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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
9

10 MARCO POLO, INC.,

11 Plaintiff,

12 v.

13 ROBERT FOSTER,

14 Defendant.

Case No.: 17-cv-1935-WQH-BLM

ORDER

15
16 HAYES, Judge:

17 The matter before the Court is the Motion to Dismiss (ECF No. 12) filed by
18 Defendant Robert Foster.

19 **I. Background**

20 On September 22, 2017, Plaintiff Marco Polo, Inc. (“MPI”) initiated this action by
21 filing the Complaint (ECF No. 1). The Complaint brings claims for breach of fiduciary
22 duty, breach of contract, and conversion. Compl. at 1. On November 27, 2017, Defendant
23 Robert Foster filed the Motion to Dismiss (ECF No. 12) and a Memorandum of Points and
24 Authorities in Support of Motion to Dismiss (ECF No. 13). Foster attached the Declaration
25 of Robert Foster (ECF No. 12-1) to the Motion to Dismiss (ECF No. 12). On December
26 19, 2017, MPI filed an Opposition to Defendant Robert Foster’s Motion to Dismiss. (ECF
27 No. 15). On December 26, 2017, Foster filed a Reply in Support of Motion to Dismiss.
28 (ECF No. 16).

1 **II. Allegations of the Complaint**

2 “Marco Polo serves a wealthy and prominent philanthropist and businessman
3 [(]‘Prominent Individual.’[)]” Compl. at ¶ 9. “Marco Polo interviews, hires, pays and
4 generally oversees employees who service Prominent Individual’s estate and help in his
5 and his family’s day to day affairs.” *Id.*

6 “Foster was formerly employed by Marco Polo.” *Id.* at ¶ 4. “Foster was hired, paid,
7 and trusted[] to ethically work for Marco Polo and for the benefit of . . . Prominent
8 Individual, as well as a family member of Prominent Individual.” Compl. at ¶ 18. “[A]s a
9 condition of his employment with Marco Polo, . . . Foster executed the Confidentiality
10 Agreement.” Compl. at ¶ 11. Under the terms of the Confidentiality Agreement, Foster
11 agreed that he would not “disclose” or “otherwise use or exploit any information
12 concerning [Prominent Individual] and/or MPI” “except as required by [his] relationship
13 with [Prominent Individual] and/or MPI or expressly consented to in advance in writing by
14 [Prominent Individual] or a duly authorized representative of [Prominent Individual].”
15 (ECF No. 1 at 12). “Foster has now threatened to . . . dispel[] both confidential information
16 and untold falsities and secrets about Prominent Individual and his family.” Compl. at ¶
17 12. “Foster has already disclosed certain confidential information regarding Prominent
18 Individual to one or more third parties.” *Id.* at ¶ 24. “Foster acted with full knowledge and
19 with reckless disregard for the consequences and damages being caused by his actions,
20 both to Marco Polo and Prominent Individual.” *Id.* at ¶ 19.

21 “During his employment with Marco Polo, Foster had access to a company credit
22 card and/or petty cash (collectively ‘Corporate Funds’).” Compl. at ¶ 14. “Foster was
23 entrusted with and authorized to use Corporate Funds exclusively for the benefit of Marco
24 Polo.” *Id.* “Foster extensively used Corporate Funds for personal and/or non-business
25 related purchases, without permission from Marco Polo or an authorized agent of Marco
26 Polo” *Id.* at ¶ 15. “Foster used Corporate Funds to [sic] for personal and/or non-
27 business related gifts, meals, gas, entertainment, alcohol, Christmas shopping, various
28 memberships, and pawn shop purchases, to name a few.” *Id.*

1 **III. Facts**

2 MPI is a California corporation with its principal place of business in San Diego,
3 California. Declaration of Diane Fisher, ECF No. 15-2, at ¶¶ 11, 14.¹ MPI hired Foster in
4 September 2010. Fisher Decl. at ¶ 4. Foster executed the Confidentiality Agreement in
5 San Diego, California on October 6, 2010. (ECF No. 1 at 14). The Confidentiality
6 Agreement provided that, “[a]s part of the consideration for undertaking [an employment]
7 relationship and being compensated by MPI, [Foster] agree[d]” not to “disclose, publish,
8 or make available any ‘INFORMATION’ concerning [Prominent Individual] and/or MPI”
9 *Id.* at 12. The Confidentiality Agreement stated that MPI was a California corporation. *Id.*
10 The Confidentiality Agreement stated that it “shall be governed by the laws of California.”
11 *Id.* at 13.

12 “Foster worked predominantly in California from the time he was hired by MPI until
13 2012, when he was tasked with overseeing a project in Hawaii.” Declaration of Wilfred
14 Davis, ECF No. 15-1, at ¶ 5; Fisher Decl. at ¶ 10; *see also* Foster Decl. at ¶¶ 11, 15. From
15 2012 through 2017, Foster consistently traveled to California for business purposes. *See*
16 Davis Decl. at ¶ 5 (From 2012 through 2017, “Foster traveled from Hawaii to California
17 four to six times per year, and on average would stay in California for approximately two
18 weeks each time he made the trip.”); Foster Decl. at ¶¶ 27–28 (“I would also fly to San
19 Diego, California to provide company and protection for the owner of Marco Polo during
20 the many trips that he took outside California. During these assignments, I would meet the
21 owner of Marco Polo in California and then we would travel mostly outside of
22 California.”).

23 “The company card that Mr. Foster utilized during his employment was paid by MPI
24 from its corporate office in San Diego, California.” Fisher Decl. at ¶ 14.

25
26
27 ¹ Foster contends that MPI’s “CEO (and therefore principal place of business) was in Hawaii,” (ECF
28 No. 16 at 10) but does not present any evidence in support of that contention, *see* Foster Decl.; Second
Foster Declaration (ECF No. 16-1).

1 **IV. Motion to Dismiss for Lack of Jurisdiction**

2 Foster moves to dismiss the Complaint on the grounds that the Court does not have
3 personal jurisdiction over Foster. (ECF No. 13 at 8–16). MPI contends that the Court does
4 have personal jurisdiction over Foster. (ECF No. 15 at 9–17).

5 **A. Standard of Review**

6 “In opposition to a defendant’s motion to dismiss for lack of personal jurisdiction,
7 the plaintiff bears the burden of establishing that jurisdiction is proper.” *Boschetto v.*
8 *Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Where, as here, the parties have submitted
9 declarations and exhibits in support of their motion and opposition; *see* attachments to ECF
10 Nos. 12, 15, and 16; the Court considers both the allegations in the plaintiff’s complaint
11 and the factual material submitted. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d
12 1218, 1223 (9th Cir. 2011). The Court accepts as true all uncontroverted allegations in the
13 plaintiff’s complaint and “draw[s] reasonable inferences from the complaint in favor of the
14 plaintiff.” *Fiore v. Walden*, 688 F.3d 558, 574–75 (9th Cir. 2012), *rev’d on other grounds*,
15 134 S. Ct. 1115 (2014). However, the Court does not accept as true allegations that are
16 contradicted by factual material submitted by the parties. *Mavrix*, 647 F.3d at 1223
17 (*quoting Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir. 1977)).

18 **B. Discussion**

19 “Where, as here, no federal statute authorizes personal jurisdiction, the district court
20 applies the law of the state in which the court sits.” *Mavrix*, 647 F.3d at 1223. The
21 California statute that authorizes courts to exercise personal jurisdiction over residents of
22 other states “is coextensive with federal due process requirements, so the jurisdictional
23 analyses under state law and federal due process are the same.” *Id.*

24 *Int’l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*
25 established that a state may exercise jurisdiction over a defendant without violating due
26 process if the defendant has “certain minimum contacts with [the state] such that the
27 maintenance of the suit does not offend ‘traditional notions of fair play and substantial
28 justice.’” 326 U.S. 310, 316 (1945).

1 *International Shoe*'s conception of "fair play and substantial justice" presaged
2 the development of two categories of personal jurisdiction. The first category
3 is represented by *International Shoe* itself, a case in which the in-state
4 activities of the corporate defendant . . . gave rise to the liabilities sued on. . . .
5 Adjudicatory authority of this order, in which the suit arises out of or relates
6 to the defendant's contacts with the forum, is today called specific
7 jurisdiction.

8 *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (citations and quotations omitted).

9 *International Shoe* distinguished between, on the one hand, exercises of
10 specific jurisdiction, as just described, and on the other, situations where a
11 foreign corporation's continuous corporate operations within a state are so
12 substantial and of such a nature as to justify suit against it on causes of action
13 arising from dealings entirely distinct from those activities. . . . [A] a court
14 may assert general jurisdiction over foreign . . . corporations to hear any and
15 all claims against them when their affiliations with the State are so continuous
16 and systematic as to render them essentially at home in the forum State.

17 *Id.* (citations and quotations omitted). MPI does not contend that the Court has general
18 jurisdiction over Foster. *See* ECF No. 15.

19 The Court of Appeals has established three requirements that must be met for a court
20 to have specific jurisdiction over a non-resident defendant. First, "The non-resident
21 defendant must purposefully direct his activities or consummate some transaction with the
22 forum or resident thereof; or perform some act by which he purposefully avails himself of
23 the privilege of conducting activities in the forum, thereby invoking the benefits and
24 protections of its laws." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802
25 (9th Cir. 2004) (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). Purposeful
26 "availment and direction are, in fact, two distinct concepts. A purposeful availment
27 analysis is most often used in suits sounding in contract. A purposeful direction analysis,
28 on the other hand, is most often used in suits sounding in tort." *Id.* (citations omitted). The
second requirement is that "the claim must be one which arises out of or relates to the
defendant's forum-related activities." *Id.* at 802 (quoting *Lake*, 817 F.2d at 1421). The
final requirement is that "the exercise of jurisdiction must comport with fair play and
substantial justice, i.e. it must be reasonable." *Id.* (quoting *Lake*, 817 F.2d at 1421).

1 **1. Purposeful Availment**

2 Foster contends that “there has been no purposeful availment by Defendant” because
3 “[o]ther than his activities with Plaintiff, Defendant has no other meaningful connections
4 or contacts with California.” (ECF No. 13 at 13–14). MPI contends that the evidence
5 before the Court establishes that “[t]he purposeful availment test is . . . easily satisfied in
6 this case.” (ECF No. 15 at 12).

7 “To be subject to specific jurisdiction, a defendant must have ‘purposefully
8 avail[ed] itself of the privilege of conducting activities within the forum State, thus
9 invoking the benefits and protections of its laws.’” *Sher v. Johnson*, 911 F.2d 1357, 1362
10 (9th Cir. 1990) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).
11 “[T]he ‘purposeful availment’ requirement is satisfied if the defendant has taken deliberate
12 action within the forum state or if he has created continuing obligations to forum residents.”
13 *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) (citing *Hirsch v. Blue Cross, Blue*
14 *Shield of Kansas City*, 800 F.2d 1474, 1478 (9th Cir. 1986)). “A showing that a defendant
15 purposefully availed himself of the privilege of doing business in a forum state typically
16 consists of evidence of the defendant’s actions in the forum, such as executing or
17 performing a contract there.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,
18 802 (9th Cir. 2004). “[T]he mere existence of a contract with a party in the forum state
19 does not constitute sufficient minimum contacts for jurisdiction”; courts must consider
20 “prior negotiations and contemplated future consequences, along with the terms of the
21 contract and the parties’ actual course of dealing.” *Sher*, 911 F.2d at 1362 (quoting *Burger*
22 *King*, 471 U.S. at 479)

23 Foster correctly contends that purposeful availment analysis examines the “contacts
24 that the ‘defendant himself’ creates with the forum State,” not “contacts between the
25 plaintiff (or third parties) and the forum State.” ECF No. 13 at 9 (quoting *Burger King*,
26 471 U.S. at 475). However, Foster incorrectly relies on this rule to contend that “his
27 activities with Plaintiff . . . cannot be the basis for personal jurisdiction for purposeful
28 availment purposes.” *Id.* at 14. Courts consider a defendant’s contacts with the forum state

1 even if they occur within the context of the defendant’s relationship with the plaintiff. *See*
2 *Sher*, 911 F.2d at 1362 (quoting *Burger King*, 471 U.S. at 479) (Courts “must look to ‘prior
3 negotiations and contemplated future consequences, along with the terms of the contract
4 and the parties’ actual course of dealing’ to determine if the defendant's contacts are
5 ‘substantial.’”).

6 MPI hired Foster in September 2010. Fisher Decl. at ¶ 4. Foster executed the
7 Confidentiality Agreement in San Diego, California on October 6, 2010. (ECF No. 1 at
8 14). The Confidentiality Agreement provided that, “[a]s part of the consideration for
9 undertaking [an employment] relationship and being compensated by MPI, [Foster]
10 agree[d]” not to “disclose, publish, or make available any ‘INFORMATION’ concerning
11 [Prominent Individual] and/or MPI.” *Id.* at 12. The Confidentiality Agreement informed
12 Foster that MPI was a California corporation. *Id.* The Confidentiality Agreement stated
13 that it “shall be governed by the laws of California.” *Id.* at 13.

14 “Foster worked predominantly in California from the time he was hired by MPI until
15 2012.” Davis Decl. at ¶ 5; *see also* Foster Decl. at ¶¶ 11, 15. From 2012 through 2017,
16 Foster consistently traveled to California for business purposes. *See* Davis Decl. at ¶ 5
17 (From 2012 through 2017, “Foster traveled from Hawaii to California four to six times per
18 year, and on average would stay in California for approximately two weeks each time he
19 made the trip.”); Foster Decl. at ¶¶ 27–28 (“I would also fly to San Diego, California to
20 provide company and protection for the owner of Marco Polo during the many trips that he
21 took outside California. During these assignments, I would meet the owner of Marco Polo
22 in California and then we would travel mostly outside of California.”).

23 The Court finds that the evidence in the record demonstrates that Foster “has taken
24 deliberate action within [California and] has created continuing obligations to [California]
25 residents.” *Ballard*, 65 F.3d at 1498 (citing *Hirsch*, 800 F.2d at 1478). By doing so, Foster
26 “ha[s] ‘purposefully avail[ed] [him]self of the privilege of conducting activities within
27 [California], thus invoking the benefits and protections of its laws.’” *Sher*, 911 F.2d at
28 1362 (quoting *Burger King*, 471 U.S. at 475).

1 **2. Purposeful Direction**

2 Foster contends that he has not purposefully directed his activities at California
3 because he committed “no intentional act aimed at . . . California.” (ECF No. 13 at 14).
4 MPI contends that the purchases that Foster allegedly made using corporate funds were
5 intentional acts expressly aimed at California. (ECF No. 15 at 13).

6 A defendant has purposefully directed his activities toward a state if the defendant
7 has “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing
8 harm that the defendant knows is likely to be suffered in the forum state.” *Schwarzenegger*,
9 374 F.3d at 805 (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)).
10 “[T]he [express aiming] requirement is satisfied when the defendant is alleged to have
11 engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a
12 resident of the forum state.” *Bancroft*, 223 F.3d at 1087.

13 The Complaint alleges that Foster “used Corporate Funds for personal and/or non-
14 business related purchases, without permission from Marco Polo or an authorized agent of
15 Marco Polo.” Compl. at ¶ 15. The Complaint alleges that Foster committed intentional
16 acts: making purchases with MPI funds that were unrelated to MPI’s business. Those
17 alleged acts were targeted at MPI. Foster knew MPI was a resident of California. *See* ECF
18 No. 1 at 12. Accordingly, Foster’s alleged intentional acts were expressly aimed at
19 California and allegedly caused harm that Foster knew was likely to be suffered in
20 California. Foster purposefully directed his alleged tortious acts toward California.

21 **3. Relation to Forum-Related Activities**

22 MPI contends that “all of MPI’s causes of action arise out of or relate to
23 Defendant’s forum-related activities.” (ECF No. 15 at 14). Foster does not dispute this
24 contention. A cause of action arises out of or relates to a defendant’s forum-related
25 activities if the plaintiff would not have suffered its alleged injuries but for the defendant’s
26 forum-related activities. *Bancroft*, 223 F.3d at 1088 (citing *Ziegler v. Indian River County*,
27 64 F.3d 470, 474 (9th Cir. 1995)). MPI’s claims for breach of contract and breach of
28 fiduciary duty arise out of Foster’s conduct in California: but for Foster signing the

1 Confidentiality Agreement and other agreements with MPI, which he did in California,
2 Foster could not have breached the Confidentiality Agreement or his alleged fiduciary
3 duties to MPI. *See* ECF No. 1 at 14. MPI’s claim for conversion arises out of Foster’s
4 conduct purposefully directed at California, specifically Foster’s alleged uses of MPI funds
5 for purchases unrelated to MPI’s business.

6 **4. Reasonableness**

7 Foster contends that it would be unreasonable for the Court to exercise personal
8 jurisdiction over Foster because (1) “Defendant has not purposely interjected himself into
9 the forum state,” (2) “it would be a tremendous burden to force Defendant to litigate this
10 case in California[] since he lives in Hawaii, is unemployed and has limited means,” (3)
11 “the majority of the witnesses live in Hawaii,” (4) “the acts complained of by Plaintiff
12 occurred in Hawaii,” and (5) “Hawaii is a more appropriate forum.” (ECF No. 13 at 15–
13 16). MPI contends that Foster has not presented a compelling case that it would be
14 unreasonable for the Court to exercise jurisdiction because (1) Foster’s “contacts with
15 California were extensive,” (2) Foster has not presented evidence showing that litigating
16 in California would be a tremendous burden, and (3) Foster’s contention that the majority
17 of witnesses live in Hawaii “is contradicted by Defendant’s own declaration.” (ECF No.
18 15 at 16–17).

19 Courts “presume that an otherwise valid exercise of specific jurisdiction is
20 reasonable.” *Ballard*, 65 F.3d at 1500 (citing *Sher*, 911 F.2d at 1364). The burden is on
21 the plaintiff to “present a compelling case that the presence of some other considerations
22 would render jurisdiction unreasonable.” *Burger King*, 471 U.S. at 477. To determine
23 whether an exercise of specific jurisdiction is reasonable, courts consider a number of
24 factors including

- 25 (1) the extent of a defendant’s purposeful interjection; (2) the burden on the
26 defendant in defending in the forum; (3) the extent of conflict with the
27 sovereignty of the defendant’s state; (4) the forum state’s interest in
28 adjudicating the dispute; (5) the most efficient judicial resolution of the

1 controversy; (6) the importance of the forum to the plaintiff’s interest in
2 convenient and effective relief; and (7) the existence of an alternative forum.

3 *Panavision Int’l, L.P. v. Toebben*, 141 F.3d 1316, 1323 (9th Cir. 1998), *overruled on other*
4 *grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199
5 (9th Cir. 2006) (citing *Burger King*, 471 U.S. at 476–77).

6 Foster has purposefully interjected himself into California in a number of ways.
7 Foster accepted a position with a company that he knew was a California corporation.
8 Fisher Decl. at ¶ 4; ECF No. 1 at 12. Foster executed the Confidentiality Agreement in
9 California knowing that it was governed by California law. (ECF No. 1 at 13–14). Foster
10 worked in California from 2010 to 2012, and from 2012 to 2017 he consistently travelled
11 to California for business purposes. Foster Decl. at ¶¶ 11, 15, 27–28.

12 Foster has not established that litigating this case in California would be an
13 unreasonable burden on him. While Foster contends that he “is unemployed and has
14 limited means,” (ECF No. 13 at 15), he has not presented any evidence to that effect, *see*
15 Foster Decl.; Second Foster Decl.

16 Accordingly, the Court finds that Foster has failed to present a compelling case that
17 it would be unreasonable for the Court to exercise personal jurisdiction over him.

18 **5. Conclusion**

19 Foster has purposefully directed activities toward California and purposefully
20 availed himself of the privilege of conducting activities in California. *See supra* Sections
21 IV.B.1 and IV.B.2. MPI’s claims arise out Foster’s California-related activities. *See supra*
22 Section IV.B.3. Foster has not presented a compelling case that it would be unreasonable
23 for the Court to exercise personal jurisdiction over him. *See supra* Section IV.B.4.
24 Accordingly, the Court has specific personal jurisdiction over Foster. *See Schwarzenegger*,
25 374 F.3d at 802 (quoting *Lake*, 817 F.2d at 1421).

26 **V. Motion to Dismiss for Improper Venue**

27 Foster contends that the Court should dismiss this case or transfer it to the District
28 of Hawaii for “the convenience of the parties, the convenience of the witnesses, and the

1 interest of justice.” ECF No. 13 at 16 (numbering omitted). MPI contends that venue is
2 proper in this Court “because a substantial part of the events or omissions giving rise to the
3 claim occurred in San Diego.” (ECF No. 15 at 18).

4 Federal Rule of Civil Procedure 12(b)(3) “states that a party may move to dismiss a
5 case for ‘improper venue.’” *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of*
6 *Texas*, 571 U.S. 49, 134 (2013) (quoting Fed. R. Civ. P. 12(b)(3)). Once venue is
7 challenged, the plaintiff has the burden of showing that the current venue is proper.
8 *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). When
9 analyzing a motion to dismiss under Rule 12(b)(3), courts need not accept all allegations
10 as true and may consider facts outside of the pleadings. *Argueta v. Banco Mexicano, S.A.*,
11 87 F.3d 320, 324 (9th Cir. 1996).

12 “[W]hether venue is ‘wrong’ or ‘improper’ [] is generally governed by 28 U.S.C.
13 § 1391.” *Id.* Under § 1391, venue is proper in three categories of districts. *See* 28 U.S.C.
14 § 1391(b). One category includes “judicial district[s] in which a substantial part of the
15 events or omissions giving rise to the claim occurred.” *Id.* at § 1391(b)(2).

16 The “substantiality” requirement of § 1391(a)(2) “is intended to preserve the
17 element of fairness so that a defendant is not haled into a remote district
18 having no real relationship to the dispute.” *Cottman Transmission Sys., Inc.*
19 *v. Martino*, 36 F.3d 291, 294 (3rd Cir. 1994). A “substantial part of the events
20 or omissions” does not mean, however, that the events in that district
21 predominate or that the chosen district is the “best venue.” *Pecoraro v. Sky*
22 *Ranch for Boys, Inc.*, 340 F.3d 558, 563 (8th Cir. 2003); *First of Mich. Corp.*
23 *v. Bramlet*, 141 F.3d 260, 264 (6th Cir. 1998); *see also Mitrano v. Hawes*, 377
24 F.3d 402, 405 (4th Cir. 2004) (noting that “it is possible for venue to be proper
25 in more than one judicial district”). “Only the events that directly give rise to
26 a claim are relevant. And of the places where the events have taken place, only
27 those locations hosting a ‘substantial part’ of the events are to be considered.”
28 *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371 (11th Cir. 2003); *Silver*
Valley Partners L.L.C. v. De Motte, 400 F. Supp. 2d 1262, 1269 (W. D. Wash
2005) (same).

Duarte v. California Hotel & Casino, 2009 WL 4668739, at *2 (D. Haw. Dec. 4, 2009).

Foster executed the Confidentiality Agreement in San Diego. (ECF No. 1 at 13–14).
MPI is a California corporation with its principal place of business in San Diego, so the

1 effects of any injuries that MPI sustained as a result of Foster’s alleged breaches were felt
2 in San Diego. *See* Fisher Decl. at ¶¶ 11, 14. The Court finds that these acts form a
3 substantial part of the events or omissions giving rise to MPI’s claims for breach of contract
4 and breach of fiduciary duty. *See Renteria v. Ramanlal*, No. CV-07-00658-PHX-ROS,
5 2009 WL 73675, at *6 (D. Ariz. Jan. 9, 2009) (finding that, “[w]hile it may indeed be
6 correct to say that Hawai‘i was the district where the most significant events or omissions
7 occurred,” venue was proper in Arizona because “[Plaintiff] was resident in Arizona at all
8 times relevant to the case, including when he negotiated and executed the agreement at
9 issue,” “[Plaintiff’s company was] headquartered in Arizona,” “any financial injury
10 suffered by Plaintiffs was suffered in Arizona where their business and finances are
11 located,” and “Defendants were well aware that they were entering into business deals with
12 parties centered in Arizona”); *ESI, Inc. v. Coastal Power Prod. Co.*, 995 F. Supp. 419, 425
13 (S.D.N.Y. 1998) (“Venue may be proper in the district where the contract was substantially
14 negotiated, drafted, and/or executed, even if the contract was not to be performed in that
15 district and the alleged breach occurred elsewhere.”). Consequently, the Southern District
16 of California is a proper venue for MPI’s claims for breach of contract and breach of
17 fiduciary duty. *See Atl. Marine*, 571 U.S. at 134.

18 Certain events relating to MPI’s claim for conversion also occurred in California.
19 Foster made some of the purchases that allegedly amounted to conversion in California.
20 Fisher Decl. at ¶ 13; Foster Decl. at ¶ 20. MPI paid the credit card that Foster used to make
21 some of the purchases that allegedly amounted to conversion from its corporate office in
22 San Diego. Fisher Decl. at ¶ 14. MPI is a California corporation with its principal place
23 of business in San Diego, so the effects of any injuries that MPI sustained as a result of
24 Foster’s alleged conversions were felt in San Diego. *See* Fisher Decl. at ¶¶ 11, 14. The
25 Court finds that these acts form a substantial part of the events or omissions giving rise to
26 MPI’s claim for conversion. *See CBC Framing, Inc. v. Flores*, No. CV0800150MMMJCX,
27 2008 WL 11337545, at *5 (C.D. Cal. May 19, 2008) (“Because CBC has shown that a
28 substantial part of the events giving rise to the claim occurred in Central District—by virtue

1 of the fact that it is the district where it was injured by defendants’ alleged activities—the
2 court concludes that venue is proper despite the fact that defendants may have greater
3 contacts with [other districts].”). The Southern District of California is a proper venue.

4 **VI. Motion to Dismiss for Failure to State a Claim**

5 Foster moves to dismiss MPI’s claims for failure to state a claim. (ECF No. 13 at
6 17–24). MPI contends that the Complaint adequately states claims for breach of contract,
7 breach of fiduciary duty, and conversion. (ECF No. 15 at 19–22).

8 **A. Standard of Review**

9 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a
10 claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil
11 Procedure 8(a)(2) provides that “[a] pleading that states a claim for relief must contain . . .
12 a short and plain statement of the claim showing that the pleader is entitled to relief.” “A
13 district court’s dismissal for failure to state a claim under Federal Rule of Civil Procedure
14 12(b)(6) is proper if there is a ‘lack of a cognizable legal theory or the absence of sufficient
15 facts alleged under a cognizable legal theory.’” *Conservation Force v. Salazar*, 646 F.3d
16 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699
17 (9th Cir. 1990)).

18 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
19 requires more than labels and conclusions, and a formulaic recitation of the elements of a
20 cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting
21 Fed. R. Civ. P. 8(a)). “To survive a motion to dismiss, a complaint must contain sufficient
22 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
23 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim
24 has facial plausibility when the plaintiff pleads factual content that allows the court to draw
25 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing
26 *Twombly*, 550 U.S. at 570). “When there are well-pleaded factual allegations, a court
27 should assume their veracity and then determine whether they plausibly give rise to an
28 entitlement to relief.” *Id.* at 679.

1 **B. Contract-Based Claims**

2 Foster contends that “the factual explanation [of MPI’s claims for breach of contract
3 and breach of fiduciary duty] as laid out in the Complaint is too thin to be plausible
4 [because] there are no facts as to what exactly was said, when it was said . . . , [and in what]
5 the circumstances.” (ECF No. 13 at 22). Foster contends that all MPI has provided “are
6 legal conclusions based on a very thin factual context.” *Id.*² MPI contends that the
7 Complaint states claims for breach of contract and breach of fiduciary duty. *Id.* at 19–22.

8 **1. Breach of Contract**

9 To state a claim for breach of contract, a plaintiff must allege “(1) the contract, (2)
10 the plaintiff’s performance of the contract or excuse for nonperformance, (3) the
11 defendant’s breach, and (4) the resulting damage to the plaintiff.” *Richman v. Hartley*, 169
12 Cal. Rptr. 3d 475, 478 (Cal. Ct. App. 2014) (citing *Careau & Co. v. Sec. Pac. Bus. Credit*,
13 *Inc.*, 272 Cal. Rptr. 387, 395 (Cal. Ct. App. 1990), *as modified on denial of reh’g* (Oct.
14 31, 2001)).

15 MPI alleges that “as a condition of his employment with Marco Polo, and as a
16 condition to living rent-free on a palatial estate in Hawaii while overseeing the residence,
17 Foster executed the Confidentiality Agreement.” Compl. at ¶ 11. Under the terms of the
18 Confidentiality Agreement, Foster agreed that he would not “disclose” or “otherwise use
19 or exploit any information concerning [Prominent Individual] and/or MPI” “except as
20 required by [his] relationship with [Prominent Individual] and/or MPI or expressly
21 consented to in advance in writing by [Prominent Individual] or a duly authorized
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23
24 ² Foster also contends that MPI’s claims for breach of contract and breach of fiduciary duty should be
25 dismissed because the Confidentiality Agreement is unenforceable. (ECF No. 13 at 21). Foster contends
26 that the Confidentiality Agreement is unenforceable because “Plaintiff is attempting to suppress
27 Defendant’s ability to obtain discovery and evidence he needs to prevail on his whistleblowing retaliation
28 claim.” *Id.* The Complaint does not discuss any claims filed by Foster. *See* Compl. Foster’s contention
that the Confidentiality Agreement is unenforceable therefore asks the Court to consider material outside
of the pleadings. The Court cannot consider material outside of the pleadings when reviewing Foster’s
Motion to Dismiss. *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). Consequently, at this
stage of the proceedings, the Court does not find that the Confidentiality Agreement is unenforceable.

1 representative of [Prominent Individual].” (ECF No. 1 at 12). MPI alleges that “Foster
2 has now threatened to breach exactly those contractual obligations by dispelling both
3 confidential information and untold falsities and secrets about Prominent Individual and
4 his family.” Compl. at ¶ 12. MPI alleges that “[b]y merely having to pursue this legal
5 remedy and to address Foster’s threatened actions, Marco Polo has suffered injuries, and
6 will suffer far more severe injuries if and when Foster follows through on his threatened
7 actions in breach of the Confidentiality Agreement.” *Id.* at ¶ 23. MPI further alleges that
8 “Foster has already disclosed certain confidential information regarding Prominent
9 Individual to one or more third parties.” *Id.* at ¶ 24.

10 The Court finds that Foster is not entitled to a dismissal of MPI’s breach of contract
11 claim even though MPI does not provide specific detail concerning Foster’s alleged threats
12 and disclosures. *See Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556) (“A claim
13 has facial plausibility when the plaintiff pleads factual content that allows the court to draw
14 the reasonable inference that the defendant is liable for the misconduct alleged.”).

15 2. Breach of Fiduciary Duty

16 “To establish a cause of action for breach of fiduciary duty, a plaintiff must
17 demonstrate the existence of a fiduciary relationship, breach of that duty and damages.”
18 *Shopoff & Cavallo LLP v. Hyon*, 85 Cal. Rptr. 3d 268, 285 (Cal. Ct. App. 2008) (citing
19 *Charnay v. Cobert*, 51 Cal. Rptr. 3d 471, 480 (Cal. Ct. App. 2006)).

20 MPI alleges that “Foster was hired, paid, and trusted[] to ethically work for Marco
21 Polo and for the benefit of what was effectively Marco Polo’s client, Prominent Individual,
22 as well as a family member of Prominent Individual.” Compl. at ¶ 18. MPI alleges that
23 “Foster has now threatened to . . . dispel[] both confidential information and untold falsities
24 and secrets about Prominent Individual and his family.” *Id.* at ¶ 12. MPI alleges that “[b]y
25 merely having to pursue this legal remedy and to address Foster’s threatened actions,
26 Marco Polo has suffered injuries, and will suffer far more severe injuries if and when Foster
27 follows through on his threatened actions in breach of the Confidentiality Agreement.” *Id.*
28 at ¶ 23. MPI further alleges that “Foster has already disclosed certain confidential

1 information regarding Prominent Individual to one or more third parties.” *Id.* at ¶ 24. MPI
2 alleges that “Foster acted with full knowledge and with reckless disregard for the
3 consequences and damages being caused by his actions, both to Marco Polo and Prominent
4 Individual.” *Id.* at ¶ 19.

5 Foster is not entitled to a dismissal of MPI’s breach of fiduciary duty claim even
6 though MPI does not provide specific details concerning Foster’s alleged threats and
7 disclosures. *See Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556) (“A claim
8 has facial plausibility when the plaintiff pleads factual content that allows the court to draw
9 the reasonable inference that the defendant is liable for the misconduct alleged.”).

10 C. Conversion

11 Foster contends that MPI has failed to state a claim for conversion because MPI does
12 not allege that Plaintiff converted “a sum certain.” (ECF No. 13 at 23–24). Foster also
13 contends that MPI has failed to state a claim for conversion because the Complaint “fails
14 to give specific information as to what charges [Foster made on the credit card issued by
15 MPI], when those charges were made . . . and at what stores, businesses or vendors.” *Id.*
16 at 24. MPI contends that “California courts generally permit actions for conversion where
17 a readily ascertainable sum has been misappropriated” and that the allegations in the
18 Complaint “plausibly state a claim for conversion.” ECF No. 15 at 22 (citing *PCO, Inc. v.*
19 *Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, 150 Cal. App. 4th 384, 396
20 (Cal. Ct. App. 2007)).

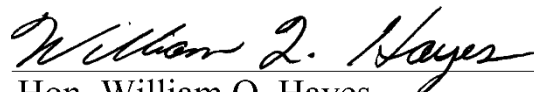
21 “The elements of a conversion cause of action are (1) plaintiffs’ ownership or right
22 to possession of the property at the time of the conversion; (2) defendants’ conversion by
23 a wrongful act or disposition of plaintiffs’ property rights; and (3) damages.” *Graham-Sult*
24 *v. Clainos*, 756 F.3d 724, 737 (9th Cir. 2014) (alteration omitted) (quoting *Hartford Fin.*
25 *Corp. v. Burns*, 158 Cal. Rptr. 169, 172 (Cal. Ct. App. 1979)). “[M]oney cannot be the
26 subject of an action for conversion unless a specific sum capable of identification is
27 involved” *Haigler v. Donnelly*, 117 P.2d 331, 335 (Cal. 1941) (citing *Baxter v. King*,
28 253 P. 172, 172 (Cal. 1927)).

1 MPI alleges that “during his employment with Marco Polo, Foster had access
2 to . . . Corporate Funds Foster was entrusted with and authorized to use Corporate
3 Funds exclusively for the benefit of Marco Polo.” Compl. at ¶ 14. MPI alleges that “Foster
4 extensively used Corporate Funds for personal and/or non-business related purchases,
5 without permission from Marco Polo or an authorized agent of Marco Polo.” *Id.* at ¶ 15.
6 MPI alleges that “Foster used Corporate Funds to [sic] for personal and/or non-business
7 related gifts, meals, gas, entertainment, alcohol, Christmas shopping, various
8 memberships, and pawn shop purchases” *Id.* The Court finds that the Complaint
9 alleges that Foster converted an amount of MPI funds that is capable of identification. The
10 Court finds that the Complaint states a claim for conversion. *See Price v. Synapse Grp.,*
11 *Inc.*, No. 16-CV-01524-BAS-BLM, 2017 WL 3131700, at *9 (S.D. Cal. July 24, 2017)
12 (citing *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1180 (S.D. Cal. 2010); *Welco*
13 *Elecs., Inc. v. Mora*, 166 Cal. Rptr. 3d 877, 882–87 (Cal. Ct. App. 2014)) (“Plaintiffs allege
14 . . . damages in the form of charges to their credit cards [and] that the amount of money
15 wrongfully taken is capable of identification. These allegations are sufficient to state a
16 conversion claim.” (citations omitted)).

17 **VII. Conclusion**

18 The Motion to Dismiss (ECF No. 12) filed by Defendant Robert Foster is DENIED.

19 Dated: March 22, 2018

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21 Hon. William Q. Hayes
22 United States District Court
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