clause, designating the
3 United States District Court for the Eastern District of
4 California as a proper forum. (Cross-Claim at ¶ 7; Decl. of Eric
5 Grant in Opp'n to Mot. to Transfer ("Grant Transfer Decl."),
6 filed Oct. 20, 2008, ¶ 4.)

7 **D. The Disclosure**

8 Days after settling with the Does, Grant sued Goemans in
9 state court, seeking declaratory judgment as to Goemans' interest
10 in the attorney's fees generated by the underlying litigation.
11 (Ex. 8 to Decl. of Paul Alston in Supp. of Mot. to Dismiss.
12 ("Alston Decl."), filed July 9, 2008.) Approximately five months
13 after suing Goemans, Grant sought and obtained a protective order
14 barring Goemans from disclosing any of the confidential terms of
15 the settlement agreement between the Estate defendants and the
16 Does. (Id. ¶ 24.)

17 However, Goemans subsequently spoke with representatives of
18 newspapers and television stations in Hawaii. (Grant Compl.,
19 filed Mar. 28, 2008, ¶ 26.) In those interviews, Goemans
20 disclosed what he claimed to be the amount of the settlement
21 between the Estate defendants and the Does. (Id.) Goemans'
22 disclosure caused great public controversy in Hawaii, and was
23 featured in television newscasts and in both of Hawaii's leading
24 newspapers. (Id.)

25 **E. This Litigation**

26 Following Goemans' disclosure of the purported settlement
27 amount, Grant brought this action against the Estate defendants
28 and the Does, seeking a declaration that he is not liable to

1 either party for damages arising out of the breach of the
2 confidential settlement agreement. The Does subsequently brought
3 a cross-claim against the Estate defendants, seeking injunctive
4 and declaratory relief, and brought a counter-claim against
5 Grant, seeking indemnity and declaratory relief. The Estate
6 defendants now move to dismiss for lack of subject matter
7 jurisdiction and personal jurisdiction, or, in the alternative,
8 to transfer venue pursuant to 28 U.S.C. § 1404.

9 ANALYSIS

10 A. Subject Matter Jurisdiction

11 The Estate defendants assert that the complaint must be
12 dismissed because the court lacks subject matter jurisdiction.
13 Specifically, the Estate defendants argue that the Does must be
14 realigned as plaintiffs for jurisdictional purposes because Grant
15 and the Does share a common interest in the principal issue in
16 the litigation, and once realigned, there is not complete
17 diversity between the parties.

18 Under Rule 12(b)(1) of the Federal Rules of Civil Procedure,
19 a party may by motion raise the defense that the court lacks
20 "jurisdiction over the subject matter" of a claim. Fed. R. Civ.
21 P. 12(b)(1). The plaintiff bears the burden of proof that
22 jurisdiction exists. Stock West, Inc. v. Confederated Tribes,
23 873 F.2d 1221, 1225 (9th Cir. 1989); Thornhill Publishing Co. v.
24 General Telephone & Electronics Corp., 594 F.2d 730, 733 (9th
25 Cir. 1979). If, as here, the defendant attacks "the existence of
26 subject matter jurisdiction in fact, quite apart from any
27 pleading," sometimes referred to as a "speaking motion," the
28 defendant can "rely on affidavits or any other evidence properly

1 before the court." Mortensen v. First Fed. Sav. & Loan Ass'n,
2 549 F.2d 884, 891 (3d Cir. 1977); St. Clair v. City of Chico, 880
3 F.2d 199, 201 (9th Cir. 1989). "It then becomes necessary for the
4 party opposing the motion to present affidavits or any other
5 evidence necessary to satisfy its burden of establishing that the
6 court, in fact, possesses subject matter jurisdiction." Id.

7 28 U.S.C. § 1332 "confers jurisdiction on federal courts
8 when each defendant is a citizen of a different state from each
9 plaintiff." Dolch v. United Cal. Bank, 702 F.2d 178, 181 (9th
10 Cir. 1983) (citations omitted). "The courts, not the parties,
11 are responsible for aligning the parties according to their
12 interests in the litigation. If the interests of a party named
13 as a defendant coincide with those of the plaintiff in relation
14 to the purpose of the lawsuit, the named defendant must be
15 realigned as a plaintiff for jurisdictional purposes." Dolch,
16 702 F.2d at 181 (citations omitted) (realigning party and
17 dismissing for lack of jurisdiction).

18 The court is not required to realign parties based on any
19 overlapping interest; rather, the court "must align for
20 jurisdictional purposes [only] those parties whose interests
21 coincide respecting the 'primary matter in dispute.'" Prudential
22 Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867,
23 873 (9th Cir. 2000) (quoting Continental Airlines, Inc. v.
24 Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 (9th Cir. 1987)).
25 When determining the primary dispute of a case, the court focuses
26 on the plaintiff's principal purpose for filing suit. Dolch, 702
27 F.2d at 181. "The determination of the 'primary and controlling
28 matter in dispute' does not include the cross-claims and

1 counterclaims filed by the defendants." Zurn Indus., Inc. v.
2 Acton Constr. Co., 847 F.2d 234, 237-38 (5th Cir.1988).

3 In this case, on the face of the complaint, the court has
4 subject matter jurisdiction based upon the complete diversity
5 between the California plaintiff, Grant, and the Hawaii
6 defendants, the Estate defendants and the Does. However, the
7 Estate defendants contend that the Does are improperly aligned as
8 defendants and should be realigned as plaintiffs, thus defeating
9 complete diversity of citizenship between plaintiffs and
10 defendants.

11 The primary and controlling matter in this dispute for
12 purposes of realignment is whether Grant is liable to either the
13 Estate defendants or the Does for damages arising out of Goeman's
14 disclosure to the press and the resulting litigation. It is
15 likely that Grant and the Does may have similar interests in
16 seeking to establish that the Estate defendants cannot hold them
17 liable for Goeman's disclosures. However, it is not necessary to
18 Grant's claim for declaratory relief that the Does be absolved of
19 liability to the Estate defendants. In fact, Grant contends
20 that, unlike the Does, he was not a party to the settlement
21 agreement in the underlying litigation and thus, cannot be held
22 liable for any breach of that agreement. (See Pl.'s Mot. for
23 Summ. J., filed Oct. 3, 2008, at 7-8.) As such, Grant does not
24 have an identical interest to the Does in proving that no
25 liability arises under the contract. Furthermore, even if both
26 Grant and the Does are absolved of any liability for Goeman's
27 disclosure, there would remain a controversy with respect to
28 Grant's liability for damages, including the cost of this

1 litigation, to the Does pursuant to the contract between them.
2 Therefore, while Grant and the Does may have similar interests
3 with respect to one major issue in the litigation, specifically
4 whether they are liable under the settlement agreement for
5 Goemans' disclosures, their interests do not coincide with
6 respect to the primary issue set forth in Grant's complaint,
7 whether he is liable for any damages. See Prudential, 204 F.3d
8 at 873-74 (declining to realign the parties because ultimate
9 resolution of the claim would create antagonistic interests
10 between the parties, even though the parties had a similar
11 interest in maintaining injunctive relief and had acted in
12 conjunction at all previous current stages of the litigation).

13 The cases relied upon by the Estate defendants in support of
14 their argument for realignment are distinguishable. In Dolch v.
15 United Cal. Bank, 702 F.2d 178. In Dolch, the plaintiff, the
16 decedent's daughter, brought suit in federal court against the
17 bank, which had been assigned the rights to the trust at issue,
18 and her sister. Id. at 179. The plaintiff claimed that she and
19 her two surviving siblings, including her defendant sister, were
20 each owners of an undivided one-third interest in the trust. Id.
21 In answering the complaint, the defendant sister admitted all of
22 the plaintiff's allegations. Id. at 181. The court also noted
23 that the defendant sister was the "driving force" behind the
24 action. Id. The Dolch court held that the siblings were
25 properly realigned as plaintiffs because they had identical
26 interests and would equally benefit from a decision against the
27 bank. Id. at 181-82. Conversely, unlike in Dolch, Grant does
28 not have an identical interest to the Does in its suit against

1 the Estate defendants; rather, it is likely that he will proceed
2 against different theories in his claim for declaratory relief.
3 Further, Grant and the Does will not benefit equally from a
4 decision against the Estate defendants; rather, they will
5 continue to have claims against each other for the costs
6 associated with this litigation. Finally, there is no evidence
7 of the type of collusion the court noted in existed in Dolch. As
8 such, the Estate defendants reliance on Dolch is unpersuasive.

9 Similarly, the facts of Continental Airlines, Inc. v.
10 Goodyear Tire & Rubber Co., 819 F.2d 1519, are readily
11 distinguishable from the facts of this litigation. In
12 Continental Airlines, Continental brought suit in state court
13 against McDonnell Douglas Corporation (MDC) and Sargent
14 Industries following a deadly airplane accident. Id. at 1521-22.
15 MDC attempted to remove the litigation to federal court, but the
16 action was remanded for lack of diversity. Id. Subsequently,
17 MDC filed a nearly identical federal declaratory judgment action,
18 naming Continental and Sargent as defendants. Id. The
19 Continental court realigned Sargent as a plaintiff with MDC,
20 holding that both parties had an *identical* interest in proving
21 the validity and scope of an exculpatory clause. Id. at 1523
22 (emphasis added). In support of its holding, the court noted
23 that one supposedly adverse party submitted briefs in support of
24 the other's summary judgment motion and the two parties were
25 represented by the same counsel on appeal. Id. In this case, as
26 set forth above, Grant and the Does do not have identical
27 interests in their issues with the Estate defendants. Moreover,
28 there is not the same type of collusive activity and blatant

1 attempt to forum shop as before the court in Continental. As
2 such, the court's holding in Continental does not support
3 realignment of the parties in this case.

