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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 TV EARS, INC.,

12 Plaintiff,

Case No.: 3:20-cv-01708-WQH-BGS

ORDER

13 v.

14 JOYSHIYA DEVELOPMENT
15 LIMITED; SHENZHEN
16 SUPERSTAR ELECTRONICS
17 CO., LTD.; SHENZHEN
18 JOYSHIYA ELECTRONIC CO.
19 LTD.; SHENZHEN SIMOLIO
ELECTRONIC CO., LTD.,

Defendants.

20 HAYES, Judge:

21 The matters pending before the Court are the Motion to Dismiss filed by Defendant
22 Shenzhen Simolio Electronic Co., Ltd. (ECF No. 34) and the Motion to File Documents
23 Under Seal filed by Plaintiff TV Ears, Inc. (ECF No. 36).

24 **I. PROCEDURAL BACKGROUND**

25 On September 1, 2020, Plaintiff TV Ears, Inc. initiated this action by filing a
26 Complaint against Defendants Joyshiya Development Limited (“Joyshiya Development”);
27 Shenzhen Superstar Electronics Co. Ltd. (“Shenzhen Superstar”); Shenzhen Joyshiya
28 Electronic Co. Ltd. (“Shenzhen Joyshiya”); and Zhuoya Gao. On November 16, 2020,

1 Plaintiff filed a First Amended Complaint that added Shenzhen Simolio Electronic Co.,
2 Ltd. (“Shenzhen Simolio”) as a Defendant. On February 17, 2021, the Clerk of the Court
3 entered default against all Defendants named in the First Amended Complaint. (ECF No.
4 19).

5 On March 5, 2021, Defendants Shenzhen Simolio and Zhuoya Gao filed a Motion
6 to Set Aside Default, and a Motion to Dismiss the First Amended Complaint. On April 5,
7 2021, Plaintiff and Defendants Shenzhen Simolio and Zhuoya Gao filed a Joint Motion for
8 Extension of Time to File Answer to Complaint and Withdraw Defendants’ Motions to
9 Dismiss and to Set Aside Default. (ECF No. 27). The joint motion requested that the
10 Court: (1) permit Defendants Shenzhen Simolio and Zhuoya Gao to withdraw their Motion
11 to Dismiss and Motion to Set Aside Default; (2) authorize Plaintiff to conduct jurisdictional
12 written discovery and to file a second amended complaint; and (3) require Defendants
13 Shenzhen Simolio and Zhuoya Gao to file a responsive pleading to the First Amended
14 Complaint within seventy days if Plaintiff did not file a second amended complaint. On
15 April 8, 2021, the Court issued an Order granting the parties’ joint motion.¹ (ECF No. 28).

16 On June 30, 2021, Plaintiff filed a Second Amended Complaint against all
17 Defendants named in the First Amended Complaint, except Zhuoya Gao. (ECF No. 31).
18 Plaintiff alleges that Defendants engaged in the “unauthorized use of Plaintiff’s trademarks
19 in connection with the manufacture, distribution, marketing, advertising, promotion,
20 offering for sale, and/or sale of Defendants’ wireless TV audio products and/or in
21 Defendants’ unauthorized use, importation, offer for sale, and sale of Defendants’ wireless
22 TV audio products.” (*Id.* ¶ 1). Plaintiff brings the following ten causes of action: (1)
23 federal trademark infringement; (2) infringement of United States Design Patent No.

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26 ¹ The Court’s Order (ECF No. 28) did not set aside the entry of default as to Defendants Shenzhen Simolio
27 and Zhuoya Gao. However, the joint motion (ECF No. 27) requested that Defendants Shenzhen Simolio
28 and Zhuoya Gao be permitted to file responsive pleadings, and default as to Defendants Shenzhen Simolio
and Zhuoya Gao is set aside.

1 D582,900; (3) federal trademark counterfeiting; (4) federal trade dress infringement; (5)
2 federal unfair competition and false designation; (6) federal dilution by blurring; (7)
3 trademark infringement under the common law; (8) California unfair competition; (9)
4 contributory trademark infringement; and (10) contributory patent infringement. Plaintiff
5 seeks injunctive relief, declaratory relief, enhanced and statutory damages, accounting and
6 paying over to Plaintiff Defendants' profits, costs and reasonable attorneys' fees, and "such
7 other and further relief as the Court deems just and proper." (*Id.* at 45-47).

8 On July 14, 2021, Defendant Shenzhen Simolio filed a Motion to Dismiss Plaintiff's
9 Second Amended Complaint for lack of personal jurisdiction pursuant to Federal Rule of
10 Civil Procedure 12(b)(2) and for failure to state a claim upon which relief can be granted
11 pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 34). On August 6, 2021,
12 Plaintiff filed an Opposition (ECF No. 35), and a Motion to File Documents Under Seal
13 (ECF No. 36), seeking to seal documents filed as exhibits to Plaintiff's Opposition. On
14 August 13, 2021, Defendant Shenzhen Simolio filed a Reply. (ECF No. 39). On
15 November 8, 2021 Defendant Shenzhen Simolio filed a Response in support of Plaintiff's
16 Motion to File Documents Under Seal. (ECF No. 42).

17 **II. ALLEGATIONS OF THE SECOND AMENDED COMPLAINT**

18 Plaintiff is a Nevada corporation that has its principal place of business in Spring
19 Valley, California. Plaintiff "has been a market leader in the TV listening device market
20 for over 20 years" and has sold over three million TV listening devices. (ECF No. 31 ¶ 7).
21 Plaintiff is the owner of United States Design Patent No. D582,900 ("the '900 patent"),
22 which "claims the ornamental design . . . for a dual headset cradle." (*Id.* ¶¶ 30-32). Plaintiff
23 is the owner of "United States Trademark Registration No. 3387270 . . . for TV • EARS
24 for infrared audio headphone products." (*Id.* ¶ 38). Plaintiff "has used the TV • EARS and
25 TV EARS marks . . . in commerce throughout the United States continuously since April
26 10, 1998 in connection with the manufacture, distribution, offering for sale, sale,
27 marketing, advertising, and promotion of infrared audio headphone products, wireless
28 headsets, and assistive listening devices." (*Id.* ¶ 39). Plaintiff is also the owner of several

1 other trademarks that include the terms “VOICE CLARIFYING” and “DUAL DIGITAL.”
2 (*Id.* ¶¶ 40-43).

3 Defendant Shenzhen Simolio is a supplier of consumer electronics and is “directly
4 affiliated” with Defendants Joyshiya Development and Shenzhen Superstar. (*Id.* ¶ 20). A
5 shareholder of Defendant Shenzhen Simolio is the current owner of U.S. trademarks for
6 “Joyshiya” and “Simolio.” (*Id.* ¶ 9). The Simolio brand name is used on the joyshiya.com
7 website, which is owned and/or operated by Defendants Joyshiya Development, Shenzhen
8 Superstar, and Shenzhen Joyshiya. “[A]t all times relevant to the matters asserted in this
9 case, Defendants were working at the direction of each other, and for their individual and
10 mutual benefit.” (*Id.* ¶ 21).

11 In April 2016, Plaintiff filed an action in this Court “against SYK Group, LLC;
12 Liberty Health Supply, LLC; TrueDio, LLC; and Sam Y. Kim (hereinafter ‘TrueDio
13 Defendants’) involving [] claims of intellectual property infringement of TV EARS
14 trademarks related to the marketing and sale of TrueDio assisted listening devices.” (*Id.*
15 ¶¶ 59-60). In May 2017, “the Court entered a Stipulated Permanent Injunction against
16 Liberty Health Supply, LLC and TrueDio LLC . . . permanently enjoining those particular
17 Defendants from . . . using the terms TV EARS, DUAL DIGITAL, and VOICE
18 CLARIFYING in connection with marketing, sales, or display of any product or services.”
19 (*Id.* ¶ 61).

20 “[O]ne or more of the Defendants in this case, working individually and/or in concert
21 with each other, were involved in the manufacturing of products that were the subject of
22 the prior litigation against the TrueDio Defendants.” (*Id.* ¶ 62). “[W]hen the TrueDio
23 Defendants were enjoined from engaging in infringing activities,” Defendants in this case
24 “lost a significant amount of revenue.” (*Id.* ¶ 63). “[E]ach of the Defendants in this case .
25 . . . simply adopted the same unlawful tactics previously used by the TrueDio Defendants”
26 by “collectively engag[ing] in a scheme to distribute knock-off TV Ears products in the
27 United States . . . despite being made aware of the prior lawsuit” (*Id.* ¶¶ 64-65).

