

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 David KAUFFMAN, individually and on
4 behalf of all others similarly situated,
5 Plaintiff,
6 v.
7 THE HOME DEPOT, INC.,
8 Defendant.

Case No.: 23-cv-0259-AGS-AHG

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS (ECF 16) AND CLOSING
CASE**

9
10 Plaintiff sued Home Depot, claiming it surreptitiously recorded his actions while on
11 its website. But because this Court lacks personal jurisdiction over Home Depot, which is
12 headquartered and incorporated outside California, the case must be dismissed.

13 **BACKGROUND**

14 According to plaintiff David Kauffman, while he was “in California,” he used his
15 cell phone to visit Home Depot’s “website . . . to shop for products” and ultimately made
16 some purchases. (ECF 13, at 9.) Unbeknownst to him, Home Depot had partnered with
17 Quantum Metric to maintain software on its website that it calls “session replay”—and that
18 Kauffman calls “spyware.” (*Id.* at 2.)

19 Kauffman claims that as soon as Home Depot’s “site loaded on Plaintiff’s cell
20 phone,” this software intercepted and recorded all the “words and text [that] were typed,”
21 including personal information like his name and “credit card number.” (ECF 13, at 10.)
22 This data was then allegedly forwarded “to Quantum’s servers,” permitting Quantum “to
23 view in real-time the users’ entire visits to [Home Depot]’s website.” (*Id.* at 4, 11.)

24 Kauffman sued Home Depot for violating California’s wiretapping laws, and he
25 seeks to represent himself and any other Californian who used the website. (*See generally*
26 ECF 13.) For its part, Home Depot characterizes session-replay monitoring as “benign
27 conduct” that “allow[s] a website operator to diagnose and correct errors the user
28 encounters on its website,” and it moves to dismiss on several grounds. (*See* ECF 16, at 7.)

1 Because the personal-jurisdiction analysis resolves this case, the Court need not reach the
2 other aspects of Home Depot’s motion.¹

3 **DISCUSSION**

4 “Personal jurisdiction comes in two varieties: general and specific.”² *Briskin v.*
5 *Shopify, Inc.*, 87 F.4th 404, 411 (9th Cir. 2023). “General jurisdiction extends to any and
6 all claims brought against a defendant,” but typically only applies to a corporate defendant
7 “in its state of incorporation and the state where it maintains its principal place of business.”
8 *Id.* Because Home Depot “is a Delaware entity with its principal place of business located
9 in Georgia” (ECF 13, at 7), Kauffman does not claim general jurisdiction applies. (*See*
10 ECF 13, at 8 (discussing jurisdictional allegations); ECF 17, at 13–16 (same).)

11 Instead, Kauffman relies on specific personal jurisdiction. (*See* ECF 17, at 13.)
12 “Specific jurisdiction covers defendants less intimately connected with a State, but only as
13 to a narrower class of claims.” *Briskin*, 87 F.4th at 411 (cleaned up). “For specific
14 jurisdiction to exist over a non-resident defendant,” plaintiff must show that defendant
15 (1) “purposefully direct[ed] his activities toward the forum” and (2) “the claim must be one
16 which arises out of or relates to the defendant’s forum-related activities.” *Id.* (cleaned up).

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19 ¹ Among other things, Home Depot asserts that Kauffman sued the wrong entity,
20 naming the parent company Home Depot, Inc., rather than retailer Home Depot U.S.A, Inc.
21 (*See* ECF 16-1, at 8 n.2.) But Home Depot does not move to dismiss on this ground.
22 Nevertheless, this distinction makes no difference to the Court’s analysis. The Court will
23 presume Kauffman sued the retailer, even if he has listed its name inaccurately. If he meant
24 to sue the parent company, there is even less basis for personal jurisdiction.

24 ² Technically, “[t]wo authorities govern a federal court’s exercise of personal
25 jurisdiction over a defendant: the Fourteenth Amendment’s Due Process Clause”—which
26 is where the specific and general jurisdictional issues arise—“and the long arm statute of
27 the state in which the district court sits.” *Briskin v. Shopify, Inc.*, 87 F.4th 404, 411 (9th Cir.
28 2023). But in this case, those “requirements are coterminous . . . because California’s long
arm statute allows courts to exercise jurisdiction on any ground not inconsistent with due
process.” *See id.*

1 Even if those requirements are met, defendant may still defeat personal jurisdiction by
2 establishing that the “exercise of jurisdiction” does not “comport with fair play and
3 substantial justice.” *Id.*

4 **A. Purposeful Direction**

5 To make out purposeful direction, “the defendant allegedly must have (1) committed
6 an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the
7 defendant knows is likely to be suffered in the forum state.” *Briskin*, 87 F.4th at 412. The
8 primary question here is whether plaintiff has sufficiently alleged Home Depot “expressly
9 aimed” its website at California.

10 Unlike passive websites, an “interactive website”—that is, a website where “users
11 can exchange information with the host computer”—can satisfy the “express aiming”
12 requirement, “but not always.” *Id.* Conduct showing a defendant is “operating a website in
13 conjunction with something more—conduct directly targeting the forum—is sufficient to
14 satisfy” the requirement. *Id.* (cleaned up).

15 That “something more” is where Kauffman comes up short. At bottom, Kauffman
16 argues that Home Depot maintained a website that Kauffman “placed an order” from,
17 starting a chain of events that ended with a product being “shipped to California.” (*See*
18 ECF 17, at 15.) Kauffman’s reliance on this point is understandable, as the Ninth Circuit
19 has held that “if a defendant, in its regular course of business, sells a physical product via
20 an interactive website and causes that product to be delivered to the forum, the defendant
21 ‘expressly aimed’ its conduct at that forum.” *Herbal Brands, Inc. v. Photoplaza, Inc.*,
22 72 F.4th 1085, 1093 (9th Cir. 2023); (*see also* ECF 17, at 15).

23 But, after the briefing in this case was complete, the Ninth Circuit expressly limited
24 *Herbal Brands* to claims arising from “defendant’s sale of a physical product to a consumer
25 in the forum state via an interactive website.” *Briskin*, 87 F.4th at 422. It “does not extend
26 to the extraction of consumer data” that forms the basis of privacy-related claims. *Id.* After
27 all, Kauffman doesn’t object to the product he received or its shipment; he complains that
28 his actions on the website were captured. By his own admission, that claim accrued “the

1 moment Plaintiff and Class Members visited Defendant’s website,” even before he made
2 any purchases. (See ECF 13, at 4.) So, Kauffman’s primary attempt to show “something
3 more” fails.

4 His other arguments fare no better. First, he contends that the “expressly aimed”
5 prong “is easily satisfied,” as Home Depot “operates numerous retail stores in California
6 and integrates the website with those stores.” (ECF 17, at 15.) Yet the Ninth Circuit has
7 refused to credit this very argument in data-extraction cases. *Briskin*, 87 F.4th at 413
8 (rejecting plaintiff’s reliance on Shopify’s “Los Angeles ‘store’” or “its California
9 fulfillment center” to satisfy the “expressly aimed” prong in a privacy case based on “data
10 extraction, retention, and processing”). Next, Kauffman argues that Home Depot knew he
11 was in California at the time of the data recording, and he points out that the privacy
12 violation occurred in California. But these also do not move the needle in the “expressly
13 aimed” analysis. *See id.* at 416–17 (holding that “Shopify did not expressly aim its conduct
14 towards California” simply because it knew “the whereabouts” of “customers through the
15 data it collects from them and the tracking tools it deploys” nor because “Briskin resided
16 there, made his online purchase while located in California, and sustained his privacy-
17 based injuries in that state” (cleaned up)).

18 Although not mentioned in his briefing, Kauffman’s complaint alleges one more fact
19 that could potentially provide the necessary “something more.” Specifically, he claims that
20 Home Depot “included California-specific provisions in its privacy policy in recognition
21 that California citizens would be using Defendant’s website while in California and that
22 such use, as well as Defendant’s own conduct, was subject to California law.” (ECF 13,
23 at 9.) But references to state law in website policies do not establish express aiming. *See*
24 *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1212 (9th Cir. 2020) (“The TOS [Terms
25 of Service] therefore does not establish any targeting of the U.S. market; it at most suggests
26 Wanat knew [the] ePorner [website] might have U.S. traffic.”); *see also L-Nutra, Inc. v.*
27 *Prevail Sols., LLC*, No. 2:21-CV-04564-SB-KK, 2021 WL 6103084, at *3 (C.D. Cal.
28 Oct. 12, 2021) (collecting cases and rejecting the argument “that Defendant’s website

1 explicitly targets California consumers because its Terms of Use” mention and contain
2 waivers of California law).

3 In short, Kauffman failed to carry his burden to show that Home Depot “expressly
4 aimed” its website at California, so he cannot prove purposeful direction.

5 **B. “Relates To” or “Arises Out Of”**

6 Even if Kauffman could show purposeful direction, he would still need to establish
7 that his claim “arises out of or relates to” Home Depot’s forum-related activities. *See*
8 *Briskin*, 87 F.4th at 411. Kauffman relies mostly on a “relates to” theory. He urges this
9 Court to consider the interplay between Home Depot’s stores and its website, as well as
10 the “critical part” that data capture plays in Home Depot’s “coordinated efforts to maximize
11 sales revenue in California.” (ECF 17, at 16.) For the “relates to” test, plaintiff must show
12 “a strong, direct connection between the defendant’s forum-related activities and the
13 plaintiff’s claims.” *Briskin*, 87 F.4th at 414. Unfortunately for Kauffman, the Ninth Circuit
14 ruled that almost identical forum-related activities did not “relate to” data-capture privacy
15 claims. The *Briskin* court held that a plaintiff’s privacy-related causes of action based on
16 Shopify’s “extraction and processing” of personal data had “nothing to do with Shopify’s
17 brick-and-mortar operations in the state.” *Id.* And *Briskin* also dispenses with Kauffman’s
18 broader “coordinated efforts” argument. It rejected a similar suggestion that “Shopify’s
19 broader business actions in California set the wheels in motion for Shopify to eventually
20 inflict privacy-related harm on him in California,” noting that “such a butterfly effect
21 theory of specific jurisdiction would be far too expansive to satisfy due process.” *Id.* at
22 415. Thus, Kauffman has not shown that his claims relate to Home Depot’s California
23 contacts.

24 That leaves the “arising out of” prong. In a single sentence, Kauffman asserts that
25 his “claim arises out of his ordering of a physical product to be shipped to California.”
26 (ECF 17, at 16.) “The ‘arising out of’ portion of the specific jurisdiction formula ‘asks
27 about causation.’” *Briskin*, 87 F.4th at 413 (quoting *Ford Motor Co. v. Mont. Eighth Jud.*
28 *Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021)). “In other words, an injury arising out of a


1 defendant's forum contacts requires 'but for' causation, in which a direct nexus exists
2 between a defendant's contacts with the forum state and the cause of action." *Id.* (cleaned
3 up). As discussed above, his purchase of a physical product did not cause his data capture;
4 that began as soon as he entered the website. (See ECF 13, at 4.) Kauffman's claims do not
5 "arise out of" his online purchase.

6 Thus, Kauffman has not carried his burden to show that any claim "arises out of or
7 relates to" defendant's forum-related activities. And this problem cannot be cured in
8 discovery. As "he did not request jurisdictional discovery," Kauffman has "waived" any
9 right to it. See *Hatset v. Century 21 Gold Coast Realty*, 649 F. App'x 400, 403 (9th Cir.
10 2016). So, this Court may not exercise personal jurisdiction over Home Depot.

11 CONCLUSION

12 Home Depot's motion to dismiss is **GRANTED** for lack of personal jurisdiction and
13 **DENIED AS MOOT** on all other grounds. The Clerk is directed to issue a judgment and
14 close this case.

15 Dated: January 19, 2024

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18 Hon. Andrew G. Schopler
19 United States District Judge
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