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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DOCUSIGN, INC.,
Plaintiff,
v.
PAUL C. CLARK,
Defendant.

Case No. [21-cv-04785-WHO](#)

**ORDER DENYING MOTION TO
DISMISS SECOND AMENDED
COMPLAINT AND SCHEDULING
CASE MANAGEMENT CONFERENCE**

Re: Dkt. No. 46

Defendant Paul Clark moves to dismiss a Second Amended Complaint (“SAC”) filed by plaintiff DocuSign, Inc. (“DocuSign”), alleging fraud, breach of contract, and other claims arising out of an agreement between the parties for Clark to provide services as an expert consultant in patent litigation. His motion, based on lack of jurisdiction, is DENIED. DocuSign has plausibly pleaded specific jurisdiction: Clark allegedly made misrepresentations in the agreement that induced reliance by DocuSign in California. That satisfies purposeful direction as articulated by the Ninth Circuit.

BACKGROUND

In or around January 2013, DocuSign hired Clark as an expert consultant in two patent infringement cases it faced in the Eastern District of Texas: *Rmail Ltd. v. DocuSign, Inc.*, No. 11-CV-00299-JRG (filed June 24, 2011) (“the *Rmail* Litigation”) and *RPost Holdings, Inc. v. DocuSign, Inc.*, No. 12-CV-683-JRG (filed Oct. 25, 2012) (“the *RPost* Litigation”). Second Am. Compl. (“SAC”) [Dkt. No. 44] ¶¶ 10-12. Clark performed litigation-related work for DocuSign in 2013 and early 2014. *Id.* at ¶ 12.

On April 24, 2014, the *RPost* Litigation was administratively stayed, about which time Clark terminated his agreement with DocuSign. *Id.* at ¶ 13. According to Clark, he told

1 DocuSign’s counsel that he would no longer work for them “due to DocuSign’s repeated late
2 payment of invoices.” Mot. to Dismiss (“MTD”) [Dkt. No. 46] 4:27-28.

3 The *RPost* stay was lifted more than four years later, on December 10, 2018. SAC at ¶ 14.
4 Counsel for DocuSign reached out to Clark to resume the consulting arrangement. *Id.* at ¶ 15.
5 According to DocuSign, Clark “insisted on the parties entering into a formal consulting agreement
6 specifying how [he] would be paid for his services.” *Id.* Another law firm also sought to hire
7 Clark as an expert consultant in a companion suit filed in the Eastern District of Texas. *See* MTD
8 at 5:1-11. On March 12 and 13, 2019, Clark and representatives from three firms—Lowe Graham
9 Jones, Crowell & Moring, and Kao LLP—signed an expert consulting agreement (“the
10 Agreement”). *See* SAC at ¶ 16 (citing Ex. P). Per the Agreement, Clark would provide expert
11 consultation regarding certain patents to facilitate the firms’ representation of 25 clients in the two
12 Eastern District of Texas cases. *See id.*, Ex. P. The Agreement also included the following
13 language: “Dr. Clark has conducted a comprehensive conflicts of interest search and analysis and
14 confirms that neither he nor his company has a conflict of interest in connection with this matter.”
15 *Id.* at ¶ 17 (citing Ex. P at 3).

16 DocuSign alleges that, unbeknownst to the company, Clark did have such a conflict: three
17 patents issued to Clark before and during the stay of the *RPost* Litigation. *Id.* at ¶¶ 18-19. Those
18 patents are U.S. Patent No. 8,695,066 (“the ’066 Patent”), U.S. Patent No. 9,391,957 (“the ’957
19 Patent”), and U.S. Patent No. 10,129,214 (“the ’214 Patent”). *Id.* at ¶¶ 18-19.

20 The *RPost* Litigation was dismissed and the case closed on August 20, 2019. *Id.* at ¶ 26.
21 About two months later, on October 15, 2019, Clark emailed DocuSign’s attorneys over payments
22 related to the litigation. *Id.* at ¶ 27. A back-and-forth ensued via email, as Clark asserted that
23 DocuSign had not paid two invoices, totaling approximately \$105,500. *See id.* at ¶¶ 28-31.

24 On July 15, 2020, Clark sued DocuSign in Maryland state court, alleging fraud and breach
25 of contract in connection with the unpaid invoice. *Id.* at ¶ 33. The case settled later that year. *Id.*

26 On April 12, 2021, Clark sued DocuSign again, this time for infringement of the ’066,
27 ’957, and ’214 patents. *Id.* at ¶ 34 (citing Ex. A). That case was filed in the District Court for the
28 District of Columbia and is still pending. *See id.* at ¶¶ 5, 8.

1 DocuSign brought this case on June 22, 2021, alleging fraudulent misrepresentation by
2 Clark and seeking declaratory judgement that it did not infringe on the three patents. *See* Dkt. No.
3 1. It later filed an amended complaint adding claims of negligent misrepresentation and
4 concealment. *See* Dkt. No. 21.

5 I dismissed the amended complaint, finding that personal jurisdiction was lacking and that
6 the first-to-file rule barred the claims for declaratory relief. Dkt. No. 41. DocuSign filed its SAC
7 on February 8, 2022, dropping the patent-related claims and instead asserting fraud, negligent
8 misrepresentation, concealment, breach of contract, and breach of the implied obligation of good
9 faith and fair dealing. Dkt. No. 44. Clark again moved to dismiss a month later. Dkt. No. 46.

10 LEGAL STANDARD

11 Under Federal Rule of Civil Procedure Rule 12(b)(2), a defendant may move to dismiss a
12 complaint for lack of personal jurisdiction. The plaintiff then bears the burden of demonstrating
13 that jurisdiction exists. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir.
14 2004). The plaintiff “need only demonstrate facts that if true would support jurisdiction over the
15 defendant.” *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). The plaintiff cannot merely
16 rely on the complaint’s bare allegations, however “uncontroverted allegations in the complaint
17 must be taken as true.” *Schwarzenegger*, 374 F.3d at 800.

18 “Where, as here, there is no applicable federal statute governing personal jurisdiction, the
19 law of the state in which the district court sits applies.” *Core-Vent Corp. v. Nobel Indus. AB*, 11
20 F.3d 1482, 1484 (9th Cir. 1993). “California’s long-arm statute allows courts to exercise personal
21 jurisdiction over defendants to the extent permitted by the Due Process Clause of the United States
22 Constitution.” *Id.*; Cal. Civ. Proc. Code § 410.10. “Because California’s long-arm jurisdictional
23 statute is coextensive with federal due process requirements, the jurisdictional analyses under state
24 law and federal due process are the same.” *Schwarzenegger*, 374 F.3d at 800-01.

25 “There are two types of personal jurisdiction: general and specific.” *Fields v. Sedgwick*
26 *Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). General jurisdiction exists when a
27 defendant’s affiliations with the forum state are “so continuous and systematic as to render them
28 essentially at home in the forum state.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564

1 U.S. 915, 919 (2011) (citation and quotation marks omitted). Specific jurisdiction arises when a
2 defendant’s contacts with the forum state give rise to the claim in question. *See Helicopteros*
3 *Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

4 The Ninth Circuit employs a three-part test for analyzing specific jurisdiction, commonly
5 known as the minimum contacts test. *Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz*
6 *Choloma, S.A.*, 972 F.3d 1101, 1107 (9th Cir. 2020); *Freestream Aircraft (Bermuda) Ltd. v. Aero*
7 *Law Grp.*, 905 F.3d 597, 603 (9th Cir. 2018). First, the defendant must “purposefully direct his
8 activities or consummate some transaction with the forum or resident thereof; or perform some act
9 by which he purposefully avails himself of the privilege of conducting activities in the forum,
10 thereby invoking the benefits and protections of its laws.” *Id.* (citation omitted). Next, the claim
11 must “arise out of or relate to” those forum-related activities. *Id.* Finally, the exercise of
12 jurisdiction must comport with fair play and substantial justice—in other words, it must be
13 reasonable. *Id.*; *see also Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008).

14 **DISCUSSION**

15 Under the first prong of the Ninth Circuit’s test for specific jurisdiction, purposeful
16 availment and purposeful direction “are, in fact, two distinct concepts.”¹ *Schwarzenegger*, 374
17 F.3d at 802. Courts generally use purposeful availment in determining jurisdiction in suits
18 sounding in contract, and purposeful direction in those sounding in tort. *Id.*

19 **I. PURPOSEFUL AVAILMENT**

20 “A showing that a defendant purposefully availed himself of the privilege of doing
21 business in a forum state typically consists of evidence of the defendant’s actions in the forum,
22 such as executing or performing a contract there.” *Id.* But the “mere existence of a contract with
23 a party in the forum state” is not enough. *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990)
24 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)). Rather, courts consider “prior
25 negotiations and contemplated future consequences, along with the terms of the contract and the
26 parties’ actual course of dealing to determine if the defendant’s contacts are substantial and not

27 _____
28 ¹ Only specific jurisdiction is at issue. DocuSign does not allege that general jurisdiction exists
over Clark. *See Oppo.* [Dkt. No. 49] 4 n.2.

1 merely random, fortuitous, or attenuated.” *Id.* (citation and quotation marks omitted).

2 I already held that the mere existence of the Agreement does not establish jurisdiction. *See*
3 Order Granting Mot. to Dismiss FAC (“First MTD Order”) [Dkt. No. 41] 6:18. DocuSign does
4 not plead that Clark executed the contract in California or performed any work on DocuSign’s
5 behalf there. *See generally* SAC. I must then focus on the prior negotiations and contemplated
6 future consequences, the Agreement’s terms, and the parties’ actual course of dealing.

7 Although DocuSign previously hired Clark in connection with the *Rmail* and *RPost*
8 Litigation, that relationship lasted little more than a year before Clark terminated it. *See* SAC at ¶¶
9 10-13. The parties then did not work together for more than four years while the *RPost* litigation
10 was stayed. *Id.* at ¶¶ 13-14. The extended hiatus indicates that Clark’s work for DocuSign was
11 limited; it does not show that his contacts with California were substantial.

12 Nor does the Agreement itself. As I previously noted, the Agreement’s terms focus on two
13 cases in Texas. *See* SAC, Ex. P at 1. It instructs Clark to send his invoices to lawyers in
14 Washington and New York. *See id.* at 2. Nowhere is California mentioned. Moreover, the
15 Agreement was signed by lawyers from three law firms representing 25 different clients. *See id.* at
16 4. Even accepting as true DocuSign’s allegation that Clark “was aware” that it is a California
17 entity, DocuSign was but one of 25 companies covered by the Agreement. *See* SAC at ¶ 46.
18 Rather than show that Clark made substantial contact with California, this suggests that the contact
19 was random, as California happened to be one of an unknown number of states where the three
20 law firms and 25 clients covered by the Agreement were located.

21 DocuSign argues that Clark’s negotiations over the Agreement and regular interactions
22 with DocuSign’s counsel in California establish substantial contacts with California. *See* *Oppo.* at
23 15:3-23 (citing SAC at ¶¶ 43, 46). But sending letters—or in this case, emails—and making
24 phone calls to a forum state is not enough to establish purposeful availment. The Ninth Circuit
25 said exactly this in *Sher*, holding that “[t]hese contacts, by themselves, do not establish purposeful
26 availment; this is not the deliberate creation of a ‘substantial connection’ with California.” 911
27 F.2d at 1362. Nor has DocuSign shown that the emails promoted business in California, as they
28 were sent in furtherance of work Clark performed outside of California in connection with two

1 lawsuits in Texas. *See id.* (stating that accepting payment from a California bank, making phone
2 calls and sending letters to California did not promote business in California because the business
3 promoted “was legal representation in Florida, not California”); *see also* MTD at 3:12-13 (“Clark
4 did not effectuate performance of his expert services in California.”).

5 Considering the prior negotiations between Clark and DocuSign, the terms of the
6 Agreement, and the parties’ actual course of dealing, DocuSign has not shown that Clark’s
7 contacts with California were substantial, as required by the purposeful avilment analysis.

8 **II. PURPOSEFUL DIRECTION**

9 Purposeful direction occurs when the defendant has: (1) committed an intentional act; (2)
10 expressly aimed at the forum state; (3) causing harm that the defendant knows is likely to be
11 suffered in the forum state. *Schwarzenegger*, 374 F.3d at 803 (citing *Calder v. Jones*, 465 U.S.
12 783 (1984)). To determine whether an act is “expressly aimed at the forum state,” courts consider
13 two factors. *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1143 (9th Cir. 2017). First, “the
14 relationship must arise out of contacts that the defendant himself creates with the forum state,” not
15 the plaintiff’s contacts. *Id.* Second, courts look to the defendant’s contacts “with the forum state
16 itself,” not with persons who reside there. *Id.* The fact that a defendant’s conduct affected a
17 plaintiff with connections to the forum state does not establish jurisdiction. *Walden v. Fiore*, 571
18 U.S. 277, 291 (2014).

19 The parties dispute whether to follow the “effects test” articulated in *Calder*, as Clark
20 wants, or the analysis of *Paccar International, Inc. v. Commercial Bank of Kuwait, S.A.K.*, 757
21 F.2d 1058 (9th Cir. 1985), in light of the Ninth Circuit’s decision in *Freestream Aircraft*. There,
22 the court held that when an intentional tort is committed within the forum state, “*Paccar*, not
23 *Calder*, is the proper starting place.” *Freestream Aircraft*, 905 F.3d at 606. Under *Paccar*, “[t]he
24 commission of an intentional tort in a state is a purposeful act that will satisfy the first two
25 requirements” of the minimum contacts test. *See* 757 F.2d at 1064. In other words, the purposeful
26 direction standard would be satisfied. *See id.*; *Freestream Aircraft*, 905 F.3d at 603.

27 In *Paccar*, the Ninth Circuit held that a foreign bank’s allegedly fraudulent demand for
28 payment induced reliance on the part of a bank in California. 757 F.2d at 1064. The court held

1 that this satisfied the first two requirements of the minimum contacts test, as the cause of action
2 arose out of that inducement. *Id.* In so deciding, the court relied heavily on *Data Disc, Inc. v.*
3 *Systems Technology Associates, Inc.*, 557 F.2d 1280, 1288 (9th Cir. 1977), which held that “[t]he
4 inducement of reliance in California is a sufficient act within California to satisfy the requirement
5 of minimum contacts where the cause of action arises out of that inducement.”

6 Although the facts in *Freestream Aircraft* are distinguishable—there, the alleged
7 intentional tort occurred within the forum state itself, where the defendant was accused of making
8 defamatory statements about the plaintiff at an aviation conference—the rule it articulates is clear.
9 *See* 905 F.3d at 600. It interpreted *Paccar* as holding that a “non-Californian defendant could be
10 sued in California for an allegedly fraudulent demand for payment made to a California entity”
11 because of the inducement of reliance in California. 905 F.3d at 603.

12 DocuSign concedes that any misrepresentation by Clark “may have been made” in
13 Maryland, where he apparently executed the Agreement. *Oppo.* at 10:14-16. But it contends that
14 “the inducement of reliance and actual reliance on such misrepresentations occurred in
15 California.” *Id.* at 10:13-22. And because DocuSign’s fraud claim arises out of that inducement,
16 it argues, purposeful direction is satisfied under *Paccar. Id.*

17 A plaintiff “need only demonstrate facts that if true would support jurisdiction over the
18 defendant.” *Ballard*, 65 F.3d at 1498. Accepting DocuSign’s allegations as true, it has met this
19 burden. *See Schwarzenegger*, 374 F.3d at 800. The SAC alleges that Clark’s misrepresentations
20 about the Agreement’s terms—namely, that he had conducted a comprehensive conflicts of
21 interest check and that no such conflicts existed—induced reliance by DocuSign in California.
22 *See* SAC at ¶ 17. Inducement of reliance is an element of fraud. *See Robinson Helicopter Co.,*
23 *Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004). As in *Paccar* and *Data Disc*, DocuSign’s cause
24 of action arises out of the alleged inducement of reliance that occurred in California.

25 Clark’s primary response is that DocuSign has not alleged that he made any
26 misrepresentations directly to DocuSign “in California or elsewhere.” Reply [Dkt. No. 50] 7:16-
27 8:1. It argues that any misrepresentations were made to the lawyers who signed the Agreement on
28 behalf of multiple parties. *See id.* But those attorneys signed the Agreement on behalf of their

1 clients, who were subject to its terms. This is clear from the language of the Agreement itself,
2 which expressly stated that counsel was acting “on behalf” of their clients, and referenced both
3 “Defendants” and “Defendants’ counsel” throughout in its terms. *See* Ex. P at 1-4.

4 Nor has Clark cited any case law that successfully counters the Ninth Circuit’s direction in
5 *Freestream Aircraft* to apply *Paccar*, or that purposeful direction is satisfied when a non-
6 California defendant induces reliance in California. *See* Reply at 6:16-7:4. Only one of the cases
7 it cites post-dates *Freestream Aircraft*, and it made no mention of purposeful direction, only
8 purposeful availment. *See Fletcher v. Donald L. Johnson, PC*, No. 18-CV-08671, 2019 WL
9 4383945, at *2 (C.D. Cal. Apr. 26, 2019).

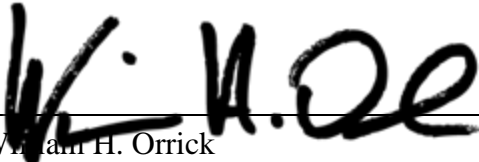
10 Without any authority to the contrary, I am bound by the collective holdings of *Freestream*
11 *Aircraft, Paccar*, and *Data Disc*: the inducement of reliance in California by a non-California
12 defendant is enough to satisfy the first two requirements of the minimum contacts test. Clark did
13 not challenge the third requirement, reasonableness. *See* MTD at 7:18-11:26. Because personal
14 jurisdiction exists over Clark with respect to the fraud claim, and because the other claims arise
15 from a common nucleus of operative facts (relating to the Agreement’s formation and terms), I
16 will assert pendent personal jurisdiction over the remaining claims. *See NetApp, Inc. v. Nimble*
17 *Storage, Inc.*, 41 F. Supp. 3d 816, 827 (N.D. Cal. 2014) (asserting pendent personal jurisdiction
18 over contract-based claims based on the same facts as the tort-based claims over which the court
19 had personal jurisdiction).

20 **CONCLUSION**

21 Clark’s motion to dismiss for lack of personal jurisdiction is DENIED. He shall answer
22 the SAC within 10 days of the issuance of this Order. A Case Management Conference is set for
23 July 5, 2022, at 2 p.m. The Joint Case Management Statement is due on June 28, 2022.

24 **IT IS SO ORDERED.**

25 Dated: June 14, 2022

26 
27 William H. Orrick
28 United States District Judge