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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RIGHTHAVEN LLC, a Nevada limited-
liability company,

Plaintiff,

2:10-CV-01062-LRH-LRL

v.

ORDER

SOUTH COAST PARTNERS, INC., a
California corporation d/b/a KELLER
WILLIAMS OC COASTAL REALTY;
TALOA INC., an entity of unknown origin
and nature; ROBERT WALTER HUNT, an
individual; and JEFFREY L. NELSON, an
individual,

Defendants.

Before the court is Defendants’ Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(2). Doc. #10. Plaintiff filed an opposition, and Defendants filed a reply. Doc. ##11-12. While the motion was pending, however, the parties stipulated to the dismissal with prejudice of defendants South Coast Partners, Inc. d/b/a Keller Williams OC Coastal Realty and Robert Walter Hunt, which the court granted. Doc. ##13-14. Resolution of the motion thus pertains only to remaining defendants Jeffrey L. Nelson (“Nelson”) and Taloa Inc. (“Taloa”).

I. Facts and Procedural History

Nelson is a California resident and licensed real estate agent in California. Beginning in 2007, he has posted news stories about the mortgage and real estate industries on an internet site

1 that he administers under his name and Taloa, Inc., an entity he controls. On May 3, 2010, Nelson
2 posted to his website an unauthorized copy of the contents of a news article entitled “Program may
3 level housing sale odds” (hereinafter referred to as “the Work”), which was published in the Las
4 Vegas Review Journal (“Review Journal”) on April 30, 2010. The article contained both factual
5 information about a new federal housing program to be initiated in Nevada and the reporter’s
6 commentary on the possible effects the program could have on the Las Vegas housing market.
7 Although the title and contents of the article were reproduced in full on Nelson’s website, the by-
8 line listing the true author was not included and Nelson himself was listed as the author of the post.

9 On May 25, 2010, after Nelson had displayed the Work, plaintiff Righthaven obtained a
10 transfer of rights for the Work from the Review Journal. Righthaven then filed for and received a
11 copyright registration for the Work on June 8, 2010. Subsequently, on June 30, 2010, Righthaven
12 filed its complaint alleging a single cause of action for copyright infringement pursuant to 17
13 U.S.C. § 501. Doc. #1.

14 Thereafter, Nelson filed the present motion to dismiss pursuant to Federal Rule of Civil
15 Procedure 12(b)(2) for lack of personal jurisdiction. Doc. #10.

16 **II. Legal Standard**

17 When a defendant challenges the exercise of personal jurisdiction, the plaintiff bears the
18 burden of demonstrating that the court has jurisdiction over the defendant. *Schwarzenegger v.*
19 *Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Where, as here, the court receives only
20 written materials, the plaintiff need only make a prima facie showing of jurisdiction through its
21 pleadings and affidavits to avoid dismissal. *Id.* The plaintiff cannot simply rest on the bare
22 allegations of its complaint; however, uncontroverted allegations in the plaintiff’s complaint must
23 be taken as true, and conflicts between the facts contained in the parties’ affidavits must be
24 resolved in the plaintiff’s favor. *Id.*

1 **III. Discussion**

2 To establish that personal jurisdiction over the nonresidents defendants is proper,
3 Righthaven must show that the defendants have at least “minimum contacts with Nevada ‘such that
4 the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’”
5 *Id.* (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). While personal jurisdiction
6 may be either general or specific, Righthaven contends only that the court has specific personal
7 jurisdiction over the defendants.

8 A three-part test applies to determine whether the exercise of specific jurisdiction satisfies
9 the requirements of due process: (1) the non-resident defendant must purposefully direct his
10 activities or consummate some transaction with the forum or resident thereof; or perform some act
11 by which he purposefully avails himself of the privilege of conducting activities in the forum,
12 thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises
13 out of or relates to the defendant’s forum-related activities; and (3) the exercise of jurisdiction must
14 comport with fair play and substantial justice—*i.e.*, it must be reasonable. *Yahoo! Inc. v. La Ligue*
15 *Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (en banc). The
16 plaintiff bears the burden of establishing the first two prongs, and if the plaintiff succeeds “the
17 burden then shifts to the defendant to ‘present a compelling case’ that the exercise of jurisdiction
18 would not be reasonable.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.
19 2004) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)).

20 **A. Purposeful Availment or Direction**

21 Although the term “purposeful availment” is often used as shorthand to identify the first
22 prong, it encompasses both purposeful availment and purposeful direction, which “are, in fact, two
23 distinct concepts.” *Id.* Purposeful availment usually applies in cases sounding in contract and is
24 typically established by evidence of the defendant’s actions in the forum, such as executing or
25 performing a contract there. *Id.* By contrast, purposeful direction usually applies in cases
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1 sounding in tort and is typically established by evidence of the defendant’s activities outside the
2 forum state that are directed at the forum. *Id.* at 803. As copyright infringement is often
3 characterized as a tort, purposeful direction is the proper analytical framework for this case.
4 *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010).

5 Purposeful direction is determined under the “effects” test of *Calder v. Jones*, 465 U.S. 783
6 (1984). The effects test imposes three requirements: “the defendant allegedly must have (1)
7 committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the
8 defendant knows is likely to be suffered in the forum state.” *Yahoo!*, 433 F.3d at 1206 (citation,
9 brackets and internal quotations omitted). Importantly, notwithstanding its label, the “effects” test
10 is not satisfied merely by a foreign act with foreseeable effects in the forum; there must be
11 “something more”—namely, “express aiming” at the forum state. *Bancroft & Masters, Inc. v.*
12 *Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (citing *Calder*, 465 U.S. at 789).

13 Righthaven contends that as this case involves a claim of willful copyright infringement, it
14 is controlled by *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106
15 F.3d 284 (9th Cir. 1997), *overruled on other grounds by Feltner v. Columbia Pictures Television*,
16 523 U.S. 340 (1998). There, a California-based television studio brought a copyright infringement
17 action in California against the owner of three television stations in the southeast for continuing to
18 broadcast programs after the studio terminated the licensing agreements. *Id.* at 288. Without
19 elaboration, the Ninth Circuit held that where the defendant was found to have “willfully infringed
20 copyrights owned by [the plaintiff], which, as [the defendant] knew, had its principal place of
21 business in the [forum],” “[t]his fact alone is sufficient to satisfy” the *Calder* effects test. *Id.* at 289
22 (citing *Calder*, 465 U.S. at 789-90).

23 This court recognizes that substantial tension—if not an irreconcilable conflict—exists
24 between *Columbia Pictures’* application of *Calder* and a series of subsequent opinions by the
25 Ninth Circuit. In those cases, the court has consistently held that infringement of a plaintiff’s
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1 intellectual property rights, with knowledge that the plaintiff’s principal place of business is in the
2 forum and that the harm will be felt there, is insufficient to establish personal jurisdiction without a
3 further showing that the defendant otherwise expressly aimed its activities at the forum. *See, e.g.,*
4 *Schwarzenegger*, 374 F.3d at 807 (articulating the “express aiming” requirement and holding that,
5 even though the defendant may have known that plaintiff lived in California, the requirement was
6 not satisfied by the defendant’s unauthorized use of plaintiff’s image in a newspaper advertisement
7 because it was published only in Ohio); *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1158 (9th Cir.
8 2006) (where a California golf resort alleged intentional infringement and dilution of its registered
9 trademark, holding that the use of “Pebble Beach” in the domain name of a passive website for a
10 UK bed and breakfast did not constitute “express aiming” at California, despite the defendant’s
11 knowledge of the California resort); *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 609 (9th
12 Cir. 2010) (“Where a defendant’s ‘express aim was local,’ the fact that it caused harm to the
13 plaintiff in the forum state, even if the defendant knew that the plaintiff lived in the forum state, is
14 insufficient to satisfy the effects test.”). The court has further clarified that knowledge of the
15 plaintiff’s residency “goes to the foreseeable effects prong of the ‘effects test’ and is not an
16 independent act that can be interpreted as being expressly aimed at [the forum].” *Pebble Beach*,
17 453 F.3d at 1158.

18 The Ninth Circuit has also adhered to this application of the *Calder* effects test in cases
19 where the court found the express aiming requirement satisfied. *See, e.g., Rio Properties, Inc. v.*
20 *Rio Int’l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002) (concluding that RII “engaged in
21 ‘something more’ than the operation of passive website” by specifically targeting consumers in
22 Nevada by running studio and print advertisements in Las Vegas, in competition with Rio);
23 *Yahoo!*, 433 F.3d at 1206, 1209 (sitting en banc, adopting *Schwarzenegger*’s 3-pronged
24 deconstruction of the *Calder* effects test and finding that a French lawsuit “was expressly aimed at
25 California” because “[t]he suit sought, and the French court granted, orders directing Yahoo! to
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1 perform significant acts in California”); *Brayton Purcell*, 606 F.3d at 1129 (noting that “[i]t is
2 beyond dispute in this circuit that maintenance of a passive website alone cannot satisfy the
3 express aiming prong,” but finding the requirement satisfied because the defendant “individually
4 targeted Brayton Purcell by making commercial use of Brayton Purcell’s copyrighted material for
5 the purpose of competing with Brayton Purcell for elder abuse clients” in the forum). *Calder* itself
6 is in accord. 465 U.S. at 789-90 (finding that the defendants’ actions in writing and publishing a
7 libelous article about the plaintiff were “expressly aimed at California,” where the defendants knew
8 the plaintiff lived and worked in the state and the publication had its largest circulation in the
9 state).

