UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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THE WINE GROUP LLC, a Delaware limited liability company,

Plaintiff,

v.

LEVITATION MANAGEMENT, LLC, a Nevada limited liability company; and TIPTON SPIRITS, LLC, d/b/a Desirée Vodka Company, LLC, an Indiana limited liability company,

Defendants.
_____/

NO. CIV. 2:11-1704 WBS JFM

MEMORANDUM AND ORDER RE: MOTION TO DISMISS OR TO TRANSFER

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Plaintiff The Wine Group LLC ("TWG") brought this trademark infringement action against defendants Levitation Management, LLC ("Levitation"),[1] and Tipton Spirits, LLC, d/b/a Desirée Vodka Company, LLC ("Tipton"). Defendants move to

[1] According to defendants, the name of this company is Levitation Marketing, LLC, not Levitation Management, LLC, as captioned in the Complaint.

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dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) or, alternatively, to transfer to the Southern District of Indiana for improper venue pursuant to 28 U.S.C. § 1406(a).

I. Factual and Procedural Background

Plaintiff, a Delaware limited liability company with its principal place of business in Tracy, California, produces, imports, and markets wine, vodka, and other alcoholic beverages. (Compl. ¶¶ 3, 7.) Its products are advertised, distributed, and sold throughout the United States. (Id. ¶ 7.)

In 2007, plaintiff launched a brand of wine called "Cupcake." (Id. ¶ 8.) Plaintiff has registered "Cupcake" as a trademark. (Id. ¶ 15.) In 2010, plaintiff created a sub-brand of Cupcake wine called "Red Velvet." (Id. ¶ 12.)

After allegedly great nationwide success with the Cupcake wine, plaintiff decided to create a Cupcake brand of vodka in 2010 and launched the Cupcake vodka in April of 2011. (Id. ¶ 16.) Plaintiff has registered "Cupcake" as a trademark for spirits. (Id. ¶ 18.)

According to plaintiff, California is the largest market for vodka in the United States and plaintiff sells more Cupcake wine, Cupcake Red Velvet wine, and Cupcake vodka in California than any other state. (Lizar Decl. ¶¶ 3-7.)

In early 2010, defendants created a "Desirée" brand of vodka. (Compl. ¶ 19.) Levitation is a Nevada limited liability company, (id.), with its principal place of business in Brazil, Indiana. (Knight Decl. I ¶ 5.) "It is a marketing consulting agency that owns the DESIRÉE trademark, the other trademarks at

issue [], and the domain name desireevodka.com." (Compl. ¶ 4.) Tipton, an Indiana limited liability company, "is responsible for the sales and marketing of the [Desirée vodka.]" (Id. ¶ 5.) Tipton's principal place of business is in Brazil, Indiana. (Knight Decl. I ¶ 8.)

Plaintiff takes issue with two of defendants' sub-brands of Desirée vodka: "On one vodka, Defendants use the trademark CUPCAKE and a large depiction of a cupcake, and on the other Defendants use the trademark RED VELVET and a large depiction of a slice of a layer cake." (Compl. ¶ 20.)

In February of 2011, before defendants had launched their vodka, plaintiff informed defendants by letter of its trademark registration and pending application and asked defendants to change their labels. Defendants were informed that plaintiff is located in California. The parties exchanged a series of communications in which defendants disputed that their use of "Cupcake" or "Red Velvet" was improper. In April of 2011, defendants launched their vodka and did not change their labels. (See Reidl Decl. ¶¶ 2-7; Compl. ¶¶ 23-27.)

The Complaint alleges the "[a]cts giving rise to the claims asserted herein have been expressly aimed at, have occurred in, and will continue to occur in California and this District," (Compl. ¶ 2), and that California and this district are the place of injury. (Id. ¶ 3.)

Plaintiff has not alleged that defendants sell their vodka in California. According to defendants, they currently sell their vodka in seven states. (Knight Decl. I ¶ 15.) Defendants' vodka cannot be purchased through their website.

(Id. ¶ 28, Ex. 1.)

Plaintiff alleges that defendants "are in the process of rolling out CUPCAKE and RED VELVET vodka and seeking distributors on a national basis, including in California. The Defendants' DESIRÉE vodka competes directly with TWG's CUPCAKE vodka." (Compl. ¶ 21.)

Defendants admit to engaging in one unsuccessful discussion with a California-based distributor, which resides in this district, that touched on defendants' vodka. (See Knight Decl. I ¶¶ 21-22.) Defendants' website states that their products will be "Coming soon" to every state. (Id. Ex. 1.)

In support of their allegation that defendants market and promote their vodka in California, (see Compl. ¶ 21), plaintiff relies heavily on defendants' Internet activity. Defendants maintain a website, www.desireevodka.com, at which visitors are invited to contact defendants to receive additional information. (Knight Decl. I Ex. 1.) The website includes "metatags" for "Cupcake Vodka" and "Red Velvet Vodka." (Lizar Decl. ¶ 8; Knight Decl. II ¶ 14.) Plaintiff alleges that the metatags "ensure that references to Defendants' vodka will appear whenever a consumer searches for TWG's wine or vodka." (Compl. ¶ 26.) However, according to defendants, a recent search on the search engine Google for "cupcake vodka" only yielded results related to plaintiff on the first two pages; the third page contained results related to defendants. (Knight Decl. II ¶ 14, Ex. A.) Defendants' website invites visitors to "follow" defendants on the website of Facebook, a California company, and provides a link to their Facebook page. (Knight Decl. I Ex. 1.)

Defendants have created a Facebook page that allows defendants to post information about their products. (Knight Decl. I ¶ 29.) The page also permits website users to post messages to defendants and defendants to respond to users messages. (Knight Decl. I, Ex. 2.) Defendants also use the Facebook page to solicit applications for "Brand Ambassadors" it hires to promote defendants' products. (Id.)

The parties dispute how Facebook functions and how defendants have used it. According to plaintiff, "each [Facebook "friend"] will receive all updates posted by the other person on their respective homes pages." (Lizar Decl. ¶ 14.) Plaintiff claims that the owner of a Facebook page must first "accept" a "friend request" and can "delete" a "friend." (Id. ¶¶ 14, 16-17.) Plaintiff contends that only a "friend" can determine where another "friend" resides.[2] (Id. ¶ 15.)

Plaintiff's counsel, a resident of this district, "friended" defendants and has since "automatically receive[d] all communications posted to the Facebook page by Defendants," including an entry referring to "Cupcake Vodka" and "Red Velvet Vodka." (Reidl Decl. ¶¶ 12-13.) Plaintiff's counsel notes two entries on defendants' page by "friends" of defendants who indicate that they live in California. One entry from a "friend" in Bakersfield, California, simply said that defendants' vodka

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[2] According to defendants, defendants' Facebook page only allows a Facebook user to "like" or "follow" or become a "fan" of defendants. In other words, defendants do not "accept" "friend requests." Defendants can only restrict Facebook "fans" by age and country, and defendants can only view information on a user's profile that the user has made "public," which may or may not include where the user lives. (See Knight Decl. II ¶¶ 15-16.)

was not available in California, to which defendants did not respond. Another entry asked defendants when the vodka would be available in California, to which defendants responded that a distributor had not been appointed "yet" and asked for suggestions. (See Reidl Decl. ¶¶ 18-19; Knight Decl. I Ex. 2.)

According to defendants, as of August 2, 2011, five of the Facebook users who "like" defendants indicate that they live in California. Defendants have approximately 254 "fans." A search on Facebook's search bar for "cupcake vodka" does not result in any mention of defendants or their vodka. Such a search only results in a page for plaintiff's Cupcake vodka. (See Knight Decl. II ¶¶ 18-19, Ex. B.)

Facebook allows advertising, including advertising based on geography. (Id. ¶ 17.) According to defendants, they have not purchased targeted advertising on Facebook "for any country or state, let alone California or the cities that reside in the Eastern District of California." (Id.) Further, "at no time ha[ve] [defendants] engaged in paid advertising . . . anywhere outside of the markets where the Desirée vodka products are sold." (Id. ¶ 20.)

On June 24, 2011, plaintiff filed this action against defendants, asserting claims for trademark infringement under the Lanham Act, 15 U.S.C. §§ 1051-1127, and restitution based on unjust enrichment.