1 “TV hearing assistance products under the Simolio brands are being advertised,
2 promoted, and offered for sale on the joyshiya.com website to consumers in the U.S.” (*Id.*
3 ¶ 68). These products are also being offered for sale through Defendant Shenzhen
4 Simolio’s “Simolio Direct” storefront on Amazon.com. (*Id.* ¶ 69). Defendants “repeatedly
5 use and display Plaintiff’s Marks in product titles, banners, product descriptions,
6 navigation paths, keywords, metatags, HTML code tags, or in other visually prominent
7 ways” (*Id.* ¶ 71). Defendant Shenzhen Simolio “uses terms such as ‘TV EARS’ . . .
8 and ‘DUAL DIGITAL’ as keywords in [its] Amazon product listings and for sponsored
9 advertisement placement to deceptively attract consumers that may be searching for
10 Plaintiff’s products on Amazon.” (*Id.* ¶ 82). Defendants’ “counterfeit products are likely
11 to deceive, confuse, and mislead purchasers and prospective purchasers that are shopping
12 online into believing that these unlicensed and unauthorized products are authorized by
13 Plaintiff.” (*Id.* ¶ 78). Defendants “targeted Plaintiff with the specific intent to market and
14 sell off of Plaintiff’s established goodwill, trade dress, and its trademarks.” (*Id.* ¶ 81).

15 Defendants also infringe Plaintiff’s ‘900 patent by selling dual headset cradles that
16 are “substantially the same.” (*Id.* ¶ 85). Defendants “willfully and knowingly infringed
17 Plaintiff’s rights in the ‘900 patent.” (*Id.* ¶ 87).

18 Defendants “regularly have solicited business in California and in this District, have
19 transacted and done business in California and this district, sold infringing products to
20 California consumers, and have wrongfully directed and caused injury to Plaintiff in
21 California and in this District, such injury being reasonably foreseeable” (*Id.* ¶ 5).

22 **III. MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

23 Defendant Shenzhen Simolio contends that Plaintiff’s Second Amended Complaint
24 should be dismissed for lack of personal jurisdiction. Defendant Shenzhen Simolio
25 contends that the Court lacks general jurisdiction because Plaintiff fails to allege and
26 present facts to show that Defendant Shenzhen Simolio “maintained ‘continuous’
27 ‘systematic’ and ‘substantial’ contacts with California.” (ECF No. 34 at 11). Defendant
28 Shenzhen Simolio contends that the Court lacks specific jurisdiction because Plaintiff fails

1 to allege and present facts to show that Defendant Shenzhen Simolio targeted California
2 residents. Defendant Shenzhen Simolio contends that “[r]equiring a foreign entity that
3 maintains only a passive website to answer claims in the United States offends due
4 process.” (*Id.* at 12). Defendant Shenzhen Simolio contends that any sales of its allegedly
5 infringing products to California consumers were fulfilled by Amazon and cannot be the
6 basis for exercising specific jurisdiction. Defendant Shenzhen Simolio contends that it has
7 no relationship or connection to the TrueDio defendants involved in prior litigation.²

8 Plaintiff contends that the Court has specific jurisdiction over Defendant Shenzhen
9 Simolio. Plaintiff contends that Defendant Shenzhen Simolio committed an intentional act
10 “by specifically targeting and using Plaintiff’s registered TV EARS trademark to promote
11 its infringing products.” (ECF No. 35 at 10). Plaintiff contends that Defendant Shenzhen
12 Simolio “expressly aimed [its] acts at California” because “Defendant [Shenzhen Simolio]
13 knew that Plaintiff was based in California at the time [Defendants] devised and
14 implemented their trademark infringement scheme . . . ” as a result of the prior litigation
15 involving the TrueDio defendants. (*Id.* at 10-11). Plaintiff further contends that the express
16 aiming requirement is satisfied because Defendant Shenzhen Simolio “has conducted *more*
17 *than a thousand* transactions with California residents” and had “customer service
18 communications with at least one consumer . . . who was from California.” (*Id.* at 13).
19 Plaintiff contends that Defendant Shenzhen Simolio caused harm known to be suffered in
20 California, at Plaintiff’s principal place of business. Plaintiff contends that its claims “are
21 all directly related to [Defendant Shenzhen Simolio’s] sales of competing products in
22 California and elsewhere.” (*Id.* at 15). Plaintiff contends that the exercise of jurisdiction
23 is reasonable.

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26 ² The allegations in the Second Amended Complaint concerning Defendants’ connection to the TrueDio
27 defendants are uncontroverted by affidavit or other evidence. On a motion to dismiss for lack of personal
28 jurisdiction, the Court must accept these allegations as true. *Compare Mavrix Photo*, 647 F.3d at 1223
 (“uncontroverted allegations in the complaint must be taken as true.”), with *Data Disc, Inc. v. Sys. Tech,*
Assocs., Inc., 557 F.2d 1280, 1284 (9th Cir. 1977) (“[W]e may not assume the truth of allegations in a
pleading which are contradicted by affidavit.”)

1 Under Federal Rule of Civil Procedure 12(b)(2), a defendant may move to dismiss a
2 complaint for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). In opposing a
3 defendant’s Rule 12(b)(2) motion, “the plaintiff bears the burden of establishing that
4 jurisdiction is proper.” *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Where
5 the court considers the motion without holding an evidentiary hearing, “the plaintiff need
6 only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss.”
7 *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011) (citing
8 *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010),
9 *abrogated on other grounds as recognized by Axiom Foods, Inc. v. Acerchem Int’l, Inc.*,
10 874 F.3d 1064 (9th Cir. 2017)). “The plaintiff cannot ‘simply rest on the bare allegations
11 of its complaint,’ but uncontroverted allegations in the complaint must be taken as true.”
12 *Id.* (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004)).
13 “[W]e may not assume the truth of allegations in a pleading which are contradicted by
14 affidavit, but we resolve factual disputes in the plaintiff’s favor.” *Id.* (alteration in
15 original). In other words, “the plaintiff need only demonstrate facts that if true would
16 support jurisdiction over the defendant.” *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.
17 1995).

18 “Federal courts apply state law to determine the bounds of their jurisdiction over a
19 party.” *Axiom Foods*, 874 F.3d at 1067. “California authorizes its courts to exercise
20 jurisdiction to the full extent that such exercise comports with due process.” *Id.*; *see also*
21 Cal. Civ. Proc. Code § 410.10 (“A court of this state may exercise jurisdiction on any basis
22 not inconsistent with the Constitution of this state or of the United States.”). “Accordingly,
23 ‘the jurisdictional analyses under [California] state law and federal due process are the
24 same.’” *Axiom Foods*, 874 F.3d at 1067 (alteration in original) (quoting *Mavrix Photo*,
25 647 F.3d at 1223). “There are two forms of personal jurisdiction that a forum state may
26 exercise over a nonresident defendant—general jurisdiction and specified jurisdiction.”
27 *Boschetto*, 539 F.3d at 1016. Plaintiff does not contend that this Court has general
28 jurisdiction over Defendant Shenzhen Simolio.

1 “The inquiry whether a forum State may assert specific jurisdiction over a
2 nonresident defendant ‘focuses on the relationship among the defendant, the forum, and
3 the litigation.’” *Axiom Foods*, 874 F.3d at 1068 (quoting *Walden v. Fiore*, 571 U.S. 277,
4 284 (2014)). “Two principles animate the ‘defendant-focused’ inquiry.” *Id.* (quoting
5 *Walden*, 571 U.S. at 284). “First, the relationship between the nonresident defendant, the
6 forum, and the litigation ‘must arise out of contacts that the defendant *himself* creates with
7 the forum state.” *Id.* (quoting *Walden*, 571 U.S. at 284). “Second, the minimum contacts
8 analysis examines ‘the defendant’s contacts with the forum State itself, not the defendant’s
9 contacts with persons who reside there.’” *Id.* (quoting *Walden*, 571 U.S. at 285). “It
10 follows that ‘a defendant’s relationship with a plaintiff or third party, standing alone, is an
11 insufficient basis for jurisdiction.’” *Id.* (quoting *Walden*, 571 U.S. at 286).

12 “In a specific jurisdiction inquiry, we consider the extent of the defendant’s contacts
13 with the forum and the degree to which the plaintiff’s suit is related to those contacts.”
14 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1210 (9th
15 Cir. 2006). “A strong showing on one axis will permit a lesser showing on the other.” *Id.*
16 “[S]ome single or occasional acts’ related to the forum may not be sufficient to establish
17 jurisdiction if ‘their nature and quality and the circumstances of their commission’ create
18 only an ‘attenuated’ affiliation with the forum.” *Burger King Corp. v. Rudzewicz*, 471 U.S.
19 462, 475 n.18 (1985) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). “A
20 defendant’s ‘random, fortuitous, or attenuated contacts’ will not suffice.” *Id.* (quoting
21 *Walden*, 571 U.S. at 286).

22 The Court of Appeals employs a three-prong test to assess whether a defendant’s
23 contacts with the forum state are sufficient to subject it to specific jurisdiction:

- 24 (1) the defendant must either “purposefully direct his activities” toward the
25 forum or “purposefully avail[] himself of the privileges of conducting
activities in the forum”;
- 26 (2) “the claim must be one which arises out of or relates to the defendant’s
27 forum-related activities”; and
- 28 (3) “the exercise of jurisdiction must comport with fair play and substantial
justice, i.e., it must be reasonable.”

1 *Axiom Foods*, 874 F.3d at 1068 (alteration in original) (quoting *Dole Food Co. v. Watts*,
2 303 F.3d 1104, 1111 (9th Cir. 2002)). “The plaintiff bears the burden of satisfying the first
3 two prongs of the test.” *Id.* (quoting *Schwarzenegger*, 374 F.3d at 802). “If the plaintiff
4 meets that burden, ‘the burden then shifts to the defendant to present a compelling case that
5 the exercise of jurisdiction would not be reasonable.’” *Id.* at 1068-69 (quoting
6 *Schwarzenegger*, 374 F.3d at 802).

7 **Purposeful Direction**

8 For causes of action sounding in tort, the Court of Appeals applies the purposeful
9 direction test. *See id.* at 1069 (“Where, as here, a case sounds in tort, we employ the
10 purposeful direction test.”). Alleged trademark and patent infringement qualifies as
11 tortious conduct under the test. *See Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007,
12 1019-20 (9th Cir. 2002) (applying test to case involving trademark infringement). The
13 purposeful direction test, “often referred to as the ‘effects’ test, derives from *Calder v.*
14 *Jones*, 465 U.S. 783 . . . (1984).” *Axiom Foods*, 874 F.3d at 1069. To satisfy the *Calder*
15 test, “[t]he defendant must have ‘(1) committed an intentional act, (2) expressly aimed at
16 the forum state, (3) causing harm that the defendant knows is likely to be suffered in the
17 forum state.’” *Id.* (quoting *Mavrix Photo*, 647 F.3d at 1228).

18 The first prong of the purposeful direction inquiry requires that the defendant
19 committed an intentional act. This merely requires the defendant to have an “intent to
20 perform an actual, physical act in the real world, rather than an intent to accomplish a result
21 or consequence of that act.” *Schwarzenegger*, 374 F.3d at 806.

22 The Second Amended Complaint alleges that Defendant “Shenzhen Simolio is a
23 supplier of consumer electronic products, such as wireless headsets, wireless headphones,
24 and TV hearing aids.” (ECF No. 31 ¶ 19). The Second Amended Complaint alleges that
25 “TV hearing assistance products under the Simolio brands are being advertised, promoted,
26 and offered for sale through Amazon.com to consumers in the U.S. through the . . . the
27 direct seller page of Shenzhen Simolio on Amazon.com.” (*Id.* ¶ 69). Plaintiff submitted
28 supporting exhibits of Defendant Shenzhen Simolio’s Amazon transactions in the U.S. and

1 California. Plaintiff alleges and presents facts to show an intentional act by Defendant
2 Shenzhen Simolio. *See, e.g., Loomis v. Slendertone Distrib., Inc.*, 420 F. Supp. 3d 1046,
3 1068 (S.D. Cal. 2019) (“Because Defendants developed, advertised, and sold the product,
4 the Court finds Plaintiff has carried her burden to show an intentional act by Defendant.”).

5 The second prong of the purposeful direction inquiry requires that the defendant
6 expressly aimed its conduct at the forum state. A plaintiff must demonstrate that the forum
7 is the “focal point” of both the claims and the harm suffered. *Axiom Foods*, 874 F.3d at
8 1071 (quoting *Walden*, 571 U.S. at 287). A plaintiff must prove that “the ‘effects’ caused
9 by the defendants’ [conduct]—*i.e.*, the injury to the plaintiff[] . . . —connected the
10 defendants’ conduct to California, not just to a plaintiff who lived there. *Walden*, 571 U.S.
11 at 288. In the context of tortious conduct on the internet, courts have considered several
12 factors, “including the interactivity of the defendant’s website, the geographic scope of the
13 defendant’s commercial ambitions, and whether the defendant individually targeted a
14 plaintiff know to be a forum resident.” *Mavrix Photo*, 647 F.3d at 1229.

15 The Second Amended Complaint alleges that “Plaintiff is a corporation that is
16 incorporated in Nevada and has its principal place of business in Spring Valley,
17 California.” (ECF No. 31 ¶ 7). The Second Amended Complaint alleges that in a prior
18 lawsuit the Court entered an injunction against “SYK Group, LLC; Liberty Health Supply,
19 LLC; TrueDio, LLC; and Sam Y. Kim,” enjoining them “from many of the same infringing
20 activities at issue here.” (*Id.* ¶ 60). The Second Amended Complaint alleges that “one or
21 more of the Defendants in this case . . . were involved in the manufacturing of products
22 that were the subject of the prior litigation against the TrueDio Defendants.” (*Id.* ¶ 62).
23 The Second Amended Complaint alleges that “Defendants in this case lost a significant
24 amount of revenue” because of the injunction. (*Id.* ¶ 63). The Second Amended Complaint
25 alleges that Defendants “adopted the same unlawful tactics previously used by the TrueDio
26 Defendants in order to restore sales in the U.S. of hearing assistance devices.” (*Id.* ¶ 64).
27 The Second Amended Complaint alleges that “Defendants collectively engaged in a
28 scheme to distribute knock-off TV Ears products . . . despite being made aware of the prior

1 lawsuit which made similar claims against the TrueDio Defendants.” (*Id.* ¶ 65). The
2 Second Amended Complaint adequately alleges facts to support an inference that
3 Defendant Shenzhen Simolio engaged in wrongful conduct targeted at a plaintiff whom
4 Defendant knows to be a resident of the forum state. *See Axiom Foods*, 874 F.3d at 1069
5 (“A theory of individualized targeting alleges that a defendant ‘engaged in wrongful
6 conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum
7 state.”) (quoting *Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 675 (9th Cir.
8 2012) *abrogated on other grounds as recognized by Hungerstation LLC v. Fast Choice*
9 *LLC*, 857 Fed. Appx. 349, 352 (9th Cir. 2021))).

10 Individualized targeting, by itself, is insufficient for the Court to exercise personal
11 jurisdiction over Defendant Shenzhen Simolio. *See Ayla, LLC v. Alya Skin Pty. Ltd.*, No.
12 20-16214, 2021 WL 3823624, at *4 (9th Cir. Aug. 27, 2021) (“Express aiming requires
13 more than the defendant's awareness that the plaintiff it is alleged to have harmed resides
14 in or has strong ties to the forum . . .”). “[S]omething more’—conduct directly targeting
15 the forum” is required. *Rio Properties*, 284 F.3d at 1020 (quoting *Panavision Intern., L.P.*
16 *v. Toebben*, 141 F.3d 1316, 1322 (9th Cir. 1998). However, individualized targeting “may
17 remain relevant to the minimum contacts inquiry.” *Axiom Foods*, 874 F.3d at 1070.

18 In *Calder*, a libel action, the Supreme Court held that jurisdiction in the forum was
19 proper even though the defendants wrote and edited the allegedly libelous material outside
20 the forum and were not responsible for its circulation in the forum. *Calder*, 465 U.S. at
21 791. The Supreme Court in *Walden* stated that the outcome in *Calder* was “largely a
22 function of the nature of the libel tort.” *Walden*, 571 U.S. at 287. The Court explained:

23 [B]ecause publication to third persons is a necessary element of libel, the
24 defendants' intentional tort actually occurred in California. In this way, the
25 ‘effects’ caused by the defendants' article—*i.e.*, the injury to the plaintiff's
26 reputation in the estimation of the California public—connected the
27 defendants' conduct to *California*, not just to a plaintiff who lived there.

28 *Id.* at 288.

1 Like libel, a trademark infringement claim requires demonstrating an in-forum effect
2 on the public—likelihood of confusion—as an essential element of the cause of action. *See*
3 *OTR Wheel Eng’g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1022 (9th Cir. 2018)
4 (To prevail on [a trademark infringement claim], a plaintiff must show that: 1) it has a
5 valid, protectable mark, and 2) the defendant's use of the mark is likely to cause consumer
6 confusion.”). In this case, the likelihood of confusion to California consumers, an element
7 of a trademark infringement claim, connects “[D]efendant’s conduct to California, not just
8 to a plaintiff who lived there.” *Walden*, 571 U.S. at 288; *see Nissan Motor Co. v. Nissan*
9 *Comput. Corp.*, 89 F. Supp. 2d 1154, 1161 (C.D. Cal. 2000) (“California has a strong
10 interest in protecting its citizens from trademark infringement and consumer confusion.”).

11 The Second Amended Complaint further alleges that “Defendants regularly have
12 solicited business in California and in this District, have transacted and done business in
13 California and this district, [and] sold infringing products to California consumers”
14 (ECF No. 31 ¶ 5). Plaintiff’s supporting exhibits of Defendant Shenzhen Simolio’s
15 Amazon transactions show that approximately 1,118 of Defendant Shenzhen Simolio’s
16 Amazon transactions occurred with California based customers—approximately 15% of
17 Defendant Shenzhen Simolio’s total U.S. Amazon transactions. (Ex. 2 to Clark Decl., ECF
18 No. 35-2; Ex. 3 to Clark Decl., ECF No. 35-3). A defendant’s suit-related commercial ties
19 to a forum can serve as “something more” to provide a basis for the exercise of personal
20 jurisdiction. *See Boschetto*, 539 F.3d at 1011 (9th Cir. 2008) (stating that jurisdiction could
21 be proper where “defendant was using the [online] platform as a broader vehicle for
22 commercial activity”); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997)
23 (“the likelihood that personal jurisdiction can be constitutionally exercised is directly
24 proportionate to the nature and quality of commercial activity that an entity conducts over
25 the Internet.” (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124
26 (W.D. Pa. 1997))). In this case, Plaintiff alleges and presents facts to show that Defendant
27 Shenzhen Simolio conducts regular and substantial business with California residents. *See,*
28 *e.g., Adobe Sys. Inc. v. Nwubah*, No. 18-cv-06063-LHK, 2020 WL 3432639, at *8 (N.D.

1 Cal. June 23, 2020) (holding that 863 sales constituting approximately 18% of total sales
2 were “regular” and sufficient to satisfy the express aiming prong); *Mysfyt, Inc. v. Lum*, No.
3 16-cv-03813-KAW, 2016 WL 6962954, at *3 (N.D. Cal. Nov. 29, 2016) (same for sales
4 of 888 units on Amazon, 20% of the total).

5 The Supreme Court’s concern in *Walden*—that a defendant could be forced to
6 litigate in a forum solely because the defendant was aware that the plaintiff resided there—
7 is not implicated in this case. Personal jurisdiction is supported by facts to show Defendant
8 Shenzhen Simolio’s alleged regular and substantial business with California residents. The
9 resulting likelihood of confusion to consumers in California—an element of Plaintiff’s
10 trademark infringement claim—further connects Defendant Shenzhen Simolio’s in-state
11 business to California itself.

12 The third prong of the purposeful direction inquiry requires that the defendant caused
13 harm that the defendant knows is likely to be suffered in the forum state. A corporation
14 suffers harm “where the corporation has its principal place of business.” *Dole Food*, 303
15 F.3d at 1113. The Second Amended Complaint alleges that Plaintiff is “a corporation that
16 is incorporated in Nevada and has its principal place of business in Spring Valley,
17 California.” (ECF No. 31 ¶ 7). The Second Amended Complaint alleges that “Defendants
18 collectively engaged in a scheme to distribute knock-off TV Ears products . . . despite being
19 made aware of [Plaintiff’s] prior lawsuit which made similar claims against the TrueDio
20 Defendants.” (*Id.* ¶ 65). Plaintiff alleges and presents fact sufficient to support an
21 inference that Defendant Shenzhen Simolio engaged in wrongful conduct targeted at
22 Plaintiff, with the knowledge that Plaintiff was a resident of California. The Court
23 concludes that the facts alleged in the Second Amended Complaint plausibly demonstrate
24 that Defendant Shenzhen Simolio committed an intentional act, expressly aimed at
25 California, and causing harm that Defendant Shenzhen Simolio knows is likely to be
26 suffered in California.

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1 **Relationship Between Claim and Forum-Related Activities**

2 “[T]he claim must be one which arises out of or relates to the defendant’s forum-
3 related activities.” *Axiom Foods*, 874 F.3d at 1068 (alteration in original) (quoting *Dole*
4 *Food*, 303 F.3d at 1111). Defendant Shenzhen Simolio’s forum-related activities were its
5 sales of its products to consumers in California. Defendant Shenzhen Simolio’s alleged
6 violations of Plaintiff’s intellectual property rights arise out of these sales. Plaintiff alleges
7 and presents facts sufficient to demonstrate that Defendant Shenzhen Simolio purposefully
8 established minimum contacts within California.

9 **Reasonableness**

10 “Once it has been decided that a defendant purposefully established minimum
11 contacts within the forum State, these contacts may be considered in light of other factors
12 to determine whether the assertion of personal jurisdiction would comport with ‘fair play
13 and substantial justice.’” *Burger King*, 471 U.S. at 476. “[W]here a defendant who
14 purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he
15 must present a compelling case that the presence of some other considerations would render
16 jurisdiction unreasonable.” *Id.* Courts consider:

17 (1) the extent of the defendants' purposeful interjection into the forum state's
18 affairs; (2) the burden on the defendant of defending in the forum; (3) the
19 extent of conflict with the sovereignty of the defendants' state; (4) the forum
20 state's interest in adjudicating the dispute; (5) the most efficient judicial
21 resolution of the controversy; (6) the importance of the forum to the plaintiff's
interest in convenient and effective relief; and (7) the existence of an
alternative forum.

22 *Core-Vent Corp. v. Nobel Ind. AB*, 11 F.3d 1482, 1487-88 (9th Cr. 1993).

23 The Second Amended Complaint adequately alleges facts to support that Defendant
24 Shenzhen Simolio had regular and substantial business with California residents causing a
25 likelihood of confusion to consumers in California, and willfully infringed on Plaintiff’s
26 intellectual property rights with the knowledge that Plaintiff would be harmed in
27 California. The first factor weighs in favor of asserting jurisdiction.
28

1 Defendant Shenzhen Simolio is a foreign entity organized under the laws of China.
2 “The Supreme Court has recognized that defending a lawsuit in a foreign country can
3 impose a significant burden on a nonresident alien.” *Core-Vent*, 11 F.3d at 1488. However,
4 “[u]nless such inconvenience is so great as to constitute a deprivation of due process, it
5 will not overcome clear justifications for the exercise of jurisdiction.” *Roth v. Garcia*
6 *Marquez*, 942 F.2d 617, 623 (9th Cir. 1991) (quoting *Hirsch v. Blue Cross, Blue Shield of*
7 *Kansas City*, 800 F.2d 1474, 1478 (9th Cir.1986)) (alteration in original). The Second
8 Amended Complaint alleges facts to support an inference that Defendant Shenzhen Simolio
9 knowingly engaged in wrongful conduct—the sale of infringing products—to avoid the
10 effect of an injunction issued by a court in California on Defendant Shenzhen Simolio’s
11 business dealings. This alleged conduct further mitigates the concern for the inconvenience
12 to Defendant Shenzhen Simolio. *Cf. Reebok Intern. Ltd. V. McLaughlin*, 49 F.3d 1387,
13 1391-92 (9th Cir. 1995) (stating that the exercise of personal jurisdiction for a contempt
14 proceeding over a nonparty who knowingly aids the violation a court order but has no other
15 contacts with a forum “may be sound, even necessary”). On balance, the second factor is
16 neutral.

17 There are no facts that suggest that China has a strong interest in adjudicating this
18 dispute or that adjudication in California will conflict with China’s sovereign interests.
19 The suit concerns Defendant Shenzhen Simolio’s business activity in the United States and
20 Plaintiff alleges violations of United States law in connection with Plaintiff’s United States
21 intellectual property rights. The third factor weighs in favor of asserting jurisdiction. *See*
22 *Dole Food*, 303 F.3d at 1115 (examining “the competing sovereign interests in regulating
23 [the parties’] behavior”).

24 “California has a strong interest in providing a forum for its residents and citizens
25 who are tortiously injured.” *Id.* at 1115-16; *see also Nissan Motor*, 89 F. Supp. 2d at 1161
26 (“California has a strong interest in protecting its citizens from trademark infringement and
27 consumer confusion.”). Plaintiff’s primary place of business is in California. Plaintiff
28

1 alleges and present facts to show that consumers in California purchased Defendant
2 Shenzhen Simolio's products. The fourth factor weighs in favor of asserting jurisdiction.

3 "In evaluating [the fifth] factor, we have looked primarily at where the witnesses
4 and the evidence are likely to be located." *Core-Vent*, 11 F.3d at 1489. On the current
5 record, it is difficult to determine the most efficient forum in which to litigate the dispute.
6 On balance, the fifth factor is neutral.

7 California is likely the most convenient forum to Plaintiff because Plaintiff's
8 principal place of business is located in the forum. However, "[i]n this circuit, the
9 Plaintiff's convenience is not of paramount importance." *Dole Food*, 303 F.3d at 1116.
10 The sixth factor weighs in favor of asserting jurisdiction.

11 Plaintiff bears the burden of proving the unavailability of an alternative forum. *See*
12 *Menken v. Emm*, 503 F.3d 1050, 1061 (9th Cir. 2007). Plaintiff states "An alternative
13 forum in the U.S. does not appear to exist." (ECF No. 35 at 17). The declaration of
14 Xiangfeng Li, the "vice general manager of Shenzhen Simolio Electronic Co., LTD,"
15 offered in support of Defendant Shenzhen Simolio's Motion to Dismiss, states:
16 "[Defendant Shenzhen Simolio] has no officers or employees within the United States.
17 [Defendant Shenzhen Simolio] does not own any property and has no interest in any
18 property with the United States [Defendant Shenzhen Simolio] does not target any
19 specific audience, venue, forum, or state." (Declaration of Xiangfeng Li, Ex. A to Motion
20 to Dismiss, ECF No. 34-1 at 2-3). Plaintiff's contention that an alternative forum is
21 unavailable does not satisfy Plaintiff's burden. However, taken together with the facts
22 alleged in the Second Amended Complaint and the declaration offered by Defendant
23 Shenzhen Simolio, on balance, this factor is neutral.

24 Four of the seven factors weigh in favor of asserting jurisdiction while none weigh
25 against. The Court concludes that exercising jurisdiction is reasonable and comports with
26 "fair play and substantial justice." *See Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126,
27 129 (9th Cir. 1995) (stating that the defendant "has not presented a 'compelling case' that
28 exercising jurisdiction over it would be unreasonable" where "neither party is clearly

1 favored in the final balance”). Defendant Shenzhen Simolio’s Motion to Dismiss for lack
2 of personal jurisdiction is denied.

3 **IV. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

4 Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a
5 complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P.
6 12(b)(6). In order to state a claim for relief, a pleading “must contain . . . a short and plain
7 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
8 Dismissal under Rule 12(b)(6) “is proper only where there is no cognizable legal theory or
9 an absence of sufficient facts alleged to support a cognizable legal theory.” *Shroyer v. New*
10 *Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (quoting *Navarro v.*
11 *Block*, 250 F.3d 729, 732 (9th Cir. 2001)).

12 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
13 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
14 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
15 “A claim has facial plausibility when the plaintiff pleads factual content that allows the
16 court to draw the reasonable inference that the defendant is liable for the misconduct
17 alleged.” *Id.* “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
18 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements
19 of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (second alteration in original)
20 (quoting Fed. R. Civ. P. 8(a)).

21 The court must accept as true all “well-pleaded factual allegations.” *Iqbal*, 556 U.S.
22 at 679. The court is not “required to accept as true allegations that are merely conclusory,
23 unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State*
24 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “In sum, for a complaint to survive a motion
25 to dismiss, the non-conclusory factual content, and reasonable inferences from that content,
26 must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret*
27 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

1 “Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only
2 if the defendant shows some obvious bar to securing relief on the face of the complaint.”
3 *Asarco, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014), *as corrected*
4 (Aug. 27, 2014). “If, from the allegations of the complaint as well as any judicially
5 noticeable materials, an asserted defense raises disputed issues of fact, dismissal under
6 Rule 12(b)(6) is improper.” *Id.* (citing *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir.
7 1984) (per curiam)).

8 **Fair Use**

9 Defendant Shenzhen Simolio contends that Plaintiff’s Second Amended Complaint
10 should be dismissed for failure to state a claim. Defendant Shenzhen Simolio contends
11 that Plaintiff’s claims for federal trademark infringement (Count I), federal trademark
12 counterfeiting (Count III), federal and California unfair competition (Count V and VIII),
13 federal dilution (Count VI), common law trademark infringement (Count VII), and
14 contributory infringement (Count IX) should be dismissed because Defendant Shenzhen
15 Simolio’s use of Plaintiff’s trademarked terms was descriptive of Defendant Shenzhen
16 Simolio’s goods and services, and permitted under the fair use doctrine.

17 Plaintiff contends that the Second Amended Complaint adequately alleges facts to
18 show that Defendant Shenzhen Simolio used Plaintiff’s trademarked terms in a non-
19 descriptive, infringing manner. Plaintiff further contends that its trademark-related claims
20 should not be dismissed because the Second Amended Complaint alleges that Defendant
21 Shenzhen Simolio was aware of the prior lawsuit involving the TrueDio Defendants and
22 adopted their infringing practices.

23 In trademark law, fair use is a defense that

24 the use of the name, term, or device charged to be an infringement is a use,
25 otherwise than as a mark . . . of a term or device which is descriptive of and
26 used fairly and in good faith only to describe the goods or services of such
party, or their geographic origin.

27 15 U.S.C. § 1115(b)(4). Fair use is a defense to claims for trademark infringement,
28 trademark counterfeiting, federal and California unfair competition, dilution, common law

1 trademark infringement, and contributory infringement. *See, e.g., Rolex Watch U.S.A., Inc.*
2 *v. Agarwal*, No. CV 12-06400-MMM-MRWx, 2012 WL 12886444, at *6 (C.D. Cal. Dec.
3 17, 2012) (trademark infringement and counterfeiting); *Applied Underwriters Inc. v.*
4 *Lichtenegger*, No. 2:15-cv-02445-TLN-CKD, 2017 WL 2881517, at *5 (E.D. Cal. July 6,
5 2017) (federal and California unfair competition); *Playboy Enter., Inc. v. Welles*, 7 F. Supp.
6 2d 1098, 1105 (S.D. Cal. 1998) (dilution); *Louis Vuitton Malletier S.A. v. Akanoc Solutions,*
7 *Inc.*, 591 F. Supp. 2d 1098, 1104 (N.D. Cal. 2008) (stating that claims for contributory
8 infringement require an underlying direct infringement). To assert this defense “[a]
9 defendant must show that its use is (1) other than as a trademark, (2) descriptive of the
10 defendant's goods, and (3) in good faith.” *Marketquest Grp., Inc. v. BIC Corp.*, 862 F.3d
11 927, 935 (9th Cir. 2017).

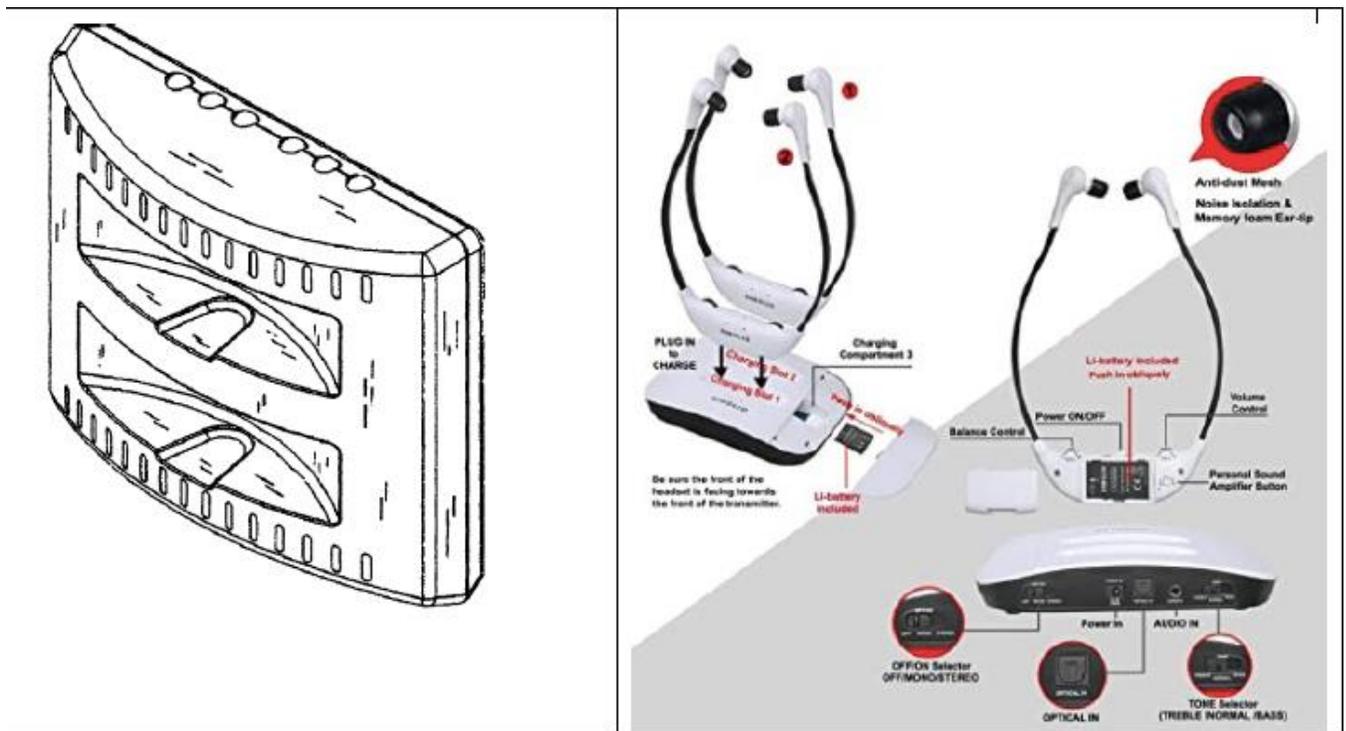
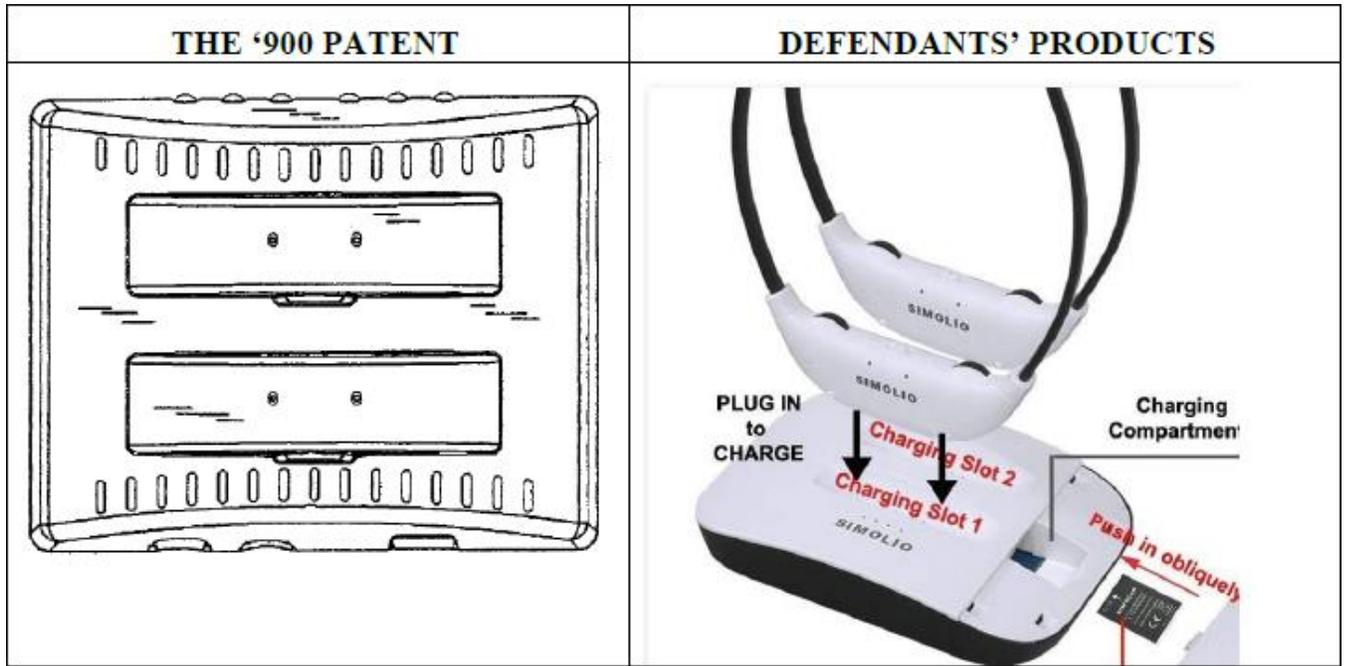
12 The “good faith” element requires analysis of “whether defendant in adopting its
13 mark intended to capitalize on plaintiff's good will.” *Fortune Dynamic, Inc. v. Victoria's*
14 *Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1043 (9th Cir. 2010). The Second
15 Amended Complaint alleges that “one or more of the Defendants in this case . . . were
16 involved in the manufacturing of products that were the subject of the prior litigation
17 against the TrueDio Defendants.” (ECF No. 31 ¶ 62). The Second Amended Complaint
18 alleges that “Defendants collectively engaged in a scheme to distribute knock-off TV Ears
19 products . . . despite being made aware of the prior lawsuit which made similar claims
20 against the TrueDio Defendants.” (*Id.* ¶ 65). These allegations are sufficient to plausibly
21 demonstrate a lack of good faith on the part of Defendant Shenzhen Simolio. *See*
22 *Marketquest Grp.*, 862 F.3d at 937 (stating that evidence that the defendant “knew of the
23 mark” and “disregard[ed] [] the plaintiff's rights” is relevant in determining whether the
24 good faith requirement is satisfied); *see also Fortune Dynamic*, 618 F.3d at 1043 (holding
25 that a “failure to investigate whether someone held a [] trademark,” combined with
26 evidence that such investigation was a standard industry practice provided “support for a
27 jury's potential finding” of lack of good faith). Defendant Shenzhen Simolio's Motion to
28 Dismiss Plaintiff's claims for federal trademark infringement (Count I), federal trademark

1 counterfeiting (Count III), federal and California unfair competition (Count V and VIII),
2 federal dilution (Count VI), common law trademark infringement (Count VII), and
3 contributory infringement (Count IX) is denied.

4 **Design Patent Infringement**

5 Defendant Shenzhen Simolio contends that Plaintiff's claims for direct and
6 contributory design patent infringement (Counts II and X) should be dismissed because the
7 design of the device it sells is "easily distinguishable to an ordinary observer" from
8 Plaintiff's patented design. (ECF No. 34 at 16). Plaintiff contends that the '900 patent and
9 the design of Defendants' device are not materially distinguishable.

10 The "ordinary observer" test, first promulgated by the Supreme Court in *Gorham*
11 *Mfg. Co., v. White*, 81 U.S. 511 (1871), is used to determine whether a design patent has
12 been directly or contributorily infringed (Counts II and X). A product violates the
13 "ordinary observer" test when "an ordinary observer, familiar with the prior art designs,
14 would be deceived into believing that the accused product is the same as the patented
15 design." *Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294, 1303 (Fed. Cir. 2010). Under
16 the "ordinary observer" test, the claimed and accused designs are first compared to each
17 other to determine if they are sufficiently similar—if so, the designs are then compared
18 with prior art to help clarify differences between the two that might not be noticeable in
19 the abstract. *See Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 678 (Fed. Cir. 2008).
20 The determination of whether a design patent has been infringed is a question of fact that
21 is generally inappropriate to decide on a motion to dismiss. *See Catalina Lighting, Inc. v.*
22 *Lamps Plus, Inc.*, 295 F.3d 1277, 1287 (Fed. Cir. 2002).



Defendant identifies the following differences between the '900 Patent and Defendants' design, as pictured in the Second Amended Complaint: (1) "the '900 Patent shows a number of elongated oval shapes running along the top and bottom edges of the top surface, no such shapes appear on the Simolio product"; (2) "the '900 [P]atent has a top and bottom edge where the front and back side walls meet the top surface that are

1 distinctly beveled”; (3) “the shape of the two charging ports themselves are distinctly
2 different with the ’900 Patent claiming an inset cutout on the middle portion of the side
3 walls”; (4) “the front side of the ’900 Patent design requires 6 separate LED lights
4 disposed symmetrically with three LED lights on each side of the center line” whereas “no
5 such lights are present on the Simolio product”; (5) “the Simlio [sic] product is entirely
6 different with an entirely different configuration of openings along the back side.” (ECF
7 No. 34 at 21-23).

8 The parties have not presented any prior art through which the importance of the
9 differences can be analyzed. At the current stage in litigation, the Court is unable to
10 conclude that an ordinary observer would not be deceived into believing that Defendants’
11 device is the same as the patented design. See *Ethicon Endo-Surgery, Inc.*, 796 F.3d 1312,
12 1335 (Fed. Cir. 2015) (“Differences . . . must be evaluated in the context of the claimed
13 design as a whole, and not in the context of separate elements in isolation.”); *Litton Sys.,*
14 *Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (Fed. Cir. 1984) *abrogated on other grounds*
15 *as recognized by Converse, Inc. v. Int’l Trade Comm’n Sketchers U.S.A., Inc.*, 909 F.3d
16 1110 (Fed. Cir. 2018) (“[M]inor differences between a patented design and an accused
17 article’s design cannot, and shall not, prevent a finding of infringement.”). Defendant
18 Shenzhen Simolio’s Motion to Dismiss Plaintiff’s claims for direct and contributory patent
19 infringement (Counts II and X) is denied.

20 **Trade Dress Infringement**

21 Defendant Shenzhen Simolio contends that Plaintiff’s claim for trade dress
22 infringement (Count IV) should be dismissed because the allegations in the Second
23 Amended Complaint are conclusory and fail to adequately describe Plaintiff’s claimed
24 trade dress. Defendant Shenzhen Simolio contends that even if the trade dress was
25 described sufficiently, there is no risk of a substantial likelihood of confusion between
26 Plaintiff and Defendant Shenzhen Simolio’s devices. Plaintiff contends that its claim for
27 trade dress infringement is supported by a comparison picture contained in the Second
28

1 Amended Complaint, as well as allegations that the design of its headset cradle is
2 distinctive and has acquired secondary meaning.

3 To establish a federal trade dress infringement claim, “a plaintiff must meet three
4 basic elements: (1) distinctiveness, (2) nonfunctionality, and (3) likelihood of confusion.”
5 *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1047 (9th Cir. 1998).
6 Trade dress refers to “the ‘total image of a product’ and may include features such as size,
7 shape, color, color combinations, texture or graphics.” *Int’l Jensen, Inc. v. Metrosound*
8 *U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993) (quoting *Vision Sports, Inc. v. Melville Corp.*,
9 888 F.2d 609, 613 (9th Cir. 1989). A plaintiff must clearly articulate the discrete elements
10 of its product that constitute the trade dress. *See Sleep Sci. Partners v. Lieberman*, No. 09-
11 04200-CW, 2010 WL 1881770, at *3 (N.D. Cal. May 10, 2010) (“A plaintiff should clearly
12 articulate its claimed trade dress to give a defendant sufficient notice.”).

13 The Second Amended Complaint identifies Plaintiff’s trade dress as “the design
14 configurations [] depicted herein in Plaintiff’s TV EARS Original, TV EARS Digital, TV
15 Ears Long Range Headset, and TV EARS Dual digital products” (ECF No. 31 ¶ 111).
16 The Second Amended Complaint includes pictures of the products. The Second Amended
17 Complaint’s description of Plaintiff’s alleged trade dress is insufficient to give Defendant
18 Shenzhen Simolio adequate notice of what elements constitute Plaintiff’s claimed trade
19 dress. *See Sleep Sci. Partners*, 2010 WL 1881770, at *3 (holding that trade dress for a
20 website’s “look and feel” was insufficient); *McCarthy on Trademarks and Unfair*
21 *Competition* § 8:3 (“Whatever plaintiff may claim as the combination of elements making
22 up its alleged trade dress in the product or its packaging and presentation, it is not adequate
23 for the plaintiff to solely identify such a combination as ‘the trade dress.’ Rather, the
24 discrete elements which make up that combination must be separated out and clearly
25 identified in a list. All courts agree that the elements of the alleged trade dress must be
26 clearly listed and described.”). Plaintiff’s inclusion of pictures of the designs does not cure
27 the Second Amended Complaint’s lack of specificity. *See Crafty Prods., Inc. v. Michaels*
28 *Cos.*, 424 F. Supp. 3d 983, 992 (S.D. Cal. 2019) (“While pictures of products certainly help

1 the Court in understanding what is to be protected, merely attaching hundreds of images
2 requires the Court to do all of the work for Plaintiffs.”). Defendant Shenzhen Simolio’s
3 Motion to Dismiss Plaintiff’s claim for trade dress infringement (Counts IV) is granted.

4 **Shotgun Pleading**

5 Defendant Shenzhen Simolio contends that the entire Second Amended Complaint
6 should be dismissed as a “shotgun” pleading that impermissibly groups Defendants
7 together without identifying what each Defendant did wrong and impermissibly
8 incorporates all allegations in the Second Amended Complaint into each cause of action.
9 Plaintiff contends that the Second Amended Complaint is not a “shotgun” pleading because
10 it contains detailed factual allegations that satisfy Rule 8 of the Federal Rules of Civil
11 Procedure. Plaintiff contends that if the allegations implicating Defendant Shenzhen
12 Simolio are insufficient, Plaintiff should be granted leave to amend the Second Amended
13 Complaint.

14 Federal Rule of Civil Procedure 8(a)(2) requires a pleading that states a claim for
15 relief to contain “a short and plain statement of the claim showing that the pleader is entitled
16 to relief.” Fed. R. Civ. P. 8(a)(2). Pleadings that make it difficult or impossible for
17 defendants to make informed responses to the plaintiff’s allegations are considered
18 impermissible “shotgun” pleadings. *See Sollberger v. Wachovia Secs., LLC*, No. SACV
19 09-0766-AG-ANx, 2010 WL 2674456, at *4 (C.D. Cal. June 30, 2010) (discussing types
20 of “shotgun” pleadings). One type of impermissible “shotgun” pleading is a complaint that
21 “assert[s] multiple claims against multiple defendants without specifying which of the
22 defendants are responsible for which acts or omissions, or which of the defendants the
23 claim is brought against.” *Tuinstra v. Bonner County*, 2:21-cv-00074-DCN, 2021 WL
24 2534983, at *3 (D. Idaho June 21, 2021) (quoting *Weiland v. Palm Beach Cnty. Sheriff’s*
25 *Off.*, 792 F.3d 1313, 1321-23 (11th Cir. 2015)); *see Destfino v. Reiswig*, 630 F.3d 952, 958
26 (9th Cir. 2011) (“The district court made clear in this order that plaintiffs must amend their
27 shotgun pleading to state[] clearly how each and every defendant is alleged to have violated
28 plaintiffs’ legal rights. The second amended complaint was properly dismissed because it

1 failed to do this, continuing to make everyone did everything allegations.” (internal
2 quotations omitted) (alteration in original)). A second type of “shotgun” pleading is a
3 complaint that incorporates a collection of general allegations into each count by reference.
4 *See McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996) (affirming dismissal of
5 complaint in which “each claim incorporate[d] 122 paragraphs of confused factual
6 allegations and then merely ma[de] perfunctory reference to a legal claim said to arise from
7 these undifferentiated facts.”)

8 The Second Amended Complaint alleges that Defendant Shenzhen Simolio is a
9 supplier of consumer electronics and is “directly affiliated” with Defendants Joyshiya
10 Development and Shenzhen Superstar. (ECF No. 31 ¶ 20). The Second Amended
11 Complaint alleges that a shareholder of Defendant Shenzhen Simolio is the current owner
12 of U.S. trademarks for “Joyshiya” and “Simolio.” (*Id.* ¶ 9). The Second Amended
13 Complaint alleges that the Simolio brand name is used on the joyshiya.com website, which
14 is owned and/or operated by Defendants Joyshiya Development, Shenzhen Superstar, and
15 Shenzhen Joyshiya. The Second Amended Complaint alleges that “at all times relevant to
16 the matters asserted in this case, Defendants were working at the direction of each other,
17 and for their individual and mutual benefit.” (*Id.* ¶ 21). The Second Amended Complaint
18 alleges that “TV hearing assistance products under the Simolio brands are being advertised,
19 promoted, and offered for sale on the joyshiya.com website to consumers in the U.S.” (*Id.*
20 ¶ 68). The Second Amended Complaint alleges that these products are also being offered
21 for sale through Defendant Shenzhen Simolio’s “Simolio Direct” storefront on
22 Amazon.com. (*Id.* ¶ 69). The Second Amended Complaint alleges that Defendant
23 Shenzhen Simolio “uses terms such as ‘TV EARS’ . . . and ‘DUAL DIGITAL’ as keywords
24 in [its] Amazon product listings and for sponsored advertisement placement to deceptively
25 attract consumers that may be searching for Plaintiff’s products on Amazon.” (*Id.* ¶ 82).

26 The factual allegations contained in the Second Amended Complaint are sufficient
27 to put Defendant Shenzhen Simolio on notice of how it is alleged to have violated
28 Plaintiff’s legal rights. That each claim incorporates every allegation by reference is not a

1 valid basis for dismissal in this case, because the claims have a common factual basis. *See*
2 *Tuinstra*, 2021 WL 2534983, at *3 (stating that incorporation of all preceding allegations
3 in each count is not a problem where this “does not confuse the claims and is necessary to
4 state the claims because of how interrelated they are.”). Defendant Shenzhen Simolio’s
5 Motion to Dismiss Plaintiff’s claims on the basis that the Second Amended Complaint is
6 an impermissible “shotgun” pleading is denied.

7 **V. MOTION TO FILE DOCUMENTS UNDER SEAL**

8 Plaintiff’s Motion to File Documents Under Seal seeks the sealing of three
9 documents produced by Defendant Shenzhen Simolio in jurisdictional discovery and filed
10 as exhibits to Plaintiff’s Opposition to Defendant Shenzhen Simolio’s Motion to Dismiss.
11 A protective order has not been entered. Exhibits Two and Three are spreadsheets
12 containing information about Defendant Shenzhen Simolio’s Amazon sales in the United
13 States and in California, respectively. Exhibit Four is a record of customer
14 communications on the Amazon platform.

15 Plaintiff contends that the documents should be sealed because they “contain certain
16 information of Defendant [Shenzhen Simolio] that Defendant [Shenzhen Simolio] may
17 contend is required to be maintained as confidential.” (ECF No. 36 at 3). Defendant
18 Shenzhen Simolio contends that sealing of Exhibits Two and Three is proper for the
19 following additional reasons: (1) the documents “are not directly related to the merits of
20 the case,” as they do not prove infringement; (2) the documents include “detailed address
21 information” of individual customers; (3) competitors could use the information contained
22 in the documents to “target specific markets, locations, or users to unfairly compete” with
23 Defendant Shenzhen Simolio; and (4) Defendant Shenzhen Simolio’s agreement with
24 Amazon requires Defendant Shenzhen Simolio to “keep all customer personal data
25 confidential at all times.” (ECF No. 42 at 3). Defendant Shenzhen Simolio contends that
26 Exhibit Four should be sealed because it contains “details of private communications” with
27 customers that include “strategies for handing [sic] customer returns and fixing any product
28 issues” and because it includes “detailed order information and detailed customer names.”

1 (*Id.* at 4). Defendant Shenzhen Simolio requests that the Court allow the filing of redacted
2 versions if the Court rules that the Exhibits should not be sealed.

3 “It is clear that the courts of this country recognize a general right to inspect and
4 copy public records and documents, including judicial records and documents.” *Nixon v.*
5 *Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). “Following the Supreme Court’s
6 lead, ‘we start with a strong presumption in favor of access to court records.’” *Ctr. for*
7 *Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quoting *Foltz v.*
8 *State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). “A party seeking to
9 seal a judicial record [] bears the burden of overcoming this strong presumption by meeting
10 the ‘compelling reasons’ standard.” *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1178
11 (9th Cir. 2006) (quoting *Foltz*, 331 F.3d at 1135). “Under this stringent standard, a court
12 may seal records only when it finds ‘a compelling reason and articulate[s] the factual basis
13 for its ruling, without relying on hypothesis or conjecture.’” *Ctr. for Auto Safety*, 809 F.3d
14 at 1096-97 (quoting *Kamakana*, 447 F.3d at 1179) (alteration in original). “The court must
15 then ‘conscientiously balance[] the competing interests of the public and the party who
16 seeks to keep certain judicial records secret.’” *Id.* at 1097 (quoting *Kamakana*, 447 F.3d
17 at 1179) (alteration in original). “What constitutes a ‘compelling reason’ is ‘best left to the
18 sound discretion of the trial court.’” *Id.* (quoting *Nixon*, 435 U.S. at 599). “Examples
19 include when a court record might be used to ‘gratify private spite or promote public
20 scandal,’ to circulate ‘libelous’ statements, or ‘as sources of business information that
21 might harm a litigant’s competitive standing.’” *Id.* (quoting *Nixon*, 435 U.S. at 598-99).

22 The compelling reasons standard is applicable because the motion for which the
23 documents were offered—Defendant Shenzhen Simolio’s Motion to Dismiss—is closely
24 related to the underlying cause of action. *See Ctr. for Auto Safety*, 809 F.3d at 1099 (“The
25 focus in all of our cases [concerning the applicability of the compelling reasons standard]
26 is on whether the motion at issue is more than tangentially related to the underlying cause
27 of action.”). The designation of a document as “confidential” does not satisfy the
28 compelling reasons standard. *See, e.g., Houston Cas. Co. v. Cibus US LLC*, No. 19-cv-

1 00828-BAS-LL, 2021 WL 3678599, at *2 (S.D. Cal. Aug. 19, 2021) (ordering a party to
2 file a response “that explains why there are compelling reasons to seal information . . .
3 designated as confidential”). Defendant Shenzhen Simolio’s agreement with Amazon to
4 keep customer personal data confidential is also not a compelling reason to seal the
5 documents. *See, e.g., WatchGuard Tech., Inc. v. iValue Infosolutions Pvt. Ltd.*, No. C15-
6 1697-BAT, 2017 WL 3581624, at *2 (W.D. Wash. Aug. 18, 2017) (stating that the fact
7 that an agreement “may contain a confidentiality provision, without more, does not
8 constitute a *compelling* reason to seal [] information”).

9 Exhibits Two and Three contain information associated with individual purchases
10 of Defendant Shenzhen Simolio’s products on Amazon, including the date and time of the
11 order, the numeric order ID, and the customer’s city, state, and postal code. Defendant
12 Shenzhen Simolio’s volume of sales and the location of its customers is central to the
13 Court’s decision on the Motion to Dismiss. The parties do not explain how such
14 information—in the absence of names, street addresses, telephone numbers, etc.—could
15 be used to identify the specific individuals who purchased Defendant Shenzhen Simolio’s
16 products. Under these circumstances, the reasons advanced by the parties for sealing (or
17 redacting) Exhibits Two and Three are not compelling. *See Foltz*, 331 F.3d at 1137
18 (“Simply redacting the identifying information of third parties (*e.g.*, their names, addresses,
19 telephone numbers, and social security numbers) from these records and disclosing the
20 remaining information would not injure the third parties.”); *see also Primus Grp., Inc. v.*
21 *Inst. for Env’t Health, Inc.*, 395 F. Supp. 3d 1243, 1267-68 (N.D. Cal. 2019) (allowing
22 redaction of information identifying “specific” customers because publication would allow
23 competitors to “target their marketing efforts without expending similar time and resources
24 to learn about the product testing needs of *particular* companies,” and denying sealing of
25 sales data that stated the number and types of tests performed (emphasis added)); *Triquant*
26 *Semiconductor, Inc. v. Avago Tech. Ltd.*, No. cv 09-1531-PHX-JAT, 2011 WL 6182346,
27 at *2 (D. Ariz. Dec. 13, 2011) (allowing redaction “solely” of customer names and other
28 identifying information).

1 Exhibit Four is a record of communication between Defendant Shenzhen Simolio
2 and three different customers regarding those customers' issues with Defendant Shenzhen
3 Simolio's products. The document contains order information, the customers' first names,
4 and the content of the communication between the customers and Defendant Shenzhen
5 Simolio. When cross-referenced with the information in Exhibits Two and Three, the
6 identities of individual customers are discoverable. The Exhibit is not relied upon in this
7 Order. The Court concludes that compelling reasons exist to seal Exhibit Four and that the
8 public's interest in access to court records is not seriously affected.

9 **VI. CONCLUSION**

10 IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendant Shenzhen
11 Simolio Electronic Co., Ltd. (ECF No. 34) is granted in part and denied in part. The motion
12 is granted as to Plaintiff TV Ears, Inc.'s fourth cause of action (trade dress infringement)
13 and is otherwise denied.

14 IT IS FURTHER ORDERED that the Motion to File Documents Under Seal filed
15 by Plaintiff TV Ears, Inc. (ECF No. 36) is granted in part and denied in part. The motion
16 is granted as to Exhibit Four (ECF No. 35-4) and is otherwise denied.

17 Dated: November 18, 2021

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19 Hon. William Q. Hayes
20 United States District Court
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