

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HUGO ELLIOTT,  
Plaintiff,  
v.  
PUBMATIC, INC.,  
Defendant.

Case No. 21-cv-01497-PJH

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS**

Re: Dkt. No. 23

United States District Court  
Northern District of California

Defendant PubMatic, Inc.'s motion to dismiss came on for hearing before this court on August 12, 2021. Plaintiff appeared through his counsel, Caroline Taylor and Andrew Hathaway. Defendant appeared through its counsel, H. Mark Mao and Ed Takashima. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby **GRANTS** defendant's motion, for the following reasons in addition to those stated at the hearing.

**I. BACKGROUND**

Plaintiff Hugo Elliott is a U.K. citizen residing in England. Defendant PubMatic, Inc. ("PubMatic") is incorporated under the laws of the State of Delaware with its principal place of business in Redwood City. FAC ¶¶ 17-18. PubMatic is a digital advertising technology company with some focus on targeted advertising. FAC ¶¶ 1, 67. It assists websites with the management and sale of their advertising space. FAC ¶67. Elliott frequently browses websites while he is located in the United Kingdom. FAC ¶ 202. As part of its business practices, PubMatic placed unique and therefore individuating identifiers in the form of cookies on Elliott's device and used those uniquely

1 identifying cookies to monitor and track Elliott's U.K.-based online activities. FAC ¶¶70,  
2 219. At the time of filing the original complaint, Elliott had 45 PubMatic cookies on his  
3 Chrome browser. FAC ¶ 205.

4 Elliott claims he was harmed by PubMatic's alleged internet cookie placement  
5 practices in violation of his U.K. data privacy rights. FAC ¶¶ 15, 200. Elliott seeks to  
6 represent a class of "[a]ll persons residing or who resided in England and Wales who  
7 used Chrome, Edge, or Internet Explorer browsers and have had a PubMatic cookie  
8 placed on their device during the Relevant Time Period." FAC ¶ 240. Elliott defines the  
9 "Relevant Time Period" as May 25, 2018, through the present. FAC ¶ 242.

#### 10 U.K. GDPR

11 Plaintiff brings this action under the United Kingdom's General Data Protection  
12 Regulation ("U.K. GDPR"). "The UK GDPR is a regulation that lays out rules relating to  
13 the protection of natural persons with regard to the processing of personal data, and rules  
14 relating to the free movement of personal data in the United Kingdom." FAC ¶ 31. The  
15 U.K. GDPR protects natural persons' personal data in part by limiting the use of uniquely  
16 identifying cookie IDs where consent is not expressly granted. FAC ¶¶ 38, 50. The U.K.  
17 GDPR provides a private right of action for violations. FAC ¶ 53 (citing U.K. GDPR,  
18 Article 79(1)).

19 The U.K. GDPR was adopted in 2018 to implement the European Union's GDPR,  
20 originally passed on April 14, 2016. FAC ¶ 28. Following the departure of the U.K. from  
21 the E.U. (i.e., "Brexit"), residents of the U.K. are only covered by the U.K.'s GDPR, not  
22 the EU GDPR. FAC ¶ 32.

23 The U.K. legislation contains "materially identical" obligations to the EU GDPR.  
24 FAC ¶ 33. However, there is one substantive difference relevant here: unlike the EU's  
25 GDPR, the U.K. GDPR does not require complaints to be filed in a European court. FAC  
26 ¶ 35. Plaintiff contends that this enables "UK plaintiffs to sue outside of the UK, including  
27 within the United States." FAC ¶ 35.

28

1 Procedural History

2 Elliott filed the original complaint in this court on March 3, 2021. Dkt. 1. In  
3 response to a motion to dismiss, he filed the first amended complaint (“FAC”), the  
4 pleading now at issue. Dkt. 21.

5 Elliott asserts one cause of action for violation of the U.K. GDPR, FAC ¶¶ 36, 267,  
6 which he specifies as the “General Data Protection Regulation in force in the United  
7 Kingdom at the time of this Complaint.” FAC ¶ 2; see id. ¶ 37 & Ex. A.

8 PubMatic filed the instant motion to dismiss the FAC in its entirety on June 4,  
9 2021. Dkt. 23. Alongside, PubMatic included an attorney declaration certifying that “if  
10 this Court dismisses Plaintiff’s First Amended Complaint on forum non conveniens or  
11 international comity grounds, PubMatic agrees to submit to jurisdiction in the courts of  
12 England and Wales for the purposes of Count 1 of Plaintiff’s First Amended Complaint.”  
13 Mao Decl. (Dkt. 23-1) ¶ 2.

14 **II. DISCUSSION**

15 Defendant’s motion is brought under Federal Rules of Civil Procedure 12(b)(1) and  
16 12(b)(6), and the motion raises issues of standing, forum non conveniens, and  
17 international comity. Because the court grants dismissal on forum non conveniens and  
18 international comity grounds, it does not reach the issue of standing.

19 **A. Forum Non Conveniens**

20 In general, “[a] district court has discretion to decline to exercise jurisdiction in a  
21 case where litigation in a foreign forum would be more convenient for the parties.” Lueck  
22 v. Sundstrand Corp., 236 F.3d 1137, 1142 (9th Cir. 2001) (citing Gulf Oil Corp. v. Gilbert,  
23 330 U.S. 501, 504 (1947)). Once a district court determines that the appropriate forum is  
24 located in a foreign country, the court may dismiss the case. Cheng v. Boeing Co., 708  
25 F.2d 1406, 1409 (9th Cir. 1983).

26 Before dismissing an action based on forum non conveniens, district courts  
27 analyze whether an adequate alternative forum exists, and whether the balance of private  
28 and public interest factors favors dismissal. Lueck, 236 F.3d at 1142; see also Gutierrez

1 v. Advanced Medical Optics, Inc., 640 F.3d 1025, 1029 (9th Cir. 2011). Generally, the  
2 requirement of an adequate alternative forum will be met when the defendant is  
3 “amenable to process” in the other jurisdiction. Piper Aircraft, 454 U.S. at 255, (quoting  
4 Gulf Oil, 330 U.S. at 506-7).

5 The private interest factors include: “(1) the residence of the parties and the  
6 witnesses; (2) the forum’s convenience to the litigants; (3) access to physical evidence  
7 and other sources of proof; (4) whether unwilling witnesses can be compelled to testify;  
8 (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all  
9 other practical problems that make trial of a case easy, expeditious and inexpensive.”  
10 Carijano v. Occidental Petroleum Corp., 643 F.3d 1216, 1229 (9th Cir. 2011) (internal  
11 citations omitted). The public-interest factors include: “(1) the local interest in the lawsuit,  
12 (2) the court’s familiarity with the governing law, (3) the burden on local courts and juries,  
13 (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a  
14 particular forum.” Bos. Telecommunications Grp., Inc. v. Wood, 588 F.3d 1201, 1211  
15 (9th Cir. 2009) (internal quotation marks and citations omitted).

16 Here, there is no argument—there exists an adequate alternative forum.  
17 Defendant is amenable to process in the U.K. if this court dismisses the case on forum  
18 non conveniens or international comity grounds. Mao Decl. at ¶¶ 2-3. Both sides  
19 acknowledge that the courts of the U.K. would serve as an adequate alternative forum.  
20 Even though a plaintiff’s choice of forum is typically entitled to substantial deference, the  
21 choice of Mr. Elliott, as a foreign plaintiff, deserves less deference. Piper Aircraft, 454  
22 U.S. at 256; see Lueck, 236 F.3d at 1143. Cutting further against the deference usually  
23 owed to a plaintiff’s choice of forum, Mr. Elliott seeks to represent a putative class  
24 comprised solely of foreign putative class members. Lou v. Belzberg, 834 F.2d 730, 739  
25 (9th Cir. 1987). With the adequacy of an alternative forum established and the weight of  
26 plaintiff’s forum selection diminished, the analysis proceeds to the balancing of both  
27 private interest and public interest factors.

28 As explained at the hearing, the court finds that the private interest factors do not

1 cut sharply in favor of either the U.S. or the U.K as a forum. The court does not consider  
2 all the private interest factors again here, but they generally come out neutral where  
3 neither jurisdiction is entirely convenient to either side and the locations of necessary  
4 evidence and witnesses remains unclear.

5 On the other hand, the public interest factors weigh heavily in favor of the U.K. as  
6 the appropriate forum for this dispute. The first public interest factor, the local interest in  
7 the dispute, weighs in favor of the U.K. Plaintiff is a resident of England and suffered his  
8 alleged injuries in England; the Proposed Class is made up entirely of residents or former  
9 residents of England and Wales, who suffered any alleged injuries in England and Wales;  
10 and Plaintiff's claims expressly arise only under (a new) U.K. law. While there may  
11 indeed be some local interest in ensuring California-based entities do not violate  
12 regulations elsewhere, a foreign forum's interests in protecting its citizens and vindicating  
13 its own regulatory scheme far outweigh the local interest in overseeing a U.S.-based  
14 business. The second factor, the court's familiarity with the governing law, additionally  
15 weighs against this court as the appropriate forum. This court lacks familiarity with the  
16 U.K. GDPR, a law that is still being developed in the U.K. It would be burdensome for the  
17 court to familiarize itself with, interpret, and apply this foreign law. The third, fourth, and  
18 fifth factors, the burden on local courts and juries, the congestion in the court, and the  
19 costs of resolving a dispute unrelated to a particular forum, additionally weigh against this  
20 forum where plaintiff asks California jurors to apply foreign law to award damages to an  
21 entirely foreign class.

22 On balance, the private interest factors and the public interest factors together  
23 weigh in favor of dismissal on forum non conveniens grounds. California has little  
24 interest in hosting this dispute, and PubMatic's willingness to submit to U.K. jurisdiction  
25 mitigates against this foreign plaintiff's choice of forum. The court therefore dismisses  
26 the case on forum non conveniens grounds.

27 **B. International comity**

28 International comity "is the recognition which one nation allows within its territory to

1 the legislative, executive or judicial acts of another nation, having due regard both to  
2 international duty and convenience, and to the rights of its own citizens or of other  
3 persons who are under the protection of its laws.” In re Simon, 153 F.3d 991, 998 (9th  
4 Cir.1998) (internal quotation omitted). “International comity is a doctrine of prudential  
5 abstention, one that ‘counsels voluntary forbearance when a sovereign which has a  
6 legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate  
7 claim to jurisdiction under principles of international law.” Mujica v. AirScan Inc., 771  
8 F.3d 580, 598 (9th Cir. 2014) (quoting United States v. Nippon Paper Indus. Co., 109  
9 F.3d 1, 8 (1st Cir.1997)).

10 There are two doctrines recognized under “international comity.” In re Korean  
11 Ramen Antitrust Litig., 281 F. Supp. 3d 892, 907 (N.D. Cal. 2017). The first is “legislative  
12 or prescriptive comity,” which “guides domestic courts as they decide the extraterritorial  
13 reach of federal statutes.” Mujica, 771 F.3d at 598. The second “is referred to as ‘comity  
14 among courts’ or adjudicatory comity, which ‘may be viewed as a discretionary act of  
15 deference by a national court to decline to exercise jurisdiction in a case properly  
16 adjudicated in a foreign state.” Id. at 599 (quoting In re Maxwell Commc’n Corp. plc by  
17 Homan, 93 F.3d 1036, 1047 (2d Cir.1996)). Considerations in determining whether to  
18 abstain for comity to an international tribunal include the strength of the various  
19 governments’ interests, the adequacy of the foreign forum, any conflicts between the  
20 laws of the jurisdictions, and the extraterritorial reach of the laws at issue. Mujica, 771  
21 F.3d at 600-604. In looking to the various governmental interests, the critical factor is  
22 where the conduct in question took place, “conduct” including not only the actions of the  
23 defendants but the injury suffered by plaintiffs. Mujica, 771 F.3d at 605 (citing Torres v.  
24 S. Peru Copper Corp., 965 F. Supp. 899, 909 (S.D. Tex. 1996), dismissing action under  
25 comity where the “activity and the alleged harm occurred entirely in Peru [and] Plaintiffs  
26 are all residents of Peru.”) (emphasis added).

27 Here, there is no need to repeat the earlier discussion regarding an adequate  
28 alternative forum. The courts of the U.K. provide an adequate alternative, and defendant

United States District Court  
Northern District of California

1 already certified its acceptance of U.K. jurisdiction over this case should it be dismissed  
2 here. But further, adjudicatory comity clearly applies given that this case is properly  
3 adjudicated in a foreign state. The U.K. has a strong interest in addressing injuries to  
4 English and Welsh subjects, particularly injuries to rights created by U.K. legislation.  
5 While plaintiff focuses on the California-based conduct of PubMatic, he glosses over any  
6 potential conduct by the company in the U.K. and the injuries suffered to a class of  
7 plaintiffs in England and Wales. Moreover, the U.K. has a strong interest in interpreting  
8 and applying its own regulatory scheme for Internet privacy, a scheme largely lacking in  
9 precedent. All of these considerations lead to the conclusion that this court must abstain  
10 from this case. The court therefore alternatively dismisses the case on international  
11 comity grounds.

12 **III. CONCLUSION**

13 For the reasons stated above, including the applicability of the doctrines of forum  
14 non conveniens and international comity, the court **GRANTS** defendant's motion to  
15 dismiss without prejudice to filing the case in the appropriate forum.

16 **IT IS SO ORDERED.**

17 Dated: August 16, 2021

18 /s/ Phyllis J. Hamilton

19 PHYLLIS J. HAMILTON  
20 United States District Judge  
21  
22  
23  
24  
25  
26  
27  
28