4 Accordingly, because Grant and the Does' interests do not
5 sufficiently coincide to justify realignment, the Estate
6 defendant's motion to dismiss for lack of subject matter
7 jurisdiction is DENIED.

8 **B. Personal Jurisdiction**

9 The Estate defendants assert that the complaint must be
10 dismissed because the court lacks personal jurisdiction. "Where,
11 as here, there is no applicable federal statute governing
12 personal jurisdiction, the law of the state in which the district
13 court sits applies." Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d
14 1482, 1484 (9th Cir. 1993) (citation omitted). "California's
15 long-arm statute allows courts to exercise personal jurisdiction
16 over defendants to the extent permitted by the Due Process Clause
17 of the United States Constitution." Id. at 1484 (citation
18 omitted). Thus, only constitutional principles constrain the
19 jurisdiction of a federal court in California. Sher v. Johnson,
20 911 F.2d 1357, 1361 (9th Cir. 1990). "Due process requires that
21 in order to subject a defendant to a judgment *in personam*, if he
22 be not present within the territory of the forum, he have certain
23 minimum contacts with it such that the maintenance of suit does
24 not offend traditional notions of fair play and substantial
25 justice." Harris Rutsky & Co. Ins. Servs., Inc. v. Bell &
26 Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003) (internal
27 quotations omitted); see Burger King v. Rudzewicz, 471 U.S. 462,
28 476 (1985).

1 Once a defendant challenges jurisdiction, the burden of
2 proof to show that jurisdiction is appropriate lies with the
3 plaintiff. Sher, 911 F.2d at 1361. When a defendant's motion to
4 dismiss is to be decided on the pleadings, affidavits, and
5 discovery materials, the plaintiff need only make a prima facie
6 showing that personal jurisdiction exists in order for the action
7 to proceed. Id.

8 A court may exercise either general or specific jurisdiction
9 over a non-resident defendant. "General jurisdiction exists when
10 a defendant is domiciled in the forum state or his activities
11 there are 'substantial' or 'continuous and systematic.'" Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir.
12 1998) (quoting Helicopteros Nacionales de Columbia, S.A. v. Hall,
13 466 U.S. 408, 414-416 (1984)). The Does and Grant do not contend
14 that the court has personal jurisdiction over the Estate
15 defendants based upon general jurisdiction. (See Pl. Grant's
16 Opp'n to Mot. to Dismiss ("Grant Opp'n"), filed Oct. 17, 2008, at
17 9; Does' Opp'n to Mot. to Dismiss ("Doe Opp'n"), filed Oct. 17,
18 2008, at 12.)

19 Where general jurisdiction does not exist, the court may
20 still determine whether the defendant has had sufficient minimum
21 contacts with the state, as it relates to the pending litigation
22 against it, in order to justify the exercise of specific
23 jurisdiction. See Omeluk v. Langsten Slip & Batbygggeri A/S, 52
24 F.3d 267, 270 (9th Cir. 1995). In determining whether a district
25 court can exercise specific jurisdiction over a defendant, the
26 Ninth Circuit has articulated the following three-part test:
27

28 /////

- 1 (1) the nonresident defendant must purposefully direct
2 [its] activities or consummate some transaction
3 with the forum or resident thereof; or perform
4 some act by which [it] purposefully avails
5 [itself] of the privilege of conducting activities
6 in the forum, thereby invoking the benefits and
7 protections of its laws;
- 8 (2) the claim must be one which arises out of or
9 relates to the defendant's forum-related
10 activities; and
- 11 (3) the exercise of jurisdiction must comport with
12 fair play and substantial justice, i.e. it must be
13 reasonable.

14 Core-Vent, 11 F.3d at 1485 (citation omitted).

15 **1. Purposeful Availment**

16 The purposeful availment prong requires a "qualitative
17 evaluation of the defendant's contact with the forum state in
18 order to determine whether the defendant's conduct and connection
19 with the forum state are such that he should reasonably
20 anticipate being haled into court there." Harris, 328 F.3d at
21 1130 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S.
22 286, 297 (1980); Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir.
23 1987)) (internal quotations omitted). "The purposeful availment
24 requirement is met if the defendant 'performed some type of
25 affirmative conduct which allows or promotes the transaction of
26 business within the forum state.'" Id. (quoting Sher, 911 F.2d
27 at 1362). However, a defendant may not be haled into a
28 jurisdiction based upon the unilateral acts of third parties.
Lake, 817 F.2d at 1421 (citing Burger King, 471 U.S. at 475).

In a case arising out of a contractual relationship, "the
mere existence of a contract with a party in the forum state does
not constitute sufficient minimum contacts for jurisdiction."
Sher, 911 F.2d at 1362. Rather, the court "must look to 'prior

1 negotiations and contemplated future consequences, along with the
2 terms of the contract and the parties' actual course of dealing'
3 to determine if the defendant's contacts are '*substantial*' and
4 not merely 'random, fortuitous, or attenuated.'" Id. (quoting
5 Burger King, 471 U.S. at 478-80) (emphasis in original).

6 In this case, the Estate defendants sought representation in
7 the underlying litigation from California counsel, Kathleen
8 Sullivan. Sullivan worked from California in her representation
9 of the Estate defendants before the district court in Hawaii,
10 before the initial 3-judge panel of the Ninth Circuit in San
11 Francisco, California, and before the 15-judge en banc Ninth
12 Circuit panel in San Francisco, California. (Grant Dismiss Decl.
13 ¶ 8.) On May 8, 2007, Sullivan, acting on behalf of the Estate
14 defendants, and Grant conducted settlement negotiations in person
15 in Pleasanton, California. (Grant Dismiss Decl. ¶ 11.) Over the
16 next three days, Sullivan and Grant also conducted negotiations
17 via telephone and e-mail from their respective offices in
18 California. (Grant Dismiss Decl. ¶ 12.) On May 11, 2007, the
19 negotiations consummated in a written settlement agreement that
20 Sullivan and Grant approved as to form in California. (Grant
21 Dismiss Decl. ¶ 13.) Two of the trustees of Kamehameha signed
22 the agreement in California. (Kalama Decl. ¶ 6; Lau Decl. ¶ 6.)
23 Under these facts, the court finds that extensive negotiations
24 leading up to the execution of the contract at issue in the
25 parties' claims against the Estate defendants took place in
26 California and that the contract was executed, in part, in
27 California. Moreover, the settlement agreement provided that no
28 signatory or releasee, including counsel, would disclose the

1 Does' names or any term of the Settlement Agreement.³ (Cross-
2 Claim ¶ 7.) As such, the contract may have imposed continuing
3 obligations on California residents, namely the parties'
4 California counsel, to abide by the confidentiality provisions.⁴

5 Because the Estate defendants conducted extensive settlement
6 negotiations in California through their designated California
7 representative, because the agreement was executed, in part, in
8 California, and because the agreement imposed continuing
9 obligations on California residents, the court finds that the
10 Estate defendants conducted sufficiently substantial activities
11 in California to satisfy the purposeful availment prong. See
12 Minnesota Mining & Mfg. Co. v. Nippon Carbide Indus. Co., Inc.,
13 63 F.3d 694, 697-98 (8th Cir. 1995) (holding that a defendant's
14 contacts with the forum states were substantial where the
15 litigation arose out of the alleged breach of a settlement
16 agreement that was partially negotiated in the forum state,
17 executed in the forum state, and demanded on-going duties from a
18 resident of the forum state); see also Data Disc, Inc. v. Sys.
19 Tech. Assocs., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977) (holding
20 that "[b]y participating in the contract negotiations in
21 California, [the defendant] purposely availed itself of the
22 privilege of carrying out activities in that state); cf.

23
24 ³ The court also notes that the alleged essence of the
25 agreement, the exchange of monetary compensation in return for
26 the Does' dismissal of their pending petition for certiorari,
27 required partial performance in California. The money paid by
28 the Estate defendants to Grant's client trust account at his bank
in Sacramento, California. (Grant Decl. ¶ 15.)

⁴ The court notes that it is not making any finding with
respect to the merits of the litigation.

1 Boschetto v. Hansing, 539 F.3d 1011, 1017 (9th Cir. 2008)
2 (holding that the defendant's contract with the plaintiff for a
3 one time sale of a good did not amount to purposeful availment
4 where the contract did not impose any ongoing obligations with
5 the plaintiff).

6 **2. Arising Under**

7 In order to satisfy the second prong of the three-part test,
8 Grant must establish that the contacts giving rise to purposeful
9 direction are those that give rise to the current dispute.

10 Bancroft, 223 F.3d at 1088. The Ninth Circuit relies "on a 'but
11 for' test to determine whether a particular claim arises out of
12 forum-related activities and thereby satisfies the second
13 requirement for specific jurisdiction." Ballard v. Savage, 65
14 F.3d 1495, 1500 (9th Cir. 1995) (citation omitted). The Estate
15 defendants' contacts in California - namely its representation by
16 a California attorney who negotiated a settlement agreement in
17 California that may have imposed future obligations on California
18 residents - resulted in the contract and confidentiality
19 agreement which are at the center of the litigation. Therefore,
20 the current action arises out of the Estate defendants' contacts
21 with California.

22 **3. Reasonableness**

23 Once the first two prongs of the minimum contacts test are
24 established, a defendant may defeat jurisdiction only by
25 "present[ing] a compelling case that the presence of some other
26 considerations would render jurisdiction unreasonable." Core-
27 Vent, 11 F.3d at 1487; Amini Innovation Corp., 497 F. Supp. 2d at
28 1108. Specifically, a defendant must show that the exercise of

1 jurisdiction in the forum would "make litigation so gravely
2 difficult and inconvenient that a party unfairly is at a severe
3 disadvantage in comparison to his opponent." Burger King, 471
4 U.S. at 478 (internal quotations and citations omitted). In
5 determining whether the exercise of specific jurisdiction is
6 reasonable, the court must weigh the following seven factors:

- 7 (1) the extent of the defendant['s] purposeful
interjection into the forum state's affairs;
- 8 (2) the burden on the defendant of defending in the
forum;
- 9 (3) the extent of conflict with the sovereignty of the
defendant['s] state;
- 10 (4) the forum state's interest in adjudicating the
dispute;
- 11 (5) the most efficient [forum for] judicial resolution
of the controversy;
- 12 (6) the importance of the forum to the plaintiff's
interest in convenient and effective relief; and,
- 13 (7) the existence of an alternative forum.

14 Core-Vent, 11 F.3d at 1487-88 (citation omitted).⁵

15 While, as set forth above, the court concludes that the
16 Estate defendants purposefully directed their activities to
17 California, the extent of the interjection has not been great.
18 Rather, all of their contacts arise out of both their own and the
19 Does' representation by California counsel in litigation that was
20 initiated in Hawaii by Hawaiian parties. This factor thus weighs
21 in favor of the Estate defendants.

22 The Estate defendants assert that they would suffer
23 substantial burdens if required to litigate this case in
24 California because all of Kamehameha's employees, witnesses, and
25 representatives are located in Hawaii. The Ninth Circuit has
26 recognized that "[m]odern means of communication and

27
28 ⁵ Neither of the parties raise any argument with regard
to sovereignty of the defendants' state.

1 transportation have tended to diminish the burden of defense of a
2 lawsuit in a distant forum." Ins. Co. of N. Am. v. Marina Salina
3 Cruz, 649 F.2d 1266, 1271 (9th Cir. 1981); see also Menken v.
4 Emm, 503 F.3d 1050, 1060 (9th Cir. 2007) ("[W]ith the advances in
5 transportation and telecommunications and the increasing
6 interstate practice of law, any burden is substantially less than
7 in days past."); Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d
8 126, 128-29 (9th Cir. 1995) (noting that unless the
9 "inconvenience is so great as to constitute a deprivation of due
10 process, it will not overcome clear justifications for the
11 exercise of jurisdiction.") (citation omitted). "[S]ome
12 additional inconvenience is inevitable" in almost any case where
13 the defendant does not reside in the forum state. Indiana
14 Plumbing Supply, Inc. v. Standard of Lynn, Inc., 880 F. Supp.
15 743, 748 (C.D. Cal. 1995). In light of the resources available
16 to the Estate defendants, this factor weighs in favor of
17 reasonableness, or, at best, is neutral.

18 Both California and Hawaii have an interest in the
19 litigation. California has an interest in providing a forum for
20 adjudicating the dispute of one of its residents. Hawaii has an
21 interest in this litigation because the underlying litigation
22 which gave rise to the settlement agreement was between Hawaiian
23 parties and concerned schools and children in Hawaii. Moreover,
24 the effect of the disclosure of the terms of that agreement was
25 felt in Hawaii. Because both states can claim an interest in
26 this litigation, this factor is neutral.

27 All parties agree that Hawaii is an alternative forum for
28 this dispute. Based upon the submissions of the parties, the

1 court finds that Hawaii would be the most efficient forum for
2 resolution of the claims. The majority of witnesses are located
3 in Hawaii, including Kamehameha trustees, attorneys, and
4 employees, the reporters in Hawaii to whom disclosures were made,
5 and the Does. Further, the agreement at issue settles a lawsuit
6 between Hawaii residents filed in a Hawaii court, which included
7 a settlement payment by the Hawaii defendants to Hawaii
8 plaintiffs. Grant chose to represent these non-resident
9 defendants in the underlying action and filed the complaint in
10 Hawaii. The court finds it troubling that Grant now contends
11 that appearance in a Hawaii court arising out of the settlement
12 agreement in that litigation would be inconvenient and unduly
13 burdensome. This assertion is particularly troubling in light of
14 the his current representation of another plaintiff in a case
15 against Kamehameha in Hawaii. (Defs' Reply in Supp. of Mot. to
16 Dismiss, filed Oct. 24, 2008, at 12.) Therefore, these factors
17 weigh in favor of the Estate defendants.

18 Looking at the arguments and submissions of the party as a
19 whole, the court finds that Hawaii would be a more reasonable
20 forum for this litigation. However, in light of the presumption
21 of reasonableness created by their conduct directed at
22 California, it is not enough that the Estate defendants
23 demonstrate that another forum is more reasonable than
24 California. See Sher, 911 F.2d at 1365. Rather, defendants must
25 show that the exercise of jurisdiction in this forum gives rise
26 to a "severe disadvantage" that amounts to a due process
27 violation. Id. The Estate defendants have not met this burden.
28 While the Estate defendants have demonstrated significant

1 inconvenience and a less efficient forum, they have not supported
2 a finding that litigation in this forum would place them at a
3 "severe disadvantage."

4 Therefore, because Grant has demonstrated that the Estate
5 defendants had sufficient minimum contacts with California giving
6 rise to this cause of action and because the Estate defendants
7 have failed to demonstrate that the exercise of jurisdiction
8 would be so unreasonable as to violate due process, the Estate
9 defendants' motion to dismiss for lack of personal jurisdiction
10 is DENIED.

11 **C. Transfer**

12 Alternatively, the Estate defendants move to transfer venue
13 of this action to Hawaii pursuant to 28 U.S.C. § 1404(a).
14 Pursuant to § 1404(a), "[f]or the convenience of the parties and
15 witnesses, in the interest of justice, a district court may
16 transfer any civil action to any other district or division where
17 it might have been brought." 28 U.S.C. § 1404(a). A court has
18 broad discretion in deciding whether or not to transfer venue
19 pursuant to 28 U.S.C. § 1404(a). E. & J. Gallo Winery v. F. & P.
20 S.P.A., 899 F. Supp. 465, 466 (E.D. Cal. 1994). A defendant
21 moving to transfer venue under § 1404(a) must therefore satisfy
22 both of the following requirements: (1) the transferee district
23 is one in which the action might have been brought originally;⁶
24 and (2) transfer will enhance the convenience of the parties and

25
26 ⁶ The Estate defendants assert that this litigation could
27 have been brought in the United States District Court for the
28 District of Hawaii. Neither the Does nor Grant dispute this
assertion. Rather, in opposition to the Estate defendants'
motion to dismiss, the Does and Grant concede that Hawaii is an
alternative forum.

1 witnesses, and is in the interests of justice. See Van Dusen v.
2 Barrack, 376 U.S. 612, 616 (1964). In considering the second
3 requirement, the court employs a case by case analysis, which may
4 include evaluation of the following factors: (1) the convenience
5 of the witnesses and the availability of compulsory process to
6 compel attendance of unwilling non-party witnesses; (2) ease of
7 access to sources of proof; (3) the location where the relevant
8 agreements were negotiated and executed; (4) the contacts
9 relating to the plaintiff's cause of action in the chosen forum;
10 (5) the respective parties' contacts with the forum; (6) the state
11 that is most familiar with the governing law; and (7) the
12 plaintiff's choice of forum and the presence of a forum selection
13 clause; and (8) the differences in costs in litigation in the two
14 forums.⁷ See Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-
15 99 (9th Cir. 2000). Courts should also consider the relevant
16 public policy of the forum state. Id. at 499.

17 The moving party has the burden of establishing that an
18 action should be transferred. Commodity Futures Trading Comm'n
19 v. Savage, 611 F.2d 270, 279 (9th Cir. 1979). Unless the balance
20 is strongly in favor of the defendant, the plaintiff's choice of
21 forum should rarely be disturbed. Gulf Oil Corp. v. Gilbert, 330
22 U.S. 501, 508 (1947).

23 Considering the Estate defendants' showing in light of the
24 factors described in Jones, the court finds that under the facts

25
26 ⁷ The Estate defendants do not raise this issue in their
27 motion. While the Does attempt to assert that Grant will suffer
28 a substantial burden if required to litigate this case in Hawaii,
Grant does not make this argument on his own behalf. Further, as
set forth infra, Grant's voluntary participation in both past and
current litigation in Hawaii renders this argument unpersuasive.

1 of this case, transfer is warranted. All parties in this action,
2 with the exception of Grant, are residents of Hawaii. All of the
3 parties to the underlying action, the primary parties to the
4 settlement agreement at issue, are residents of Hawaii. These
5 witnesses' testimony may be relevant to the interpretation of the
6 confidentiality provision and its importance to the respective
7 parties. Kamehameha's employees are all citizens of Hawaii.
8 These witnesses' testimony may also be relevant to the importance
9 of the confidentiality agreement and the effect of the
10 disclosure. The reporters to whom Goemans disclosed information
11 about the settlement are located in Hawaii. These witnesses may
12 have information relevant to the full extent of Goemans'
13 disclosures or to the effect of such disclosure in the community.
14 The two participants in the conversation that gave rise to the
15 declaratory relief action, Schulmeister and Kuniyuki, are
16 citizens of Hawaii. Their testimony may be relevant to the
17 existence of a controversy between the parties in the current
18 action.⁸

19 Grant and the Does assert that the most important witnesses
20 to this case reside in California. Goemans, the Does' former
21 counsel, is currently in Los Angeles. (Decl. of Paul Alston in
22

23 ⁸ Grant contends that the court should disregard the
24 Estate defendants' list of potential witnesses because they did
25 not provide them in the form of affidavits or declarations. See
26 Cochran v. NYP Holfings, Inc., 58 F. Supp. 2d, 1113, 1119 (C.D.
27 Cal. 1998). The court declines to do so. Unlike the case relied
28 upon by Grant, the Estate defendants have not merely broadly
asserted that the most relevant witnesses are located outside the
district, but rather, they have identified their witnesses and
set forth a description of the testimony it is anticipated they
will provide. See Saleh v. Tital Corp., 361 F. Supp. 2d 1152,
1162-63 (S.D. Cal. 2005).

1 Supp. of Mot. to Transfer, filed Oct. 24, 2008, ¶ 4.) The Does
2 and Grant also assert that California lawyers who currently
3 represent the parties may need to testify. However, there is no
4 evidence that these same attorneys would not continue to
5 represent the parties if the action was transferred to Hawaii.
6 As such, there would appear to be little inconvenience in calling
7 them to testify. Moreover, the court also notes that only one of
8 the referenced attorneys, James Banks, is located in the Eastern
9 District of California.

10 Therefore, the court finds that the majority of the
11 potential witnesses are located in Hawaii. For the most part,
12 the remaining witnesses are attorneys who voluntarily chose to
13 represent Hawaiian residents in either the underlying or current
14 litigation. As such, the court finds that the convenience of the
15 majority of witnesses,⁹ the availability of compulsory process to
16 compel attendance of unwilling non-party witnesses, and the ease
17 of access to proof¹⁰ weigh heavily in favor of transfer to
18 Hawaii.

19 While the settlement agreement that is at the core of this
20 litigation was negotiated in California, it was executed by
21

22 ⁹ Grant contends that his filing of a summary judgment
23 motion relevant to this inquiry because if successful, the
24 litigation will be resolved without any witnesses. This
25 contention, without support to any case law, is meritless. The
26 court will not assess the merits of Grant's motion for summary
judgment, to which defendants have not had an opportunity to
respond, in assessing the pending motion to transfer venue.

27 ¹⁰ The court primarily considers the availability and ease
28 of access to witnesses under this factor as the Estate defendants
have not demonstrated with any specificity how transfer aids in
the ease of access to documentary evidence.

1 almost all parties in Hawaii. Further, the settlement agreement
2 resolved litigation filed by Hawaii plaintiffs against Hawaii
3 defendants in the Hawaii district court, challenging policies
4 that pertain to Hawaii schools and primarily affect Hawaiian
5 children. The court notes that many of the contacts with
6 California which gave rise to personal jurisdiction, including
7 the in-person negotiations between Grant and Sullivan and the
8 execution of the settlement agreement by two of the trustees,
9 took place outside the Eastern District of California. Moreover,
10 as set forth above, while these contacts were sufficiently
11 substantial to satisfy the purposeful availment prong of personal
12 jurisdiction, the extent of the Estate defendants' contacts in
13 California generally, and in this district specifically, are not
14 great.

15 Further, this litigation all arises out of Grant's voluntary
16 representation of Hawaiian plaintiffs in an action filed in
17 Hawaii. It strains credulity for Grant to now assert that his
18 contacts with and this action's relationship to Hawaii is
19 minimal. This premise is further strained by his current
20 representation of Hawaiian plaintiffs in a similar action against
21 similar defendants in Hawaii. See Jacob Doe v. Kamehameha
22 Schools/Bernice Pauahi Bishop Estate, Civ. No. 08-00359 JSM-BMK
23 (D. Haw. 2008).¹¹

24 Under the circumstances of this case, the location where the
25 relevant agreements were negotiated and executed, the contacts

26
27 ¹¹ The court takes judicial notice that a complaint was
28 filed in this case on August 6, 2008, listing Grant as counsel
for plaintiffs. The docket reveals that Grant remains counsel
for plaintiffs, pro hac vice.

1 relating to the plaintiff's cause of action in the chosen forum,
2 and the respective parties' contacts with the forum weigh heavily
3 in favor of transfer to Hawaii.

4 While the court does not reach any conclusions with respect
5 to the choice of law to be applied in this action, it notes that
6 it is very likely that Hawaii law will be at the center of the
7 dispute between the Estate Defendants, Grant, and the Does. Both
8 the Estate defendants and the Does agree that Hawaii state law
9 governs the settlement agreement in the underlying litigation.
10 Further, because the gravamen of the settlement agreement, which
11 was executed for the most part in Hawaii, was the exchange of
12 money by Hawaii defendants to Hawaii plaintiffs in return for the
13 dismissal of the petition for certiorari arising out of a claim
14 initially filed in Hawaii, it is very likely that Hawaii state
15 law applies to the dispute arising out of the settlement
16 agreement. See Cal. Civ. Code § 1646. As such this factor
17 weighs in favor of transfer to Hawaii.

18 Grant and the Does argue that this dispute also involves the
19 settlement agreement reached between them with respect to the
20 apportionment of attorneys' fees and potential indemnification
21 for the costs of suit and damages. This agreement contains both
22 a forum selection clause, designating this court as a proper
23 forum, and a choice of law provision, designating California law
24 as the applicable law. (Grant Transfer Decl. ¶ 4.) However, the
25 Estate defendants were not a party to this agreement. Moreover,
26 this agreement is derivative of Grant's representation of the
27 Does in the underlying litigation. While the court makes no
28 determinations with respect to the merits of the dispute, it is

1 highly likely that the applicability of the indemnity provisions
2 in the Doe/Grant agreement is contingent upon or at least
3 seriously affected by the resolution of the claims against the
4 Estate defendants. As such, it is the settlement agreement in
5 the underlying action which is at the core of this litigation for
6 purposes of the court's determination regarding transfer.
7 Finally, the court notes that nothing prevents Grant or the Does
8 from seeking to sever these claims from the original action in
9 order to give effect to the forum selection and choice of law
10 provisions in the contract between them.

11 Finally, public policy weighs in favor of transfer of this
12 litigation to Hawaii. While California has an interest in
13 providing a forum for adjudicating the dispute of one of its
14 residents, Hawaii has an interest in this litigation because the
15 underlying litigation which gave rise to the settlement agreement
16 was between Hawaiian parties and concerned schools and children
17 in Hawaii. Hawaii has a substantial public policy interest in
18 (1) enforcing settlement agreements between Hawaii residents; and
19 (2) regulating the conduct of out-of-state attorneys who choose
20 to represent Hawaii residents in Hawaii litigation. Under the
21 circumstances in this case, the court finds that Hawaii's
22 interest in this litigation outweighs California's interest.

23 The court notes that a plaintiff's choice of forum in which
24 he resides is accorded substantial weight. Securities Investor
25 Protection Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985)
26 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)); see
27 also Ellis v. Costco Wholesale Corp., 372 F. Supp. 2d 530, 537-38
28 (N.D. Cal. 2005). However, based upon the submissions of the

1 parties and in light of all the circumstances, the Estate
2 defendants have demonstrated that the balance of factors weighs
3 heavily in favor of transfer. As such, the Estate defendants'
4 motion to transfer venue is GRANTED.¹²

5 **CONCLUSION**

6 Therefore, for the foregoing reasons, the Estate defendants'
7 motion to dismiss for lack of subject matter jurisdiction and
8 lack of personal jurisdiction is DENIED.¹³ The Estate
9 defendants' motion to transfer this case to the United States
10 District Court for the District of Hawaii pursuant to 28 U.S.C. §
11 1404(a) is GRANTED.¹⁴

12 IT IS SO ORDERED.

13 DATED: November 17, 2008



14
15 FRANK C. DAMRELL, JR.
16 UNITED STATES DISTRICT JUDGE
17
18
19
20
21

22 ¹² Because the court grants the Estate defendants' motion
23 to transfer, it does not reach the argument raised in their reply
24 that venue is not proper.

25 ¹³ Because the court finds that transfer is appropriate
26 pursuant to § 1404(a), the court does not reach the merits of the
27 Estate defendants' motion for the court to exercise its
28 discretion to decline to entertain Grant's declaratory relief
claim.

¹⁴ In light of the court's order, plaintiff Grant's
pending motion for summary judgment is DENIED as MOOT.