II. Discussion

The plaintiff has the burden of establishing that the court has personal jurisdiction over a defendant. Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001). Where the court does

not hold an evidentiary hearing and the motion is based on written materials, as here, plaintiff need only establish a prima facie showing of jurisdiction. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). Once a defendant has contradicted allegations contained in the complaint, plaintiff may not rest on the pleadings, but must present admissible evidence which, if true, would support the exercise of personal jurisdiction. Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003). Uncontroverted allegations in the Complaint must be taken as true and conflicts between statements contained in affidavits must be resolved in the plaintiff's favor. Schwarzenegger, 374 F.3d at 800.

"Where there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which it sits. California's long-arm jurisdictional statute is coextensive with federal due process requirements." Love v. Associated Newspapers, Ltd., 611 F.3d 601, 608-09 (9th Cir. 2010) (citing Yahoo! v. La Ligue Contre Le Racisme, 433 F.3d 1199, 1205 (9th Cir. 2006) (en banc)); Cal. Code Civ. Proc. § 410.10). "For a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have at least 'minimum contacts' with the relevant forum such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" Schwarzenegger, 374 F.3d at 801 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Plaintiff relies only on specific jurisdiction.

The Ninth Circuit uses a three-prong test to determine

whether specific jurisdiction exists:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Id. at 802 (quoting Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987)) (internal quotation marks omitted).

"The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state." Id. Once the plaintiff satisfies the first two prongs, "the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." Id. (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985)).

A. Purposeful Direction

"The first prong is satisfied by either purposeful availment or purposeful direction . . . . 'A purposeful availment analysis is most often used in suits sounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort.'" Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting Schwarzenegger, 374 F.3d at 802).

"Trademark . . . claims are akin to tort claims, and therefore, are analyzed under the purposeful direction test."

One True Vine, LLC v. Liquid Brands LLC, No. C 10–04102, 2011 WL 2148933, at *4 (N.D. Cal. May 31, 2011). But cf. Adidas Am., Inc. v. Bobosky, No. CV 10-603, 2010 WL 4365795, at *4 (D. Or. Oct. 8, 2010) ("In trademark infringement cases, however, Ninth Circuit courts have used both purposeful direction and purposeful availment frameworks simultaneously . . . ."), adopted by Civil No. 10-603, 2010 WL 4364609 (D. Or. Oct. 28, 2010).

Plaintiff relies on purposeful direction. The Ninth Circuit analyzes purposeful direction using the "Calder effects" test, originated in Calder v. Jones, 465 U.S. 783 (1984). See Brayton Purcell, 606 F.3d at 1128. Under the effects test, "[t]he defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." Id. (quoting Yahoo!, 433 F.3d at 1206) (internal quotation marks omitted).

Because the first and third factors are easiest to address, the court will discuss those factors first before determining whether defendants expressly aimed at the forum.

1. Intentional Act

"'Intentional act' has a specialized meaning in the context of the Calder effects test." Schwarzenegger, 374 F.3d at 806. A defendant need only have performed "an actual, physical act in the real world" and need not have intended "to accomplish a result or consequence of that act." Id. Defendants in this case performed such intentional acts when they designed and launched their website, registered metatags with Google, created their Facebook page, and used that page to interact with their

"fans." See, e.g., Purcell, 606 F.3d at 1128 (posting copyrighted material on passive website was an intentional act); Nutrishare, Inc. v. BioRX, L.L.C., No. 08-1252, 2008 WL 3842946, at *7 (E.D. Cal. Aug. 14, 2008) (using a protected trademark in online advertisements was an intentional act). The first requirement of the Calder test is met.

2. Defendants Knew Harm Was Likely in California

Under the third prong of the Calder test, a plaintiff must show that a defendant has caused harm it "knew was likely to be suffered in the forum state." Brayton Purcell, 606 F.3d at 1131 (citing Yahoo! 433 F.3d at 1206). "This element is satisfied when defendant's intentional act has 'foreseeable effects' in the forum." Id. (citing Bancroft, 223 F.3d at 1087).

The Ninth Circuit "has repeatedly held that a corporation incurs economic loss, for jurisdictional purposes, in the forum of its principle place of business." CollegeSource, Inc. v. AcademyOne, Inc., No. 09-56528, --- F. Supp. 2d ---, ----, 2011 WL 3437040, at *10 (9th Cir. 2011) (citing Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1113-14 (9th Cir. 2002); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1482, 1322 n.2 (9th Cir. 1998); Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487 (9th Cir. 1993)). The injury in a trademark infringement case is the damage to the trademark owner's reputation, see Au-Tomotive Gold Inc. v. Volkswagen of Am., Inc., 603 F.3d 1133, 1137 (9th Cir. 2010), and economic loss caused by intentional infringement of a plaintiff's trademark is foreseeable, see Brayton Purcell, 606 F.3d at 1131 (economic loss caused by intentional copyright infringement is foreseeable).

Plaintiff's principal place of business is in California and it holds trademark rights to the terms "Cupcake" and "Red Velvet" as applied to wine and spirits. Defendants were made aware of these facts when they received plaintiff's February 2011 letter and, therefore, could know it was likely that they would cause plaintiff harm in the forum.

In response to plaintiff's allegation that defendants have intentionally interfered with plaintiff's trademark, damaging its brand and causing consumer confusion, defendants respond that because they have not sold any products in the forum and are unaware of any sales of their products in the forum, they could not know that plaintiff would suffer harm in the forum. They further claim that for that same reason, a lack of in-forum sales, plaintiff cannot have actually suffered any harm in the forum, foreseeable or not.[3] The cases, though, make clear that a defendant's out of forum actions may cause a plaintiff likely, foreseeable injury in forum. Yahoo, 433 F.3d at 1206 (citing Schwarzenegger, 374 F.3d at 803). The third Calder factor is satisfied.

3. Express Aiming

The express aiming requirement is met when "the defendant is alleged to have engaged in wrongful conduct targeted

[3] Defendants report that a search on Google for the term "cupcake vodka" yields only results related to plaintiff for the first two pages. (Knight Decl. II ¶ 14.) Because the court's ruling does not rely solely on harm caused by defendants' use of metatags, the court will not address the question of whether defendants' submission would shift the burden to plaintiff to submit evidence supporting the challenged allegations, but does point out that defendants did not submit evidence of the results of a similar search for the trademarked term "Red Velvet."

at a plaintiff whom the defendant knows to be a resident of the forum state." Dole Food, 303 F.3d at 1111.

The invention of the Internet has posed a challenge to traditional jurisdictional analysis and courts have "struggled with the question whether tortious conduct on a nationally accessible website is expressly aimed at any, or all, of the forums in which the website can be viewed." Mavrix Photo Inc. v. Brand Technologies, 647 F.3d 1218, 1229 (9th Cir. 2011) (citing cases). It is well established that posting information on a passive website alone is insufficient to confer jurisdiction in all states in which that website is be accessed. Id. at 1229 (citing Brayton Purcell, 606 F.3d at 1129).

"[O]perating even a passive website in conjunction with 'something more'--conduct directly targeting the forum--is sufficient" to establish jurisdiction. Rio Props, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1020 (9th Cir. 2002). Websites that facilitate and encourage interactions may form the basis for jurisdiction, and this is especially likely to be the case if the interactions are commercial in nature. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997) (citing Zippo Manuf. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

When evaluating whether a non-resident's online activity satisfies the expressly aimed prong of the effects test, courts have considered "the interactivity of the defendant's website, e.g., Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1153-54, 1158 (9th Cir. 2006); Cybersell, 130 F.3d at 417-20[,] the geographic scope of the defendant's commercial ambitions, e.g.,

Pebble Beach, 453 F.3d at 1156-58; Rio Props, 284 F.3d at 1020-21[,] and whether the defendant 'individually targeted' a plaintiff known to be a forum resident, e.g., Brayton Purcell, 606 F.3d at 1129; Pebble Beach, 453 F.3d at 1156-57; Panavision, 141 F.3d at 1321-22." Mavrix Photo, 647 F.3d at 1229. It is the aggregate effect of a defendant's contacts with the forum that courts consider, not individual acts taken in isolation, to determine if jurisdiction exists. See Love, 611 F.3d at 606-07. (jurisdiction may be appropriate where there is "a series of ongoing efforts by the defendant to avail itself of the benefits of the [forum] market," but not where defendant has only single, isolated contacts with the forum state unconnected to the tortious act) (quoting Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1193 (9th Cir. 1988))); Panavision, 141 F.3d at 1321-22.

i. Interactivity

In Nutrishare, this court found that a website with a discussion board allowing visitors to post messages and chat online with employees of the defendant, a referral section allowing visitors to sign up to become customers, and a "Contact Us" e-mail page allowing visitors to request further information was not interactive enough, on its own, to show express aiming. Nutrishare, Inc., 2008 WL 3842946, at *8.

Defendants' own website is a passive website that allows one-way communication with site users. Holland Am. Line Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 460 (9th Cir. 2007). Website visitors can access advertising material that defendants post, but defendants do not make any sales and there are no interactive features. There is a "Contact Us" link consumers can

click on to send an email to defendants, but such features do not make a website "interactive." See Cybersell, 130 F.3d at 416, 419 (website that invited visitors to email defendant was "essentially passive"); Pebble Beach, 453 F.3d at 1154-55 (characterizing website with link allowing users to contact defendant as "passive"). If defendants' website was their only online presence, their online activities would be unlikely to form an adequate basis for jurisdiction in California.

Defendants also maintain a Facebook page for advertising purposes that has several interactive features. Visitors can use the page to post comments and questions on a message board and can sign up to be "fans" of the product. Defendants use the page to respond to questions posted by their "fans," send messages to their fans' Facebook accounts, and solicit applicants for "Brand Ambassador" positions. While defendants' Facebook page shares some features with the page in Nutrishare, it is both less interactive and less commercial and would therefore be inadequate, standing alone, to show express aiming. Considered as a part of the totality of circumstances relevant to a jurisdictional inquiry, however, the interactive and commercial nature of defendants' online activities support jurisdiction.

ii. Scope of Commercial Ambition

Courts have found express aiming where defendants used the Internet and other widely accessible methods of communication to seek commercial benefit in a forum's market. Compare Brayton Purcell, 606 F.3d at 1130 (express aiming at forum where nothing on law firm's website indicated that its practice area was did

not include the forum) and Mavrix, 647 F.3d at 1231 ("where . . . a website with national viewership and scope appeals to, and profits from, an audience in a particular state, the site's operators can be said to have 'expressly aimed' at that state") with Schwarzenegger, 374 F.3d at 807 (no express aiming where print advertisement was never circulated in California and defendant had no reason to believe that any Californians would see it).

Plaintiff alleges that defendants' goal is to sell its vodka throughout the United States, including in the forum state. Defendants' website indicates that Desirée vodka is "Coming soon" to all fifty states, and it has used its Facebook page to communicate with consumers throughout the country, including forum residents, and has engaged in an unsuccessful discussion with a forum-based distributor. These facts, again, would be insufficient on their own to confer jurisdiction. Love, 611 F.3d at 609; One True Vine, 2011 WL 2148933, at *6. However, they do provide evidence that defendants are "cultivat[ing]. . . nationwide audiences for commercial gain," Mavrix, 647 F.3d at 1230, and that California is a part of that desired audience. Cf. Love, 611 F.3d at 609 (no jurisdiction where the defendant's allegedly harmful acts were directed entirely at markets in Ireland and the United Kingdom); Schwarzenegger, 374 F.3d at 807 (no jurisdiction where defendant's "express aim was local").

Defendants have not made any California sales and, because they do not hold any California licenses, cannot directly make any California sales. The lack of sales in the forum, however, does not end the inquiry as jurisdiction can be

established in the absence of sales to forum residents. See Brayton Purcell, 606 F.3d at 1129-30 (jurisdiction existed even though defendant law firm had not accepted any forum residents as clients); CollegeSource, Inc., 2011 WL 3437040, at *2 (jurisdiction existed even though website had no paying customers who were forum citizens). What is significant are defendants' intentions. See Schwarzenegger, 374 F.3d at 807. Defendants' website indicates that they intend to enter California markets in the future and to interest prospective California consumers in their product. Unlike the defendants in Schwarzenegger, nothing defendants have said or done indicates that their "express aim" was directed at forums other than California. Id.

"Not all material placed on the Internet is, solely by virtue of its universal accessibility, expressly aimed at every state in which it is accessed," Mavrix, 647 F.3d at 1231, but in this case defendants' business plan is to target all fifty states, including California. Defendants placed their website online with "every reason to believe prospective [customers] in [the forum] would see the website--indeed, attracting new business was the point." Brayton Purcell, 606 F.3d at 1130. Plaintiff's allegations are enough to suggest that defendants online activities are intended to attract California consumers for commercial gain, a fact which supports a finding that jurisdiction exists.

iii. Individual Targeting

The third factor upon which courts have relied to show express aiming is individualized targeting of a forum resident. In the Ninth Circuit, "the 'expressly aimed' prong of the

purposeful direction test is met where a plaintiff alleges that the defendant individually targeted him by misusing his intellectual property on the defendant's website for the purpose of competing with the plaintiff in the forum." Love, 611 F.3d at 609 n.4. The plaintiff must show that the defendant's contacts with forum residents "enable or contribute to the promotion activities that [give] rise to the law suit." Id. at 609.

Plaintiff seems to believe it sufficient to claim that defendants knew that it was located in California and therefore individually targeted it in the forum when it made use of its trademarked material. However, the expressly aimed prong cannot be satisfied by reciting the same facts used to show that defendant caused harm it knew plaintiff was likely to suffer in the forum state. Pebble Beach, 647 F.3d at 1158; One True Vine, 2011 WL 2148933, at *4 ("[T]he infringement of a plaintiff's intellectual property rights with knowledge that plaintiff's operations are based in the forum and that the harm will be felt there, is insufficient to establish personal jurisdiction without a further showing that the defendant otherwise expressly aimed its activities at the forum.").

In CollegeSource, one website offering college referral services copied material from a competitor's website and posted it on its own site. Prior to posting the material, the defendant made phone calls and sent emails and letters to the plaintiff seeking to purchase the copied material. CollegeSource, 2011 WL 3437040, at *1-*2. The court found that these communications were a part of the defendant's efforts to obtain and make commercial use of the plaintiff's copyrighted material and showed

that in posting the infringing materials defendant had intentionally aimed at the plaintiff in the forum. Id. at *9.

Defendants, unlike those in CollegeSource, did not have any contacts with the forum state that enabled or contributed to their promotional activities. Plaintiff alleges that defendants intentionally misused plaintiff's trademarks in order to exploit its brand and undermine it in California markets. While such allegations might be sufficient to create a jurisdictional basis on an individual targeting theory, defendants contested this allegation by filing the affidavit of Jerry Knight, in which he claims that defendants' product line was developed without reference to plaintiff's and is not part of a scheme to exploit plaintiff's trademarks. (Knight Decl. II ¶¶ 7-12) Once a defendant has contradicted allegations in the complaint, the burden is on the plaintiff to present admissible evidence which would support the challenged allegations, Harris Rutsky, 328 F.3d at 1129, and plaintiff has not met that burden. Cf. Brayton Purcell, 606 F.3d at 1129 (defendant's "conclusory denial" inadequate to rebut plaintiff's allegation of intentional copyright violations). Defendants discussions with a California distributor did not bear fruit, and so cannot form the basis for jurisdiction. See Love, 611 F.3d at 609 (failed discussions with forum residents did not contribute to the promotion activities that gave rise to the law suit and so could not form a basis for jurisdiction).

When each factor is examined in isolation, defendants' individual actions are insufficient to show express aiming. When viewed in the aggregate, however, defendants' national marketing

strategy is revealed as, in part, an effort by defendants "to avail itself of the benefits of the [forum] market." Love, 611 F.3d at 609 (quoting Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1193 (9th Cir. 1988)). As a part of this strategy, defendants employ several websites that they use to interact with customers and potential customers in order to get people excited about their product, whether it is available on store shelves in their state or not. In these online activities, defendants use material to which a forum resident informed them it held trademark rights. Although they do not make sales online, defendants' online activities are commercial activities aimed in part at potential customers in the forum. Because plaintiff's allegations as a whole tend to show express aiming, and therefore are sufficient to meet the effects test, the court will address the remaining prongs of the Ninth Circuit specific jurisdiction test.

B. Arising Out Of

A court cannot establish personal jurisdiction over a defendant unless a plaintiff can show that its claims "arise[] out of the defendant's forum related activities." Panavision, 141 F.3d at 1322. This requirement is met if the court determines that a plaintiff would not have suffered injury "but for" the conduct directed by the defendant towards the plaintiff in the forum state. Id.

Plaintiff alleges that defendants' use of its trademarks was intended to damage the value of those trademarks and to build a national brand by exploiting the goodwill that plaintiff has created. Although defendants did not specifically

target their online advertisements at a particular state, they also did not pursue a regional or state-specific strategy. Instead they targeted all fifty states, including California. Plaintiff claims that defendants' online activities have caused customer confusion and damaged their brand's value. For the purposes of this motion, the court must take allegations that the defendant has not contradicted as true. Harris Rutsky, 328 F.3d at 1129.

According to plaintiff's allegations, but for the online advertising campaign defendants carried out, it would not have suffered the complained of injuries. Accordingly, plaintiff has met its burden to allege facts sufficient to show that its claims arise out of defendants' forum related activity, and has satisfied all three factors necessary to establish a prima facie case for specific jurisdiction.

C. Reasonableness

Once a plaintiff has established a prima facie case that specific jurisdiction is constitutional, the burden shifts to the defendant to demonstrate why jurisdiction would be unreasonable in light of traditional considerations of fair play and substantial justice. Dole Food, 303 F.3d at 1114 (citing Burger King, 471 U.S. at 477). To meet this burden, a defendant must present a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." Roth v. Garcia, 942 F.2d 617, 625 (quoting Shute v. Carnival Cruise Lines, 897 F.2d 377, 386 (9th Cir. 1990)) (emphasis in original). The Ninth Circuit considers seven factors in determining whether jurisdiction would be reasonable: "(1) the extent of the

defendant's purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (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 convenient and effective relief; and (7) the existence of an alternative forum." Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 128 (9th Cir. 1995). Defendants raise arguments related to only factors (2), (4), and (5).

Defendants are headquartered in Indiana so it is likely they will be burdened by having to litigate these claims in a California court. While it may be more difficult for defendants to litigate this case in California than it would be to litigate it in their home state, it will be only marginally more difficult. "With the advances in transportation and telecommunications and the increasing interstate practice of law, any burden [of litigating in a forum other than one's residence] is substantially less than in days past." CollegeSource, 2011 WL 3437040, at *12 (citing Menken, 503 F.3d at 1060); see also CE Distrib., LLC v. New Sensor Corp., 380 F.3d 1107, 1112 (9th Cir. 2004) (burden on New York resident of litigating in Arizona weighed only "slightly" in defendant's favor).

It is not clear that a California forum would be unreasonably inefficient. Documents and witnesses pertinent to establishing the facts in dispute may be located in Indiana, but one of the two full-time employees employed by defendants lives

in Illinois, (Knight Decl. II ¶ 12), and plaintiff has indicated that it believes it will need to call several California residents in order to put on its case, (Reidl Decl. ¶ 9). Defendants have not shown that considerations of efficiency dictate that the litigation be removed from California, especially since "this factor is 'no longer weighed heavily given the modern advances in communication and transportation.'" Harris Rutsky, 328 F.3d at 1133 (quoting Panavision Int'l, 141 F.3d at 1323).

Contrary to defendants' claims, California does have an interest in adjudicating this suit. Plaintiff alleges that it has been injured by defendants' tortious conduct, and California has an interest in protecting its citizens, of which plaintiff is one, from injury. Id. ("California maintains a strong interest in providing an effective means for redress for its residents [who are] tortiously injured" (quoting Sinatra, 854 F.2d at 1200)).

Defendants have not met the "heavy burden" they face "in proving a 'compelling case' of unreasonableness to defeat jurisdiction." Dole Food, 303 F.3d at 1117. This is especially true given that exercising jurisdiction in California would not conflict with the sovereignty of the defendant's state. Plaintiff's claims arise under federal law and analysis of those federal claims would be the same in California or in Illinois, therefore defendants would not be held subject to the laws of a foreign jurisdiction. Panavision, 141 F.3d at 1323.

The court additionally notes that the Ninth Circuit has taken a "flexible approach" to personal jurisdiction. Ochoa v.

J.B. Martin and Sons Farms, Inc., 287 F.3d 1182, 1189 n.2 (9th Cir. 2002) (citing Brand v. Menlove Dodge, 796 F.2d 1070, 1074 (9th Cir. 1986). Under this flexible approach, personal jurisdiction "can be established with a lesser showing of minimum contacts where considerations of reasonableness dictate." Id. (citing Haisten v. Grass Velley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986)). "Questions of personal jurisdiction admit of no simple solutions and . . . ultimately due process issues of reasonableness and fairness must be decided on a case-by-case basis." Davis Moreno Constr., Inc. v. Frontier Steel Bldgs. Corp., No. CV-08-854, 2009 WL 1476990, at *11 (May 26, 2009, E.D. Cal. 2009) (quoting Forsythe v. Overmyer, 576 F.2d 779, 783 (9th Cir. 1978)). "Under this analysis, there will be cases in which the defendant has not purposely directed its activities at the forum state, but has created sufficient contacts to allow the state to exercise personal jurisdiction if such exercise is sufficiently reasonable." Golden Gate Beverage Co., Inc. v. DMH Ingredients, Inc., No. 07-2247, 2008 WL 1721903, at *3 (E.D. Cal. 2008) (quoting Brand, 796 F.2d at 1074).

Where a defendant has created a website aimed at a national audience with the express purpose of attracting a national consumer base, it is not "random" or "fortuitous" for residents in any one state to come into contact with the defendants' website. Mavrix, 647 F.3d at 1231 (distinguishing a website that deliberately creates and profits from its national viewership and scope, over whom jurisdiction would be appropriate, from a local or private internet post not intended and not expected to be viewed throughout the country).

Defendants may not have targeted California markets in their advertising, but they also did not target their advertising at specific states or make an effort to exclude California from their advertising. Instead, they used technologies giving them the ability to reach a national audience in an attempt to create national demand for their product. It does not seem unreasonable to hold them nationally accountable. See Burger King, 471 U.S. at 473-74 ("[W]here individuals 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequence that arise predictably from such activities; the Due Process Clause may not readily be wielded as a territorial shield . . . ." (quoting Kulko v. California Superior Court, 436 U.S. 84, 96 (1978))).

Defendants have asked that this proceeding be transferred to the Southern District of Indiana. Under 28 U.S.C. § 1391(b) and (c), in case predicated on federal claims, a corporate defendant may be subject to jurisdiction in any venue in which it is subject to personal jurisdiction. 28 U.S.C. § 1391(b)-(c). As the court has determined that it has personal jurisdiction over defendants, venue in this court is proper.

"For the convenience of parties or witness, in the interest of justice, a district court may transfer any civil action to any other district . . . ." 28 U.S.C.A. § 1404(a). There is a strong presumption in favor of a plaintiff's choice of venue, and that choice will only be disturbed if a defendant can make a "strong showing" that another venue is more convenient. Gherebi v. Bush, 352 F.3d 1278, 1302 (9th Cir. 2003) (overruled

on other grounds). In this case, shifting venue to Southern Indiana would merely transfer the inconvenience of litigating in another state from plaintiffs to defendants, and neither party has shown that they would suffer disproportionate inconvenience. As 28 U.S.C. 1304(a) "provides for transfer to a more convenient forum, 'not a more likely to prove equally convenient or inconvenient,'" the court will not order transfer merely to shift litigation inconveniences from one party to the other. Id. (quoting Van Dusen v. Barrack, 376 U.S. 612, 646 (1964).

IT IS THEREFORE ORDERED that defendants' motion to dismiss for lack of personal jurisdiction or to transfer for improper venue be, and the same hereby is, DENIED.

DATED: October 5, 2011

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE