

1 (Opp'n, ECF No. 40.) In response, Gardner sent a second letter, which the Court
2 construes as his reply. (Reply, ECF No. 43.) Plaintiff then filed a motion to strike
3 the Reply. (ECF No. 44.)

4 The Court finds these motions suitable for determination on the papers
5 submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). For the following
6 reasons, the Court **DENIES** Plaintiff's motion to strike the reply (ECF No. 44) and
7 **DENIES** Gardner's motion to dismiss (ECF No. 38).

8 9 **I. BACKGROUND**

10 In July 2010, Plaintiff and Deep Blue Sports executed a license agreement that
11 enabled Deep Blue Sports to sell products bearing a trademark owned by Plaintiff to
12 customers in the United Kingdom ("2010 Agreement"). (Compl. ¶ 20.) The 2010
13 Agreement included a California choice of law provision. (*Id.*) The provision also
14 stated that "the parties agree to subject to the non-exclusive jurisdiction of the Courts
15 of San Diego County in California." (*Id.*) In October 2013, Plaintiff, Deep Blue
16 Sports, and BBE added an addendum to the existing agreement ("2013 Addendum").
17 (*Id.* ¶ 21.) The 2013 Addendum included a provision assigning Deep Blue Sports's
18 rights and liabilities to BBE. (*Id.*) Plaintiff alleges that Deep Blue Sports continued
19 to operate as a licensee despite the 2013 Addendum. (*Id.*) The 2010 Agreement and
20 the 2013 Addendum are collectively referred to as the "License Agreement."

21 In early 2015, Plaintiff performed an audit and determined that BBE and Deep
22 Blue Sports owed Plaintiff over \$300,000 in unpaid royalties and other commitments
23 under the License Agreement. (Compl. ¶ 23.) The License Agreement was set to
24 expire on June 30th 2015. (*Id.*) Once the License Agreement expired, BBE's right to
25 sell any inventory bearing Plaintiff's mark would also expire after ninety days. (*Id.*
26 ¶ 25.) Plaintiff alleges that, as the expiration date approached, it became apparent to
27 BBE that it was going to be left with hundreds of thousands of dollars of inventory
28

1 that it would soon be unable to sell. (*Id.*) In order to avoid this loss, Gardner traveled
2 to San Diego, California to renegotiate the terms of the 2013 Agreement. (*Id.* ¶ 26.)

3 In July 2015, Plaintiff and Gardner began to negotiate terms of a second
4 addendum (“2015 Addendum”). (Compl. ¶ 29.) Upon execution of the 2015
5 Addendum in October, Plaintiff agreed to (1) waive monies owed to Plaintiff by BBE
6 and Deep Blue Sports through the expiration of the License Agreement, (2) release
7 Deep Blue Sports of liability, and (3) assist BBE in recouping costs of unsold
8 inventory. (*Id.* ¶ 29.) Gardner executed the 2015 Addendum on behalf of Deep Blue
9 Sports and BBE in his capacity as the director of both companies.

10 Six days after executing the Second Addendum, Gardner formally resigned
11 from his positions of director and officer of BBE. (*Id.* ¶ 43.) Plaintiff alleges that
12 even after his resignation, Gardner continued to represent himself as BBE’s
13 managing director and CEO. (*Id.*)

14 Plaintiff further alleges that, during negotiations with Gardner, it was “ignorant
15 of the material facts” regarding BBE’s financial stability. (Compl. ¶ 28.) These
16 allegations include that BBE was not adequately capitalized and that Gardner was
17 planning to transfer all of BBE’s assets (including unsold inventory of licensed
18 products) to Deep Blue Sports and then liquidate BBE to escape its financial
19 obligations. (*Id.*) Plaintiff also alleges that during the process of negotiating the 2015
20 Addendum, Gardner transferred BBE’s assets to Deep Blue Sports, but represented
21 to Plaintiff that the assets belonged to BBE. (*Id.* ¶ 34.)

22 After receiving a notice of default from Plaintiff in December of 2015, Gardner
23 contacted Plaintiff and allegedly promised to fulfill all of the obligations under the
24 License Agreement including paying any monies owed. (Compl. ¶ 50.) Because he
25 had formally resigned from his positions with BBE in November, Plaintiff alleges
26 that Gardner must have intended to promise that either he, personally, or Deep Blue
27 Sports would fulfill the obligations. (*Id.*) Additionally, Plaintiff claims that, although
28 all agreements were terminated by January 2016, Deep Blue Sports and Gardner

1 continued to sell apparel bearing Plaintiff's registered trademarks without any license
2 or permission, and without paying Plaintiff royalties. (*Id.* ¶ 60.)

3 Lastly, Plaintiff asserts that, at all times, Gardner was the sole owner and
4 managing director of both BBE and Deep Blue Sports and that the companies shared
5 the same office location, employees, officers, directors, and attorneys, and engaged
6 in the same business (selling martial arts equipment and apparel). (Compl. ¶ 74.)
7 Plaintiff asserts that Gardner freely transferred assets in the form of licensed products
8 between the two companies without adequate consideration and that BBE sold
9 products bearing Plaintiff's trademarks on a website registered to Deep Blue Sports
10 and Gardner. (*Id.*) Plaintiff claims that Gardner operated BBE as a mere shell
11 company without capital assets, stock, or stockholders.

12 Plaintiff filed this action on November 7, 2016 alleging breach of contract,
13 fraud and deceit, unjust enrichment, and trademark infringement arising out of the
14 License Agreement and related addendums. (Compl. ¶¶ 20-30.) In his motion to
15 dismiss, Gardner asserts that Plaintiff never served him with any documents. (Mot.
16 at 1.) Gardner also argues that the Court lacks personal jurisdiction over him because
17 he never interacted with Plaintiff in his individual capacity. Instead, he asserts that
18 any interaction he had with Plaintiff was as an agent/representative of a BBE or Deep
19 Blue Sports. (*Id.*) Plaintiff opposed Gardner's Motion to Dismiss (ECF No. 40) and
20 moved to strike Gardner's Reply (ECF No. 44).

21 22 **II. MOTION TO STRIKE**

23 On May 9, 2018, Gardner sent a letter to the Court, responding to Plaintiff's
24 opposition to his motion to dismiss. (ECF No. 43.) The Court accepted this letter as
25 Gardner's Reply. (*Id.*) Plaintiff now moves to strike Gardner's Reply, arguing that
26 the Reply contains new purported facts without any evidentiary support. (ECF No.
27 44 at 1-2.)

1 According to the Ninth Circuit, “[p]arties cannot raise a new issue for the first
2 time in their reply brief.” *State of Nev. v. Watkins*, 914 F.2d 1545, 1560 (9th Cir.
3 1990). Reply papers should be limited to matters raised in the opposition papers. *See*
4 *Clark v. County of Tulare*, 755 F. Supp. 2d 1075, 1090 (E.D. Cal. 2010). “[I]t is
5 improper for the moving party to ‘shift gears’ and introduce new facts or different
6 legal arguments in the reply brief than presented in the moving papers.” *Id.*
7 Accordingly, a district court does not need to consider arguments raised for the first
8 time on reply. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007); *see also U.S.*
9 *v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006) (“Arguments not raised by a party in its
10 opening brief are deemed waived.”).

11 Given Gardner’s pro se status, the Court does not find that striking the Reply
12 in its entirety is warranted. Though the Court recognizes that Gardner fails to provide
13 support for his factual allegations, the Court finds that Gardner’s arguments were
14 within the scope of the opposition papers. Moreover, Gardner raises the issue of
15 personal jurisdiction in his motion to dismiss, and, when liberally construed, his
16 Reply merely expounds on this argument. *See Bernhardt v. L.A. County*, 339 F.3d
17 920, 925 (9th Cir. 2003) (“Courts have a duty to construe pro se pleadings liberally,
18 including pro se motions as well as complaints.”).

19 Plaintiff also argues that the Court should strike the Reply because Gardner’s
20 factual allegations are unsubstantiated. This argument ignores the standard that the
21 Court must apply for a motion to dismiss for lack of personal jurisdiction. *See Doe*
22 *v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (finding that a plaintiff need only
23 make a prima facie showing of personal jurisdiction to survive a Rule 12(b)(2)
24 motion). To defeat a prima facie showing of personal jurisdiction, Gardner would
25 have to produce actual evidence to dispute Plaintiff’s allegations, and the Court is
26 limited in considering such evidence. *Id.* Because the Reply only states Gardner’s
27 assertions and does not constitute evidence, Plaintiff’s request to strike is
28 unnecessary.

1 Accordingly, the Court **DENIES AS MOOT** Plaintiff’s Motion to Strike.
2 (ECF No. 44.)

3
4 **III. LEGAL STANDARD**

5 **A. Motion to Dismiss for Insufficient Service of Process**

6 The Supreme Court has set forth a constitutional minimum for sufficient
7 service of process. To ensure due process, notice of an action must be “reasonably
8 calculated, under all the circumstances, to apprise interested parties of the pendency
9 of the action.” *Greene v. Lindsey*, 456 U.S. 444, 449-50 (1982) (quoting *Mullane v.*
10 *Central Hanover Bank and Trust*, 339 U.S. 306, 314 (1950)). Once service is
11 challenged, plaintiffs bear the burden of establishing that service was valid under
12 Federal Rule of Civil Procedure 4. *See Brockmeyer v. May*, 383 F.3d 798, 801 (9th
13 Cir. 2004).

14 “Rule 4 is a flexible rule that should be liberally construed so long as a party
15 receives sufficient notice of the complaint.” *United Food & Comm. Workers Union*
16 *v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). Under Rule 4(f), a plaintiff
17 can serve an individual abroad by one of three means, the first of which is service
18 authorized by an internationally agreed means such as the Hague Convention. *See*
19 *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988). The Hague
20 Convention requires signatory countries to establish a Central Authority to receive
21 requests for service of documents from other countries, and to serve those documents
22 by methods compatible with the internal laws of the receiving state. *See id.* at 698-
23 99. Once the Central Authority has received documents in compliance with
24 applicable requirements, the Hague Convention affirmatively requires the Central
25 Authority to effect service in its country. *See Brockmeyer*, 383 F.3d at 804 (citing
26 Hague Convention, arts. 4-5, Nov. 4, 1965, 20 U.S.T. 361).

27 Constitutional due process does not require proof that a defendant actually
28 receives notice. *See Greene*, 456 U.S. at 449-50. Rather, service of process is valid

1 where an individual is served “by any internationally agreed means of service that is
2 reasonably calculated to give notice, such as those authorized by the Hague
3 Convention.” *Lidas, Inc. v. United States*, 238 F.3d 1076, 1084 (9th Cir. 2001)
4 (quoting Fed. R. Civ. P. 4(f)(1)). “A signed return of service constitutes prima facie
5 evidence of valid service which can be overcome only by strong and convincing
6 evidence.” *SEC v. Internet Sols. for Bus., Inc.*, 509 F.3d 1161, 1167 (9th Cir. 2007).
7 The burden is on the defendant to show that he or she was not served with process.
8 *See id.*

10 **B. Motion to Dismiss for Lack of Personal Jurisdiction**

11 When the parties dispute whether personal jurisdiction over a foreign
12 defendant is proper, “the plaintiff bears the burden of establishing that jurisdiction
13 exists.” *Rio Props. Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002). In
14 general, “personal jurisdiction over a defendant is proper if it is permitted by a [state]
15 long-arm statute and if the exercise of that jurisdiction does not violate federal due
16 process.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). Both the
17 California and federal long-arm statutes require compliance with due-process
18 requirements. *See Pebble Beach*, 453 F.3d at 1155; *see also Holland Am. Line Inc. v.*
19 *Wartsila N. Am., Inc.*, 485 F.3d 150, 161 (9th Cir. 2007).

20 “When a defendant moves to dismiss for lack of personal jurisdiction, the
21 plaintiff bears the burden of demonstrating that the court has jurisdiction over the
22 defendant.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006).
23 “However, this demonstration requires that the plaintiff ‘make only a prima facie
24 showing of jurisdictional facts to withstand the motion to dismiss.’” *Id.* (quoting
25 *Doe*, 248 F.3d at 922). The Court must resolve disputed jurisdictional facts in the
26 plaintiff’s favor, taking the allegations in the plaintiff’s complaint as true. *See AT&T*
27 *v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996); *see also Doe*,

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1 248 F.3d at 922 (“[T]he plaintiff need only demonstrate facts that if true would
2 support jurisdiction over the defendant.”).

3 If the defendant adduces evidence controverting the allegations in the
4 complaint, however, the plaintiff must “come forward with facts, by affidavit or
5 otherwise, supporting personal jurisdiction.” *Scott v. Breeland*, 792 F.2d 925, 927
6 (9th Cir. 1986) (quoting *Amba Mktg. Sys., Inc. v. Jobar Int’l, Inc.*, 551 F.2d 784, 787
7 (9th Cir. 1977)). “Conflicts between [the] parties over statements contained in the
8 affidavits must be resolved in the plaintiff’s favor.” *Schwarzenegger v. Fred Martin*
9 *Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); see *AT&T*, 94 F.3d at 588 (“[C]onflicts
10 between the facts contained in the parties’ affidavits must be resolved in [plaintiffs’]
11 favor for purposes of deciding whether a prima facie case for personal jurisdiction
12 exists.”)

14 **IV. ANALYSIS**

15 **A. Request to Dismiss for Insufficient Service of Process**

16 The Court construes Gardner’s assertion that he was never served with any
17 documents as a defense of insufficient service of process pursuant to Rule 12(b)(5).
18 (Mot. at 1.) Plaintiff claims that it effected service on Gardner, a U.K. resident, in
19 accordance with the Hague Convention as permitted by Rule 4(f)(1). (Opp’n at 10.)

20 Here, Plaintiff provided a signed return of service from the U.K. Central
21 Authority (“Certificate”) that constitutes “prima facie evidence of valid service that
22 can be overcome only by strong and convincing evidence.” See *Internet Sols.*, 509
23 F.3d at 1167. In her sworn declaration, Plaintiff’s counsel affirms that Gardner
24 provided his mailing address to her in an email. (King Decl. at 2, ECF No. 40-1.)
25 The email shows that, as of September 2016, Gardner’s mailing address was 15
26 Rothbury Terrace in Newcastle upon Tyne. (ECF No. 40-9 at Ex. B.) According to
27 the Certificate, “documents were served by posting them through the defendant’s
28 letterbox” at his Rothbury Terrace address. (ECF No. 40-10 at Ex. C.) This method

1 of service is in accordance with Rule 6.3(1)(c) of the Civil Procedure Rules of
2 England and Wales, and is thus valid under the Hague Convention. *See* Hague
3 Convention, art. 5; (*Id.*)

4 Additionally, Gardner does not provide any evidence establishing that he was
5 not served with process. Even construing Gardner’s letter as a sworn affidavit, the
6 mere statement that “I have not been served any documents” does not meet the burden
7 of clear and convincing evidence establishing that service of process was insufficient.
8 (Mot. at 1.) Moreover, Gardner does not contend that the Rothbury Terrace address
9 was an incorrect address for him on the date of service. Additionally, though Gardner
10 alleges he did not receive any documents, due process does not require that the
11 plaintiff prove the defendant received actual notice. *See Internet Sols.* 509 F.3d at
12 1167. Instead, Plaintiff only needs to show that it used a method of service reasonably
13 calculated to give notice to Gardener in accordance with Rule 4, which the Court
14 finds that it did. *See Lidas, Inc.*, 238 F.3d at 1084.

15 Because Plaintiff made a prima facie showing that service was valid under
16 Rule 4, and Gardner did not provide sufficient evidence to dispute this, the Court
17 denies Gardner’s request to dismiss this action for insufficient service.

18
19 **B. Request to Dismiss for Lack of Personal Jurisdiction**

20 Gardner asserts that the Court lacks personal jurisdiction over him. (Mot. at 1.)
21 In response, Plaintiff argues that the Court can exercise personal jurisdiction over
22 Gardner for two reasons: (1) specific personal jurisdiction exists for the intentional
23 tort claims because Gardner purposefully directed his tortious conduct toward a
24 California resident, and (2) personal jurisdiction exists for the contract claims
25 because Gardner is the alter ego of companies that consented to jurisdiction in
26 California. (Opp’n at 12-13.) The Court discusses each issue in turn.

1 **1. Specific Personal Jurisdiction Over Intentional Tort Claims**

2 First, Plaintiff argues that the Court has personal jurisdiction over Gardner for
3 intentional tort claims because these claims arise out of activities that Gardner
4 purposefully directed at California. (Opp’n at 14.)

5 Specific jurisdiction allows a court to exercise jurisdiction over a defendant
6 whose forum-related activities gave rise to the action before the court. *See Bancroft*
7 *& Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). The Ninth
8 Circuit employs a three-part test to determine whether the defendant’s contacts with
9 the forum state are sufficient to subject it to a court’s specific personal jurisdiction.
10 *See Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). For claims arising out of
11 intentional torts, specific jurisdiction exists when (1) the defendant purposefully
12 directed his activities toward the forum, (2) the plaintiff’s claims arise out of the
13 defendant’s forum-related activities, and (3) it is reasonable for the court to assert
14 jurisdiction over the defendant. *See Schwarzenegger*, 374 F.3d at 802; *see also*
15 *Ziegler*, 64 F.3d at 473 (noting that courts apply different purposeful availment tests
16 to contract and tort cases).

17 To assess the first prong of the specific jurisdiction framework, the Court uses
18 the “effects test” and determines whether the defendant allegedly “(1) committed an
19 intentional act, (2) expressly aimed at the forum state, (3) causing harm that the
20 defendant knows is likely to be suffered in the forum state.” *Dole Food Co. v. Watts*,
21 303 F.3d 1104, 1111 (9th Cir. 2002). Next, to assess the second prong of the
22 framework, the Court uses a “but for” test to determine whether the plaintiff’s claims
23 arise out of the defendant’s forum-related activities. *See Ballard*, 65 F.3d at 1500
24 (explaining that the question is “but for” defendants contacts with the forum, would
25 a plaintiff’s claims against a defendant have arisen). If the plaintiff shows that the
26 first two prongs are met, the burden then shifts to the defendant to “present a
27 compelling case” that the exercise of jurisdiction would not be reasonable.
28 *Schwarzenegger*, 374 F.3d at 802. “If any of the three requirements is not satisfied,

1 jurisdiction in the forum would deprive the defendant of due process of law.” *Pebble*
2 *Beach*, 453 F.3d at 1155.

3 In this case, Plaintiff alleges that the first prong of the specific jurisdiction
4 framework is met because Gardner purposefully directed his activities toward
5 California. (Opp’n at 14.) Plaintiff claims that Gardner attempted to defraud a
6 California resident, and thus expressly aimed his intentional fraudulent acts at
7 California. *See Dole*, 303 F.3d at 1111. Plaintiff alleges that Gardner repeatedly
8 visited Plaintiff’s San Diego office, including to negotiate the 2015 Addendum,
9 which he allegedly used to implement his fraudulent scheme. (*See Compl.* ¶ 26.)
10 Plaintiff contends that, during these negotiations, Gardner intentionally
11 misrepresented the financial status of his company, BBE, and withheld material
12 information, such as his alleged plan to transfer assets out of BBE and liquidate the
13 company. (*Id.* ¶ 41.) Plaintiff argues further that Gardner fraudulently induced
14 Plaintiff to agree to terms that it would not have agreed to had it known these material
15 facts. (*Id.* ¶ 42.) Additionally, Plaintiff claims that Gardner knew his fraud would
16 cause harm in California, and that Gardner caused such harm when Plaintiff allegedly
17 lost several hundreds of thousands of dollars in California—its principal place of
18 business. (Opp’n at 15.); *see Dole*, 303 F.3d at 1113 (“The places where a corporation
19 suffers economic harm include its principal place of business.”).

20 Taking the allegations in Plaintiff’s complaint as true, the Court finds that
21 Plaintiff satisfies the first prong of the specific jurisdiction under the “effects test.”
22 Plaintiff makes a prima facie showing that Gardner committed intentional acts of
23 fraud, that the acts were targeted at Plaintiff in California, and that Gardner knew
24 that the economic loss would be suffered in California. *See Dole*, 303 F.3d at 1111.

25 For the second prong, Plaintiff alleges that its tort claims arise out of Gardner’s
26 forum-related activities. Specifically, Plaintiff alleges that if it were not for Gardner
27 withholding material information during the contact negotiations in California,
28 Plaintiff would not have suffered harm. (Opp’n at 16.) In other words, but-for

1 Gardner’s forum-related activities in California, Plaintiff’s claims would not have
2 arisen. (*See id.*); *Ballard*, 65 F. 3d at 1500. The Court agrees with Plaintiff for the
3 purposes of jurisdiction, and finds that Plaintiff establishes the second prong. (*Id.*)

4 Next, because Plaintiff’s allegations support the first two prongs of specific
5 personal jurisdiction over Gardner, Gardner must show that the Court exercising
6 personal jurisdiction over him would be unreasonable. *See Dole*, 303 F.3d at 1111.
7 Gardner has not produced any evidence controverting the allegations in the complaint
8 nor has he made a compelling case that asserting jurisdiction would be unreasonable.
9 *See Schwarzenegger*, 374 F.3d at 802. Although Gardner contests having any
10 fraudulent intent sufficient to characterize his actions as tortious, he has not produced
11 sufficient evidence to support this contention. Even construing Gardner’s letters as a
12 sworn affidavits, the Court must resolve conflicting evidence in Plaintiff’s favor at
13 this stage. *See id.* at 800.

14 Taking the allegations in Plaintiff’s complaint as true, the Court finds that
15 Plaintiff has shown that Gardner purposely directed his tortious conduct at a
16 California resident, giving rise to this action. Because asserting jurisdiction would
17 not be unreasonable, the Court finds all three prongs necessary to establish specific
18 jurisdiction over Gardner for the intentional tort claims are met. *See Schwarzenegger*,
19 374 F.3d at 802.

20 21 **2. Specific Personal Jurisdiction Over Contract Claims**

22 Although Gardner is subject to the Court’s jurisdiction for claims arising out
23 of his alleged tortious conduct, Plaintiff also brings claims against Gardner
24 personally for disputes arising out of the License Agreement. For these claims,
25 Gardner argues that the Court lacks personal jurisdiction over him because he did not
26 enter into any agreement or addendum in his individual capacity. (Mot. at 1 (“I do
27 not consider that this case can proceed against me in a personal capacity, as I have
28 only ever interacted with Platypus [W]ear Inc. in a capacity as an agent/representative

1 of a limited company.”.) The Court construes Gardner’s objection as arguing that he
2 is protected under the fiduciary shield doctrine. *See Bernhardt*, 339 F.3d at 925
3 (explaining that courts have a duty to construe pro se motions liberally).

4 Plaintiff argues that Gardner is subject to the Court’s jurisdiction for actions
5 arising out of Plaintiff’s agreements with BBE and Deep Blue Sports because
6 Gardner is the alter ego of these companies, which explicitly consented to jurisdiction
7 in California. (Opp’n at 12.) Plaintiff’s alter ego argument is as follows: (1) the Court
8 has personal jurisdiction over Deep Blue Sports and BBE by virtue of their
9 contractual consent, and (2) the fiduciary shield doctrine does not protect Gardner
10 because (3) Gardner is an alter ego of the companies, which justifies piercing the
11 corporate veil and asserting jurisdiction over Gardner. The Court addresses each
12 issue—consent, fiduciary shield doctrine, and alter ego liability to pierce the
13 corporate veil—in turn.

14
15 **a. Consent to Personal Jurisdiction**

16 Plaintiff alleges that BBE and Deep Blue Sports consented to personal
17 jurisdiction in their license agreements with Plaintiff. (Opp’n at 12 (“[T]he parties
18 agree to the non-exclusive jurisdiction of the Courts of San Diego County in
19 California.”).)

20 Personal jurisdiction is a waivable right, and a party may give “express or
21 implied consent to the personal jurisdiction of the court.” *Ins. Corp. of Ir. v.*
22 *Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982). For example, parties
23 may stipulate in advance to litigate any possible controversies within a particular
24 jurisdiction. *See Doe*, 248 F.3d at 922 (“[P]arties to a contract may agree in advance
25 to submit to the jurisdiction of a given court.” (quoting *Nat’l Equip. Rental, Ltd. v.*
26 *Szukhent*, 375 U.S. 311, 316 (1964)). Ultimately, where such an agreement has been
27 freely negotiated and is not “unreasonable or unjust,” its enforcement does not offend
28 due process. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

1 969 (9th Cir. 1975). *Sheard v. Superior Court*, 114 Cal. Rptr. 743, 745 (Cal. Ct. App.
2 1974).¹

3 “To apply the alter ego doctrine, the court must determine (1) that there is
4 such unity of interest and ownership that the separate personalities of the corporation
5 and the individuals no longer exist and (2) that failure to disregard the corporation
6 would result in fraud or injustice.” *Flynn Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389,
7 1393 (9th Cir. 1984)) (citing *Watson v. Commonwealth Ins. Co.*, 8 Cal. 2d 61, 68
8 (1936)). Because the facts relating to personal jurisdiction are intertwined with the
9 merits of its claims, a plaintiff need only make a prima facie showing of alter ego
10 liability. *See Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir.
11 1977); *see also Stuart v. Spademan*, 772 F.2d 1185, 1198, n.12. (5th Cir. 1985)
12 (noting that the alter ego test for personal jurisdiction is less stringent than that for
13 liability).

14 Plaintiff makes a prima facie showing that there is a unity of interest between
15 Gardner, Deep Blue Sports, and BBE sufficient for alter ego liability. Plaintiff alleges
16 that Gardner was the sole owner, stockholder, and managing director of both Deep
17 Blue Sports and BBE. In addition, the two companies share the same office and
18 employees, operate the same type of business, and Gardner freely transferred assets
19 between them. (Compl. ¶ 74.) Plaintiff also alleges that BBE sold products on a
20 website registered to Deep Blue Sports and Gardner. (*Id.*) Finally, Plaintiff alleged
21 that Deep Blue Sports and BBE failed to observe corporate formalities, that BBE was
22 so undercapitalized that it was illusory, and that BBE was a mere shell company
23 without capital, assets, or stock, and was used a device to avoid liability. (*Id.*) The
24 Court finds that these allegations demonstrate a unity of interest between Gardner,
25 Deep Blue Sports, and BBE. *See Flynn*, 734 F.2d at 1393. Thus, Plaintiff establishes
26

27 ¹ California law analyzing personal jurisdiction is appropriate because Rule
28 4(k)(1)(a) allows personal jurisdiction over defendants “subject to the jurisdiction of
a court of general jurisdiction in the state where the district court is located.”

1 a prima facie showing that separate personalities of the companies and Gardner do
2 not exist, and rather they are alter egos.

3 Plaintiff also makes a prima facie showing that failure to find alter ego liability
4 would result in injustice. Because Plaintiff alleges that Gardner engaged in asset
5 stripping and using BBE as a device to avoid liability, failure to find alter ego would
6 allow Gardner to succeed in his alleged fraudulent scheme to avoid liability. Gardner
7 allegedly placed BBE's assets in Deep Blue Sports's name, and simultaneously
8 negotiated with Plaintiff to release Deep Blue Sports from liability for its past debts
9 without disclosing the asset transfer to Plaintiff. (Compl. ¶ 74.) Plaintiff remained
10 under the impression that BBE was adequately capitalized to operate as a business
11 and maintain a prosperous relationship. (*Id.*) Based on these allegations, Gardner may
12 be liable for Deep Blue Sports and BBE's contract breach and subsequent debts,
13 especially if he caused BBE's insolvency to the detriment of its creditors, like
14 Plaintiff. If the allegations against Gardner, Deep Blue Sports, and BBE prove to be
15 true, then adhering to the fiction of their separate existence would permit an abuse of
16 corporate privilege. As suggested by Plaintiff, it would be inequitable for Gardner to
17 escape liability to Plaintiff by virtue of his fraudulent scheme. And though Gardner
18 contests Plaintiff's claims of fraud and asset stripping (Reply at 1), for jurisdiction,
19 "the plaintiff need only demonstrate facts that if true would support jurisdiction over
20 the defendant." *Unocal*, 248 F.3d at 922. Even construing Gardner's Reply as
21 evidence, the Court resolves these factual conflicts in Platypus's favor. *See*
22 *Schwarzenegger*, 374 F.3d at 800.

23 Because Plaintiff made a prima facie showing that Gardner is the alter ego of
24 Deep Blue Sports and BBE, the Court has sufficient grounds to disregard the
25 corporate form, or pierce the corporate veil. *See Transgo, Inc.*, 768 F.2d at 1021. This
26 makes Gardner subject to the Court's jurisdiction for the contract claims because,
27 where alter ego is established so as to justify piercing the corporate veil, the basis for
28 jurisdiction over the corporation supports jurisdiction over the alter ego stockholder.

1 *See Sheard*, 114 Cal. Rptr. at 745. As discussed above, the Court finds that Deep
2 Blue Sports and BBE are subject to the Court's personal jurisdiction by virtue of their
3 contractual consent. Thus, this basis for personal jurisdiction over Deep Blue Sports
4 and BBE—their consent to jurisdiction—establishes the Court's jurisdiction over
5 Gardner.

6 In sum, the Court finds that Plaintiff has shown that Gardner is the alter ego of
7 BBE and Deep Blue Sports for the purposes of personal jurisdiction. Because BBE
8 and Deep Blue Sports consented to the Court's jurisdiction in their agreements with
9 Plaintiff, Gardner, as an alter ego, is also subject to the Court's jurisdiction for the
10 actions arising out of these agreements.


11
12 **V. CONCLUSION**

13 For the foregoing reasons, the Court **DENIES** Gardner's Motion to Dismiss
14 (ECF No. 38.) The Court **ORDERS** Gardner to file an answer to Plaintiff's complaint
15 **no later than August 30, 2018**. If Gardner fails to file an answer by that date, he will
16 be subject to an entry of default.

17 Additionally, the Court **DENIES** Plaintiff's Motion to Strike (ECF No. 44).

18 **IT IS SO ORDERED.**

19
20 **Dated: August 2, 2018**


21 **Hon. Cynthia Bashant**
22 **United States District Judge**