10 Importantly, however, the Ninth Circuit has never questioned the continuing validity of
11 *Columbia Pictures*’ application of *Calder*.¹ Some lower courts have recognized the tension
12 between *Columbia Pictures* and the Ninth Circuit’s jurisprudence following *Schwarzenegger*. *See*,
13 *e.g.*, *Brayton Purcell LLP v. Recordon & Recordon*, 361 F. Supp. 2d 1135, 1141-42 (N.D. Cal.
14 2005) (noting that “one could conclude that *Columbia Pictures* and *Schwarzenegger* are not
15 entirely consistent,” but avoiding the conflict by concluding that “the facts of the case at bar are
16 distinguishable from *Schwarzenegger*”), *aff’d*, 606 F.3d 1124 (9th Cir. 2010). Significantly,
17 however, the Ninth Circuit itself has never acknowledged the tension or made any comment on the
18 subject. Indeed, even in *Brayton Purcell*, where the district court had acknowledged the possible
19 conflict, the Ninth Circuit’s opinion in the same case made no such acknowledgment, cited
20 *Columbia Pictures* only for background propositions unrelated to the requirements of *Calder*, and
21 affirmed by finding the heightened requirements of *Schwarzenegger* satisfied on the facts. *Brayton*
22 *Purcell*, 606 F.3d at 1128-30.

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24 ¹Only *Columbia Pictures*’ application of the *Calder* effects test is in question; the court’s
25 finding of personal jurisdiction in that case is not. As an alternative ground, the court found that the
26 defendant’s “wide-ranging contract-related contacts with Columbia in the Central District” were also
“sufficient to satisfy the ‘purposeful availment’ requirement.” *Columbia Pictures*, 106 F.3d at 289
(citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 479 (1985)).

1 Ultimately, unless and until the Ninth Circuit overrules *Columbia Pictures*, this court
2 remains bound by its express holding that where the defendant “willfully infringed copyrights
3 owned by [the plaintiff], which, as [the defendant] knew, had its principal place of business in the
4 [forum],” “[t]his fact alone is sufficient to satisfy” the *Calder* effects test. *Id.* at 289. Furthermore,
5 in addition to the defendants’ alleged willful copyright infringement and their knowledge that the
6 copying of a Las Vegas Review Journal article would produce harm in Nevada, the content of the
7 copied article is focused on issues specifically related to Nevada and of special interest to Nevada
8 citizens. *Cf. Brayton Purcell*, 606 F.3d at 1129-30 (finding express aiming where one law firm
9 copied another’s website content verbatim and posted it to their own passive website without
10 attribution, creating confusion as to authorship and placing themselves “in direct competition” for
11 elder abuse clients in the forum); *Schwarzenegger*, 374 F.3d at 807 (finding no express aiming
12 where the offending advertisement “was never circulated in California, and [the defendant] had no
13 reason to believe that any Californians would see it and pay a visit to the dealership”). For these
14 reasons, the court concludes that the *Calder* effects test is satisfied and that the defendants
15 purposefully directed their wrongful activities at the forum.

16 **B. Arising Out of Forum-Related Activities**

17 Having concluded that the defendants’ allegedly wrongful conduct was purposefully
18 directed at Nevada, the second requirement for specific jurisdiction that the claim arises out of or
19 relates to the defendant’s forum-related activities is easily met. Defendants’ unauthorized copying
20 and posting of the Work appears to be their only contacts with Nevada, and but for that copyright
21 infringement, Righthaven’s claim would not have arisen. *Bancroft & Masters*, 223 F.3d at 1088;
22 *Brayton Purcell*, 361 F. Supp. 2d at 1142-43.

23 **C. Reasonableness**

24 Given Righthaven’s satisfaction of the first two requirements for specific jurisdiction, the
25 court presumes that the exercise of specific jurisdiction is reasonable, and the burden shifts to the
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1 defendants to “present a compelling case that the presence of some other considerations would
2 render jurisdiction unreasonable.” *Burger King*, 471 U.S. at 477. In evaluating reasonableness, the
3 court balances seven factors: (1) the extent of the defendants’ purposeful interjection into the
4 forum state’s affairs; (2) the burden on the defendants of defending in the forum; (3) the extent of
5 conflict with the sovereignty of the defendants’ state; (4) the forum state’s interest in adjudicating
6 the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the
7 forum to the plaintiff’s interest in convenient and effective relief; and (7) the existence of an
8 alternative forum. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993).

9 Here, the court finds the extent of the defendants’ purposeful interjection into Nevada to be
10 minimal, given that they injected themselves into the forum “only by virtue of publishing
11 copyrighted material [on a] passive website.” *Brayton Purcell*, 361 F. Supp. 2d at 1143.
12 Nonetheless, the defendants have failed to establish that defending in the forum would impose a
13 significant burden. Also, no other considerations would undermine the reasonableness of
14 jurisdiction in the District of Nevada. Thus, on balance the court concludes that the defendants
15 have failed to present a compelling case that the exercise of jurisdiction in this district would be
16 unreasonable. The court therefore concludes that the defendants are properly subject to specific
17 jurisdiction in this district.

18 IT IS THEREFORE ORDERED that Defendants’ Motion to Dismiss for Lack of Personal
19 Jurisdiction Pursuant to FRCP 12(b)(2) (Doc. #10) is DENIED.

20 IT IS SO ORDERED.

21 DATED this 5th day of February, 2011.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE