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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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INVENTORS ROW INC.,

Plaintiff,

v.

PAULA BLANKENSHIP dba NODPOD;
and DOES 1-5,

Defendant.

Civ. No. 17-2387 WBS EFB

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS, OR, IN THE
ALTERNATIVE, TO TRANSFER
VENUE

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Plaintiff Inventors Row Inc., brought this action against defendants Paula Blankenship doing business as Nodpod ("defendant" or "Blankenship") and Does 1-5 arising out of defendant's alleged trademark infringement. The matter is now before the court on defendant Blankenship's Motion to Dismiss the Complaint or, in the Alternative, to Transfer Venue. (Docket No. 8.)

I. Factual and Procedural Background

Plaintiff is the owner of a California corporation with

1 its principal place of business in Rocklin, California that
2 develops, markets, distributes, and sells pillows, including
3 travel pillow attachments. (Compl. ¶ 2 (Docket No. 1).)

4 Defendant is the owner of a privately-owned business with its
5 principal place of business in Shepherdsville, Kentucky that also
6 develops, markets, distributes, and sells travel pillows. (Id. ¶
7 1.) Plaintiff alleges that defendant transacts substantial
8 business nationwide via internet sales. (Id. ¶ 3.)

9 Beginning in October of 2014, plaintiff began
10 advertising, marketing, and distributing the NODPOD pillow. (Id.
11 ¶ 9.) On March 12, 2015, plaintiff submitted an application for
12 a design mark in the United States Patent and Trademark Office
13 ("USPTO") on the Principal Register, registration number 5173967,
14 containing the words "NODPOD EYE PILLOW." (Id. ¶¶ 12, 13.) On
15 January 17, 2016, the design mark was published. (Id. ¶ 13.)

16 Beginning in 2016, defendant began advertising,
17 marketing, and distributing a NODPOD pillow. (Id. ¶ 10.) On
18 March 18, 2016, defendant filed a trademark application for
19 "NODPOD." (Id. ¶ 14.) On June 29, 2016, defendant received a
20 suspension notice from the USPTO informing them of the conflict
21 with plaintiff's application. (Id.) On July 26, 2016, defendant
22 launched a Kickstarter Campaign for the NODPOD travel pillow and
23 by September of 2016 defendant raised \$307,274 from 7,280 backers
24 through Kickstarter, and \$328,081 through an Indiegogo campaign.
25 (Id. ¶¶ 15, 16.) Defendant's version of the NODPOD pillow was
26 published or featured in at least 30 media sources including,
27 among others, Cosmopolitan, Elle, The Telegraph, The Huffington
28 Post, and the Today Show. (Id. ¶ 18.) On April 4, 2017, a

1 registration certificate was issued to plaintiff by the USPTO.
2 (Id. ¶ 13.)

3 As a result of defendant's media campaign, plaintiff
4 alleges that it has been harmed because consumers and marketers
5 confuse defendant's product and brand with plaintiff's product
6 and brand. (See id. ¶ 20.) In addition, plaintiff alleges that
7 defendant has committed and continues to commit acts of trademark
8 infringement against plaintiff. (Id. ¶ 21.) On November 13,
9 2017, plaintiff filed a Complaint against defendant for: (1)
10 trademark infringement under section 32(1) of the Lanham Act; (2)
11 false representations in commerce and false designation of origin
12 under section 43(a) of the Lanham Act; (3) federal unfair
13 competition under section 43(a) of the Lanham Act; and (4)
14 trademark infringement under California common law. (Compl.)
15 Plaintiff seeks damages, an accounting, the imposition of a
16 constructive trust upon defendant's illegal profits, and
17 injunctive relief. (Id.)

18 III. Discussion

19 A. Rule 12(b)(2) Motion

20 A plaintiff has the burden of establishing that the
21 court has personal jurisdiction over a defendant. Doe v. Unocal
22 Corp., 248 F.3d 915, 922 (9th Cir. 2001). Where the court does
23 not hold an evidentiary hearing and the motion is based on
24 written materials, the plaintiff need only establish a prima
25 facie showing of personal jurisdiction. Schwarzenegger v. Fred
26 Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004); see also
27 Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285
28 (9th Cir. 1977) ("[I]f a plaintiff's proof is limited to written

1 materials, it is necessary only for these materials to
2 demonstrate facts [that] support a finding of jurisdiction in
3 order to avoid a motion to dismiss.”). “A ‘prima facie’ showing
4 means that the plaintiff need only demonstrate facts that, if
5 true, would support jurisdiction over the defendant.” Am.
6 Orthodontics Corp. v. MidAtl. Orthodontics, Inc., Civ. No. 3:17-
7 1129 BEN AGS, 2017 WL 4151241, at *2 (S.D. Cal. Sept. 18, 2017).
8 To meet its burden, “the plaintiff cannot simply rest on the bare
9 allegations of its complaint, . . . uncontroverted allegations in
10 the complaint must be taken as true,” and “[c]onflicts between
11 parties over statements contained in affidavits must be resolved
12 in the plaintiff’s favor.” Schwarzenegger, 374 F.3d at 800.

13 If there is no applicable federal statute governing
14 personal jurisdiction, the court applies the law of the state in
15 which it sits. Love v. Associated Newspapers, Ltd., 611 F.3d
16 601, 608-09 (9th Cir. 2010). “California’s long-arm jurisdiction
17 statute is coextensive with federal due process requirements.”
18 Id.; see also Cal. Code Civ. Proc. § 410.10. Due process
19 requires that for a nonresident defendant to be subject to the
20 court’s jurisdiction, the defendant must “have certain minimum
21 contacts with [the forum state] such that the maintenance of the
22 suit does not offend traditional notions of fair play and
23 substantial justice.” Int’l Shoe Co. v. Washington, 326 U.S.
24 310, 316 (1945) (citation omitted). The strength of contacts
25 required depends on which of the two categories of personal
26 jurisdiction a litigant invokes: specific jurisdiction or general
27 jurisdiction. Ranza v. Nike, Inc., 793 F.3d 1059, 1068 (9th Cir.
28 2015) (citing Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014)).

1 The parties do not dispute that defendant is not
2 subject to general jurisdiction in California. The sole dispute
3 is whether defendant is subject to specific jurisdiction in
4 California.

5 Specific jurisdiction exists when a case "aris[es] out
6 of or relate[s] to the defendant's contacts with the forum."
7 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408,
8 414 n.8 (1984). The Ninth Circuit uses a three-prong test to
9 determine whether specific jurisdiction exists:

10 (1) The non-resident defendant must purposefully
11 direct his activities or consummate some
12 transaction with the forum or resident thereof;
13 or perform some act by which he purposefully
14 avails himself of the privilege of conducting
15 activities in the forum, thereby invoking the
16 benefits and protections of its laws;

17 (2) the claim must be one which arises out of or
18 relates to the defendant's forum-related
19 activities; and

20 (3) the exercise of jurisdiction must comport
21 with fair play and substantial justice, i.e. it
22 must be reasonable.

23 Schwarzenegger, 374 F.3d at 802 (quoting Lake v. Lake, 817 F.2d
24 1416, 1421 (9th Cir. 1987)) (internal quotation marks omitted).

25 "The plaintiff bears the burden of satisfying the first
26 two prongs of the test. If the plaintiff fails to satisfy either
27 of these prongs, personal jurisdiction is not established in the
28 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)).

1. Purposeful Availment or Direction

1 Under the first prong, plaintiff must establish that
2 defendant "either purposefully availed itself of the privilege of
3 conducting activities in California, or purposefully directed its
4 activities toward California." Schwarzenegger, 374 F.3d at 802.
5 While courts use the term "purposeful availment," to include both
6 purposeful availment and purposeful direction, availment and
7 direction are, in fact, two distinct concepts. Id.
8 "Purposeful availment typically consists of action taking place
9 in the forum that invokes the benefits and protections of the
10 laws of the forum." Advice Co. v. Novak, Civ. No. 08-1951 JCS,
11 2009 WL 210503, at *9 (N.D. Cal. Jan. 23, 2009) (citing
12 Schwarzenegger, 374 F.3d at 802). "Purposeful direction usually
13 consists of actions outside the forum state that are directed at
14 the forum." Id. "A purposeful availment analysis is most often
15 used in suits sounding in contract . . . [while] [a] purposeful
16 direction analysis . . . is most often used in suits sounding in
17 tort." Schwarzenegger, 374 F.3d at 802 (internal citations
18 omitted).

19 "For trademark infringement actions, the Ninth Circuit
20 requires a showing of purposeful direction." AirWair Int'l Ltd.
21 v. Schultz, 73 F. Supp. 3d 1225, 1232-33 (N.D. Cal. 2014) (citing
22 Nissan Motor Co. v. Nissan Comput. Corp., 246 F.3d 675 (9th Cir.
23 2000)). Purposeful direction is evaluated under the "effects
24 test" derived from Calder v. Jones, 465 U.S. 783 (1984). Under
25 the "effects test" the defendant must have: "(1) committed an
26 intentional act, (2) expressly aimed at the forum state, (3)
27 causing harm that the defendant knows is likely to be suffered in
28 the forum state." Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874

1 F.3d 1064, 1069 (9th Cir. 2017).

2 a. Intentional Act

3 In the context of the Calder “effects test,” an
4 intentional act refers to “an intent to perform an actual,
5 physical act in the real world.” Schwarzenegger, 374 F.3d at
6 806. “The threshold of what constitutes an intentional act is
7 relatively low.” AirWair, 73 F. Supp. 3d at 1233. Here,
8 defendant’s alleged sales of an infringing good constitute
9 intentional acts under the Calder effects test. See Cal. Brewing
10 Co. v. 3 Daughters Brewing LLC, Civ. No. 2:15-2278 KJM CMK, 2016
11 WL 1573399, at *3 (E.D. Cal. Apr. 19, 2016) (marketing and
12 selling products that allegedly infringed plaintiff’s trademark
13 constituted intentional acts); see also Wash. Shoe Co. v. A-Z
14 Sporting Goods Inc., 704 F.3d 668, 674 (9th Cir. 2012), abrogated
15 on other grounds by Axiom Foods, Inc. v. Acerchem Int’l, Inc.,
16 874 F.3d 1064 (9th Cir. 2017) (purchasing and selling boots that
17 allegedly infringed on plaintiff’s copyright constituted an
18 intentional act within the meaning of the Calder effects test).
19 Accordingly, the court finds that the first prong of the Calder
20 “effects test” is met.

21 b. Expressly Aimed

22 The second prong of the Calder effects test, asks
23 whether defendant “expressly aimed its intentional act at the
24 forum.” Axiom Foods, 874 F.3d at 1069. To determine whether the
25 defendant expressly aims at the forum state, “[t]he proper
26 question is not where the plaintiff experienced a particular
27 injury or effect but whether the defendant’s conduct connects him
28 to the forum in a meaningful way.” Walden v. Fiore, 134 S. Ct.

1 1115, 1125 (2014). Thus, "mere injury to a forum resident is not
2 a sufficient connection to the forum," nor is defendant's
3 knowledge of plaintiff's strong forum connections, combined with
4 the foreseeable harm the plaintiff suffered in the forum. See
5 id.

6 In Washington Shoe, the Ninth Circuit held that a
7 theory of "individualized targeting" satisfied the express aiming
8 requirement. See Wash. Shoe, 704 F.3d at 675. "A theory of
9 individualized targeting alleges that a defendant 'engaged in
10 wrongful conduct targeted at a plaintiff whom the defendant knows
11 to be a resident of the forum state.'" Axiom Foods, 874 F.3d at
12 1069 (quoting Wash. Shoe, 704 F.3d at 675). However, the Supreme
13 Court in Walden made clear that the court must look to the
14 "defendant's 'own contacts' with the forum, not to the
15 defendant's knowledge of a plaintiff's connections to a forum."
16 Id. at 1070 (citing Walden, 134 S. Ct. at 1124-25). In light of
17 Walden, the Ninth Circuit recently held that "[w]hile a theory of
18 individualized targeting may remain relevant to the minimum
19 contacts inquiry, it will not, on its own, support the exercise
20 of specific jurisdiction, absent compliance with what Walden
21 requires." Axiom Foods, 874 F.3d at 1070-71.

22 "The Ninth Circuit utilizes the 'sliding scale'
23 approach . . . to determine whether the operation of a website
24 supports the exercise of personal jurisdiction."¹ Dale Tiffany,

25 ¹ "Axiom Foods did not explicitly answer how Walden
26 applies to cases where all of the alleged activity occurs online
27 . . . However, the Axiom Foods decision does suggest that minimal
28 online activity, when unaccompanied by any connections to the
forum state in the physical world, are not enough to confer
personal jurisdiction." Republic of Kazakhstan v. Ketebaev, Civ.

1 Inc. v. Meyda Stained Glass, LLC, Civ. No. 2:17-00536 CAS AGRX,
2 2017 WL 4417585, at *6 (C.D. Cal. Oct. 2, 2017) (citing
3 Cybersell, Inc., v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir.
4 1997)). Under this approach, the court considers the “level of
5 interactivity and commercial nature of the exchange of
6 information that occurs on the Web site.” Cybersell, 130 F.3d at
7 418 (9th Cir. 1997).

8 “A passive website ‘that does little more than make
9 information available to those who are interested in it is not
10 grounds for the exercise personal jurisdiction.’” Dale Tiffany,
11 2017 WL 4417585, at *6 (citation omitted). However, “operating a
12 passive website in conjunction with ‘something more’—conduct
13 directly targeting the forum—is sufficient.” Sec. Alarm Fin.
14 Enters., L.P. v. Nebel, 200 F. Supp. 3d 976, 985 (N.D. Cal. 2016)
15 (quoting Rio Props., Inc. v. Rio Int’l Interlink, 284 F.3d 1007,
16 1020 (9th Cir. 2002)). In determining whether a nonresident
17 defendant has done “something more,” the Ninth Circuit has
18 considered several factors, “including the interactivity of the
19 defendant’s website, the geographic scope of the defendant’s
20 commercial ambitions, and whether the defendant ‘individually
21 targeted’ a plaintiff known to be a forum resident.” Mavrix
22 Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1229 (9th Cir.
23 2011) (internal citations omitted). Furthermore, “[d]istrict
24 courts in this circuit have generally found that online product
25 sales to residents of the forum are sufficient to satisfy this
26 ‘something more’ requirement in trademark infringement cases.”

27
28 No. 17-246-LHK, 2017 WL 6539897, at *6 (N.D. Cal. Dec. 21, 2017).

1 Nat. Wellness Centers of Am., Inc. v. Golden Health Prod., Inc.,
2 Civ. No. 12-05586 CW, 2013 WL 245594, at *4 (N.D. Cal. Jan. 22,
3 2013).

4 “[A]n interactive website through which ‘the defendant
5 enters into contracts with residents of a foreign jurisdiction
6 that involve the knowing and repeated transmission of computer
7 files’ justifies a court’s exercise of personal jurisdiction.”
8 Dale Tiffany, 2017 WL 4417585, at *6 (citation omitted). If the
9 website falls somewhere in between passive and interactive, “the
10 likelihood that personal jurisdiction can be constitutionally
11 exercised is directly proportionate to the nature and quality of
12 commercial activity that an entity conducts over the Internet.”
13 See id. (quoting Cybersell, 130 F.3d at 419).

14 In this case, plaintiff alleges that defendant was
15 aware of plaintiff’s residence in the forum state and could
16 foresee that plaintiff would be harmed in California because
17 defendant received a suspension notice from the USPTO informing
18 defendant of the conflict with plaintiff’s trademark application.
19 (Compl. ¶ 14.) Additionally, plaintiff’s trademark registration
20 identifies plaintiff as a California corporation. Furthermore,
21 defendant admits that she spoke to plaintiff prior to
22 infringement, and also attempted to negotiate with plaintiff to
23 either coexist or to purchase the name “NODPOD EYE PILLOW.”
24 (Pl.’s Opp’n (Docket No. 13) at 2; Blankenship Decl. ¶¶ 11-12
25 (Docket No. 8-2).) Thus, these contacts are sufficient to
26 establish individualized targeting. See Ford Motor Co. v. Great
27 Domains, Inc., 141 F. Supp. 2d 763, 777 (E.D. Mich. 2001) (citing
28 Panavision, 141 F.3d at 1321) (“Relevant considerations in

1 assessing the level of individual targeting include [] whether
2 the trademark owner has been directly solicited to purchase the
3 domain name.”) Therefore, the court considers, but does not rely
4 solely on, plaintiff’s allegations that defendant intentionally
5 infringed on plaintiff’s trademark and knew that plaintiff was
6 located in California in conducting the “minimum contacts”
7 analysis.² (Compl. ¶ 19; Pl.’s Opp’n at 2-4.)

8 Defendant also created contacts with California by
9 selling goods to California residents through Kickstarter,
10 Indiegogo, and its website. (Compl. ¶ 15, 16; Pl.’s Opp’n at 2.)
11 Of the 7,280 backers of defendant’s travel pillow on Kickstarter,
12 128 came from Los Angeles, and 99 came from San Francisco.
13 (Pl.’s Opp’n, Ex. B (Docket No. 13-2).) These contacts are more
14 than “[r]andom, fortuitous, or attenuated contacts.” See Burger
15 King Corp, 471 U.S. at 475. The Kickstarter campaign is more
16 than a passive website, as the website is not purely
17 informational. See Dale Tiffany, 2017 WL 4417585, at *6.
18 Furthermore, the “nature and quality of commercial activity,”
19 including defendant’s online sales to more than 200 California
20 residents, provides the “something more” necessary to establish
21 conduct that directly targets the forum.

22 Furthermore, other courts have considered crowdfunding

23 ² Plaintiff also argues that defendant engaged in an
24 aggressive media marketing campaign as defendant’s product was
25 featured in articles by bloggers, in newspapers, in magazines,
26 and on television. While this media marketing campaign may have
27 reached California residents, the Ninth Circuit has made clear
28 that a defendant cannot be haled into court based upon the
unilateral activities of third parties. Brainerd v. Governors of
the Univ. of Alberta, 873 F.2d 1257, 1259 (9th Cir. 1989) (citing
Burger King, 471 U.S. at 475).

1 websites like Kickstarter and Indiegogo in holding that the court
2 may exercise specific personal jurisdiction over a party. See
3 Imation Corp. v. Sanho Corp., Civ. No. 15-1883 (JRT/JSM), 2016 WL
4 4179363, at *1 (D. Minn. Aug. 5, 2016) (finding specific personal
5 jurisdiction over a Delaware corporation with its principal place
6 of business located in California where at least one of the
7 company's Kickstarter backers was a Minnesota resident and
8 plaintiff presented evidence that many, if not all, of
9 defendant's backers were sent the infringing product); Robinson
10 v. Bartlow, Civ. No. 3:12-24, 2012 WL 4718656, at *4 (W.D. Va.
11 Oct. 3, 2012) (finding specific personal jurisdiction over
12 Washington company where company shipped products to Virginia
13 residents through the Kickstarter fundraising websites). Compare
14 Nutramarks, Inc. v. Life Basics, LLC, Civ. No. 2:15-571-DN, 2017
15 WL 2178422, at *5 (D. Utah May 17, 2017) (finding no specific
16 personal jurisdiction over Illinois company that launched its
17 crowdfunding campaign using Indiegogo where none of the
18 crowdfunding donors were from Utah and there were no other facts
19 to show that the company targeted or solicited any donations or
20 business in the State of Utah).

21 In response, defendant alleges that none of the
22 products made and shipped in relation to the Kickstarter
23 campaign, or at any other time, bore the mark Nodpod; however,
24 plaintiff contends that contrary to defendant's claims, no
25 significant rebranding took place. (Blankenship Decl. ¶ 18;
26 Pl.'s Opp'n at 3.)³ "Because the prima facie jurisdictional

27 ³ To support its contention that no significant
28 rebranding took place, plaintiff attaches a screen capture of

1 analysis requires us to accept the plaintiff's allegations as
2 true, we must adopt [plaintiff's] version of events for purposes
3 of this [motion]." Bancroft & Masters, Inc. v. Augusta Nat'l
4 Inc., 223 F.3d 1082, 1087 (9th Cir. 2000); see also Pebble Beach
5 Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006) ("[F]or the
6 purpose of [plaintiff's demonstration that the court has
7 jurisdiction over the defendant], the court resolves all disputed
8 facts in favor of the plaintiff.") Thus, accepting plaintiff's
9 allegations as true, defendant committed acts of trademark
10 infringement against plaintiff when it sold its products on
11 Kickstarter.

12 Accordingly, the court finds that plaintiff has met the
13 express aiming prong of the Calder "effects test."

14 c. Causing Harm

15 Under the third prong of the Calder test, defendant
16 must have caused harm that the defendant knows is likely to be
17 suffered in the forum state. Here, defendant knew that plaintiff
18 resided in California, and defendant spoke to Ms. Bamberg and
19 attempted to negotiate with her to either coexist or purchase the
20 name "NODPOD EYE PILLOW." (Blankenship Decl. ¶¶ 11-12; Cameron
21 Decl. ¶ 3 (Docket No. 8-3).) Defendant also admits to receiving
22 the suspension letter for the Nodpod trademark application in
23 July of 2016 (Blankenship Decl. ¶ 6). In addition, plaintiff's
24 trademark registration identifies Melissa Bamberg as a Rocklin,

25 defendant's Kickstarter campaign that plaintiff says was taken in
26 April of 2017 (Pl.'s Opp'n at 2, Ex. B.) In some of the images,
27 the product contains the word "Nodpod," and in other images the
28 product does not. (Id.) Plaintiff also attached a screen shot
from a television show that appears to show use of the mark
"Nodpod." (Pl.'s Opp'n, Ex. F.)

1 California resident. (Def.'s Mem., Ex. C.) Thus, it was
2 foreseeable that defendant's conduct would cause harm in
3 California. (See California Brewing, 2016 WL 1573399, at *5
4 (finding the foreseeable harm prong of the Calder test met where:
5 (1) defendant knew plaintiff resided in California, (2) plaintiff
6 contacted defendant to stop using the mark (3) defendant
7 investigated plaintiff's use and registration, (4) the USPTO
8 rejected defendant's application to register a mark in light of
9 plaintiff's mark, and (5) plaintiff's registration identifies it
10 as a resident of the district). Accordingly, plaintiff has
11 established the third prong of the Calder test.

12 Because plaintiff has established all three prongs of
13 the Calder test, plaintiff has established purposeful direction.

14 2. Arise Out of

15 Under the second prong of the Ninth Circuit's specific
16 jurisdiction test, a court cannot establish personal jurisdiction
17 over a defendant unless a plaintiff can show that its claims
18 "arise[] out of the defendant's forum related activities."
19 Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir.
20 1998). The Ninth Circuit "use[s] a 'but for' test to conduct
21 this analysis," under which the court must determine whether,
22 "but for [defendant's] contacts with California, would
23 [plaintiff's] claims against [defendant] have arisen?" Mattel,
24 Inc. v. Greiner & Hausser GmbH, 354 F.3d 857, 864 (9th Cir.
25 2003); accord Bancroft, 223 F.3d at 1088. "The Ninth Circuit has
26 recognized that, in trademark or copyright infringement actions,
27 if the defendant's infringing conduct harms the plaintiff in the
28 forum, this element is satisfied." Adobe Sys. Inc. v. Blue

1 Source Grp., Inc., 125 F. Supp. 3d 945, 963 (N.D. Cal. 2015)
2 (citing Panavision, 141 F.3d at 1322).

3 Here, as discussed previously, plaintiff has
4 established that defendant's conduct harms plaintiff in the
5 forum. In addition, plaintiff alleges that it suffered harm
6 because consumers and marketers are unable to identify the
7 difference between the products, and plaintiff has been denied
8 covered in media sources that have already covered defendant's
9 product. (Compl. ¶¶ 20, 22.) This is sufficient to show that
10 plaintiff's claims arose out of defendant's activity, and that
11 "but for" defendant's contacts with California, plaintiff's
12 claims would not have arisen. See Panavision, 141 F.3d at 1322
13 (finding requirement satisfied where defendant's registration of
14 plaintiff's trademarks as his own domain name on the Internet had
15 the effect of injuring plaintiff in California); Adobe, 125 F.
16 Supp. 3d at 963 (finding requirement satisfied where plaintiff
17 alleged infringement by defendant in the district by, depriving
18 plaintiff of revenue, diminishing plaintiff's goodwill, and
19 diluting plaintiff's trademark).

20 Accordingly, plaintiff has met the second prong for
21 personal jurisdiction.

22 3. Reasonableness

23 Because plaintiff has established a prima facie showing
24 of specific jurisdiction, the burden is now on defendant to
25 demonstrate why jurisdiction would be unreasonable in light of
26 traditional considerations of fair play and substantial justice.
27 See Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1114 (9th Cir.
28 2002) (citing Burger King, 471 U.S. at 477). To meet this

1 burden, a defendant must present a "compelling case that the
2 presence of some other considerations would render jurisdiction
3 unreasonable." Roth v. Garcia, 942 F.2d 617, 625 (9th Cir.
4 1991). The Ninth Circuit considers seven factors in determining
5 whether jurisdiction would be reasonable:

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

19 Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 128 (9th
20 Cir. 1995).

21 Here, defendant argues that personal jurisdiction is
22 unreasonable because defendant has not injected herself in
23 California's affairs, it would be burdensome and expensive for
24 defendant to defend herself in California, and there is a concern
25 that hearing the case in California may conflict with Kentucky's
26 sovereignty. (Def.'s Mem. at 10.) First, as previously
27 discussed, defendant has significantly injected herself into the
28 California economy so as to make jurisdiction in California
reasonable. As to the second factor, the court does not believe
that defending this suit in California would place an undue
burden on defendant given modern advances in communication and
transportation. See Panavision, 141 F.3d at 1323. As to the
third factor, "concerns for sovereignty are low when the
defendant is a citizen of a sister state, not a foreign country."

1 Huang v. Marriott Int'l, Inc., Civ. No. 2:11-01574 WBS, 2012 WL
2 170166, at *5 (E.D. Cal. Jan. 19, 2012) (citing Harris Rutsky &
3 Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1133 (9th
4 Cir. 2003). Thus, the court finds that this factor does not
5 weigh in favor of defendant.

6 As to the fourth factor, plaintiff is located in
7 California, and thus "California maintains a strong interest in
8 providing an effective means of redress for its residents
9 tortiously injured." See Panavision, 141 F.3d at 1323 (quoting
10 Gordy v. Daily News, L.P., 95 F.3d 829, 836 (9th Cir. 1996)).
11 Under the sixth factor, plaintiff is a resident of California,
12 and thus California is clearly the most convenient forum for
13 plaintiff.

14 Lastly, addressing the fifth and seventh factor,
15 defendant argues that this case should be brought in Kentucky
16 where the witnesses and products are located, where defendant is
17 located, and where the courts have smaller dockets. (Def.'s Mem.
18 at 11.) No doubt it would be more convenient for each party to
19 have the case tried in its own home jurisdiction, and it is
20 likely that witnesses and evidence are located in both California
21 and Kentucky. However, given "modern advances in communication
22 and transportation, this factor is probably neutral." See
23 Panavision, 141 F.3d at 1324 (9th Cir. 1998). As to the seventh
24 factor, plaintiff does not argue that Kentucky lacks an
25 alternative forum, but only that each state has an equal interest
26 in the case. Thus, because plaintiff has the burden of proving
27 the unavailability of an alternative forum (See Core-Vent Corp.
28 v. Nobel Indus. AB, 11 F.3d 1482, 1490 (9th Cir. 1993)), this

1 factor weighs in favor of defendant. Nevertheless, because
2 defendant has not met its burden of presenting a "compelling
3 case" of unreasonableness, the court will deny defendant's motion
4 to dismiss for lack of personal jurisdiction.

5 B. Standing

6 Defendant also moves to dismiss on the ground that
7 plaintiff lacks standing. To have standing, "[t]he plaintiff
8 must have (1) suffered an injury in fact, (2) that is fairly
9 traceable to the challenged conduct of the defendant, and (3)
10 that is likely to be redressed by a favorable judicial decision."

11 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, as revised (May
12 24, 2016). A plaintiff has standing if he or she has alleged a
13 "personal stake" in the litigation "to justify exercise of the
14 court's remedial powers on his behalf. Nev. Emps.' Ass'n, Inc.
15 v. Bryan, 916 F.2d 1384, 1391 (9th Cir. 1990) (quoting Arlington
16 Heights v. Metro. Hous. Corp., 429 U.S. 252, 261 (1977)).

17 "Section 32(1) of the Lanham Act specifically provides that a
18 'registrant' may bring a civil action for trademark
19 infringement." Lasco Fittings, Inc. v. Lesso Am., Inc., Civ. No.
20 13-2015 VAP DTBX, 2014 WL 12601016, at *3 (C.D. Cal. Feb. 21,
21 2014); 15 U.S.C. § 1114(1).

22 Here, the trademark registrant is Melissa Bamberg
23 Corporation, not Inventors Row. (Def.'s Mem., Ex. C (Docket No.
24 8-6).) Melissa Bamberg ("Bamberg") represents that she is the
25 sole owner of Inventors Row, and that Inventors Row is the sole
26 owner and assignee of all intellectual property, including the
27 Nodpod trademark. (Bamberg Decl. ¶¶ 1-2 (Docket No. 13-7).)
28 Bamberg explains that when she applied for the trademark, she

1 mistakenly listed "Melissa Bamberg Corporation"⁴ on the requisite
2 paperwork instead of Inventors Row. (Id. ¶ 3.) Bamberg
3 represents that now that she has an attorney, the appropriate
4 paperwork is in the process of being filed with the USPTO to
5 correct the error. (Id.)

6 At oral argument, counsel for plaintiff represented,
7 without offering any evidence, that Inventors Row does in fact
8 own the trademark. However, because it is not clear on the
9 record presently before the court that Inventors Row is the
10 owner, the court cannot find that Inventors Row has a personal
11 stake in the outcome of this litigation. In order to afford
12 plaintiff the opportunity to clear up what appears to have been a
13 clerical mistake, the court will deny defendant's motion to
14 dismiss for lack of standing upon the condition that within 30
15 days from the date this Order is signed plaintiff provide the
16 court with evidence that it owns the trademark at issue.

17
18 C. Motion to Dismiss for Improper Venue, or, in the
Alternative to Transfer Venue

19 Rule 12(b)(3) authorizes a court to dismiss an action
20 for improper venue. Fed. R. Civ. P. 12(b)(3); see also 28 U.S.C.
21 § 1406(a) ("The district court of a district in which is filed a
22 case laying venue in the wrong division or district shall
23 dismiss, or if it be in the interest of justice, transfer such
24 case to any district or division in which it could have been
25 brought."). Plaintiff has the burden of proving that venue is
26 proper in the district in which the suit was initiated. Munns v.

27 _____
28 ⁴ Apparently, there is no "Melissa Bamberg Corporation."

1 Clinton, 822 F. Supp. 2d 1048, 1079 (E.D. Cal. 2011) (England,
2 J.) (citing Piedmont Label Co. v. Sun Garden Packing Co., 598
3 F.2d 491, 496 (9th Cir. 1979)). “In considering a motion to
4 dismiss for improper venue, a court is not required to accept the
5 pleadings as true and may consider facts outside the pleadings.”
6 Presidio Home Care, LLC v. B-E., LLC, Civ. No. 14-1864 RSWL JEMX,
7 2014 WL 2711299, at *2 (C.D. Cal. June 13, 2014). However, “the
8 trial court must draw all reasonable inferences in favor of the
9 nonmoving party and resolve all factual conflicts in favor of the
10 non-moving party.” Id. (quoting Murphy v. Schneider Nat’l, Inc.,
11 362 F.3d 1133, 1138 (9th Cir. 2003)).

12 Venue as to a trademark claim is evaluated under the
13 general venue statute, 28 U.S.C. § 1391(b). Kaia Foods, 70 F.
14 Supp. 3d at 1184. Under 28 U.S.C. § 1391(b)(2), venue is proper
15 in “a judicial district in which a substantial part of the events
16 or omissions giving rise to the claim occurred.” 28 U.S.C. §
17 1391(b)(2). This provision “does not require that a majority of
18 the events have occurred in the district where suit is filed, nor
19 does it require that the events in that district predominate.”
20 Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1136 (N.D.
21 Cal. 2000).

22 In a trademark infringement action, “a substantial part
23 of the events occur . . . where confusion of purchasers is
24 likely to occur,” Kaia Foods, Inc. v. Bellafiore, 70 F. Supp. 3d
25 1178, 1184 (N.D. Cal. 2014), “whether that occurs solely in one
26 district or in many.” Allstar Mktg. Grp., LLC v. Your Store
27 Online, LLC, 666 F. Supp. 2d 1109, 1128 (C.D. Cal. 2009)
28 (citations omitted). “Confusion of customers occurs where the

1 passing off occurs, that is, 'where the deceived customer buys
2 the defendant's product in the belief that he is buying the
3 plaintiffs.'" Kaia Foods, 70 F. Supp. 3d at 1184 (quoting Sykes
4 Lab., Inc. v. Kalvin, 610 F. Supp. 849, 860 n. 8 (C.D. Cal.
5 1985)). "Venue may be proper even where the defendant sells only
6 a small amount of merchandise into the forum." Adidas Am., Inc.
7 v. Cougar Sport, Inc., 169 F. Supp. 3d 1079, 1095 (D. Or. 2016).

8 Here, plaintiff alleges that a substantial part of the
9 events giving rise to their tort claims occurred in the Eastern
10 District of California. Plaintiff alleges that defendant
11 transacts substantial business nationwide via internet sales.
12 (Compl. ¶ 3.) Plaintiff provides evidence that of the 7,280
13 backers of defendant's product on Kickstarter, 227 were
14 California residents. (Pl.'s Opp'n, Ex. B). Plaintiff asserts
15 that it is almost certain the defendant sold products in this
16 district. Thus, given that plaintiff is located in the Eastern
17 District of California, the plaintiff has shown a likelihood of
18 consumer confusion in this district. See California Brewing,
19 2016 WL 1573399, at *7 (finding venue is proper where "the
20 complaint alleges a likelihood of consumer confusion in [the]
21 district, where plaintiff is based, as a result of defendants'
22 sales, marketing, and advertising to California consumers");
23 Allstar Mktg. Grp., LLC v. Your Store Online, LLC, 666 F. Supp.
24 2d 1109, 1128 (C.D. Cal. 2009) (denying defendants' Motion to
25 Dismiss for improper venue where plaintiffs "adduced evidence
26 that 19% of defendants' sales of the products at issue occur in
27 California, but evidence of defendants' products in this
28 district, however, is at best minimal.")

1 Moreover, defendant does not dispute that it sold
2 products in the Eastern District of California; instead,
3 defendant alleges that its products did not infringe on
4 plaintiff's trademark. On a motion to dismiss for improper
5 venue, courts accept as true uncontroverted allegations. See
6 Allstar, 666 F. Supp. 2d at 1129-30. Thus, the court accepts as
7 true the fact that defendant made sales in this district. See
8 id., at 1128 (noting that "defendant[], who [is] in the best
9 position to adduce evidence regarding [its] sales in this
10 district, have come forward with no evidence controverting
11 plaintiff['s] allegations regarding [its] sales.").

12 Accordingly, because venue is proper in this district,
13 the court will deny defendant's Motion to Dismiss for Improper
14 Venue, or, in the Alternative, to Transfer Venue.

15 IT IS THEREFORE ORDERED that defendant's Motion to
16 Dismiss the Complaint, in the Alternative, to Transfer Venue
17 (Docket No. 8) be, and the same hereby is, DENIED on the
18 condition that within 30 days from the date this Order is signed
19 plaintiff submits evidence that plaintiff owns the trademark at
20 issue.

21 Dated: May 2, 2018



22 **WILLIAM B. SHUBB**
23 **UNITED STATES DISTRICT JUDGE**
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