

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JAMES MALINCHAK INTERNATIONAL,
INC.,

Plaintiff(s),

v.

SUZANNE EVANS COACHING, LLC, and
SUZANNE EVANS,

Defendant(s).

Case No. 2:16-CV-89 JCM (CWH)

ORDER

Presently before the court is defendants Suzanne Evans Coaching, LLC's (the "LLC") and Suzanne Evans's ("Evans" and collectively, as "defendants") motion to dismiss for lack of jurisdiction. (ECF No. 7). Plaintiff James Malinchak International, Inc. filed a response (ECF No. 9), to which defendants replied (ECF No. 10).

I. Facts

This is a trademark infringement action involving the trademark "Big Money Speaker" (the "trademark"), United States Patent and Trademark Office ("USPTO") registration number 3899731. (ECF No. 1).

Plaintiff claims to be the owner of the trademark and alleges that defendants infringed on its registered trademark through their website. (ECF No. 1). Plaintiff further alleges that defendants' website provides direct links to purchase tickets for speaking engagements in Las Vegas, Nevada. (ECF No. 1). Moreover, plaintiff asserts that defendants used the trademark in published videos, web pages, and seminars. (ECF No. 1).

Plaintiff's complaint alleges four causes of action: (1) mark infringement under the Lanham Act, 15 U.S.C. § 1114(1)(a); (2) false designation of origin under the Lanham Act, 15

1 U.S.C. § 1125(a); (3) mark dilution under the Lanham Act, 15 U.S.C. § 1125(c); and (4)
2 misappropriation of licensable commercial property under Nevada law. (ECF No. 1).

3 In the instant motion, defendants move to dismiss for lack of jurisdiction and improper
4 venue. (ECF No. 7). The court will address each in turn.

5 **II. Legal Standards**

6 **A. Lack of Personal Jurisdiction**

7 Federal Rule of Civil Procedure 12(b)(2) allows a defendant to move to dismiss for lack of
8 personal jurisdiction. To avoid dismissal under Rule 12(b)(2), a plaintiff bears the burden of
9 demonstrating that its allegations would establish a prima facie case for personal jurisdiction. See
10 *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Allegations in plaintiff’s complaint
11 must be taken as true and factual disputes should be construed in the plaintiff’s favor. *Rio Props,*
12 *Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002).

13 When no federal statute governs personal jurisdiction, the district court applies the law of
14 the forum state. *Boschetto*, 539 F.3d at 1015; *see also Panavision Int’l L.P. v. Toeppen*, 141 F.3d
15 1316, 1320 (9th Cir. 1998). Where a state has a “long-arm” statute providing its courts jurisdiction
16 to the fullest extent permitted by the due process clause, as Nevada does, a court need only address
17 federal due process standards. See *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 134 P.3d
18 710, 712 (Nev. 2006) (citing Nev. Rev. Stat. § 14.065); *see also Boschetto*, 539 F.3d at 1015.

19 An assertion of personal jurisdiction must comport with due process. See *Wash. Shoe Co.*
20 *v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 672 (9th Cir. 2012). To satisfy due process, a court
21 may exercise personal jurisdiction over a defendant only where the defendant has certain minimum
22 contacts with the forum state “such that the maintenance of the suit does not offend traditional
23 notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316
24 (1945).

25 Two categories of personal jurisdiction exist: (1) general jurisdiction; and (2) specific
26 jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–15 (1984);
27 *see also LSI Indus., Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000).

28 . . .

1 **B. Improper Venue**

2 Under Federal Rule of Civil Procedure 12(b)(3), a defendant may rely on improper venue
3 as a valid defense to a plaintiff's claim. To withstand dismissal under Rule 12(b)(3), plaintiff bears
4 the burden to establish that venue is properly in this district. *Nat'l Fitness Co. v. Procore Labs.,*
5 *LLC*, 2:10-cv-2168-JCM (RJJ), 2011 WL 2463296, at *1 (D. Nev. June 20, 2011) (citing *Piedmont*
6 *Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979)). In a civil action, venue
7 is proper in the following districts:

8 (1) a judicial district in which any defendant resides, if all defendants are residents
9 of the State in which the district is located;

10 (2) a judicial district in which a substantial part of the events or omissions giving
11 rise to the claim occurred, or a substantial part of property that is the subject of the
12 action is situated; or

13 (3) if there is no district in which an action may otherwise be brought as provided
14 in this section, any judicial district in which any defendant is subject to the court's
15 personal jurisdiction with respect to such action.

16 28 U.S.C. § 1391(b).

17 Further, "[t]he district court of a district in which is filed a case laying venue in the wrong
18 division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district
19 or division in which it could have been brought." 28 U.S.C. § 1406(a). Similarly, "[f]or the
20 convenience of parties and witnesses, in the interest of justice, a district court may transfer any
21 civil action to any other district or division where it might have been brought." 28 U.S.C. §
22 1404(a). Nonetheless, the district court has discretion in determining whether to dismiss or transfer
23 an action. *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992).

24 **III. Discussion**

25 Plaintiff asserts that jurisdiction and venue are proper because defendants infringed on its
26 trademark through their website, which provides direct links to purchase tickets to speaking
27 engagements in Las Vegas, Nevada. (ECF No. 9 at 2).

28 **A. Personal Jurisdiction**

 Defendants assert that no general jurisdiction exists, arguing plaintiff failed to allege any
facts that demonstrate continuous and systematic contact with the forum state, here Nevada. (ECF
No. 7 at 6). In response, plaintiff claims that it lacks an adequate basis to respond to defendants'

1 assertion, reiterating that regardless, defendants are subject to specific jurisdiction in Nevada.
2 (ECF No. 9 at 10).

3 General jurisdiction arises where the defendant has continuous and systematic ties with the
4 forum, even if those ties are unrelated to the litigation. See *Tuazon v. R.J. Reynolds Tobacco Co.*,
5 433 F.3d 1163, 1171 (9th Cir. 2006) (citing *Helicopteros Nacionales de Columbia, S.A.*, 466 U.S.
6 at 414–16). “[T]he plaintiff must demonstrate the defendant has sufficient contacts to constitute
7 the kind of continuous and systematic general business contacts that approximate physical
8 presence.” *In re W. States Wholesale Nat. Gas Litig.*, 605 F. Supp. 2d 1118, 1131 (D. Nev. 2009)
9 (internal quotation marks and citations omitted). In other words, defendant’s affiliations with the
10 forum state must be so “continuous and systematic” as to render it essentially “at home” in that
11 forum. See *Daimler AG v. Bauman*, --- U.S. ----, 134 S. Ct. 746, 760 (2014).

12 Here, defendants are not “at home” in Nevada. Defendant Evans is a resident of South
13 Carolina and the LLC is a South Carolina limited liability company with its principal place of
14 business in South Carolina. (ECF No. 7 at 5). Therefore, there is no general jurisdiction over
15 defendants in Nevada.

16 Specific jurisdiction arises where sufficient contacts with the forum state exist such that
17 the assertion of personal jurisdiction “does not offend ‘traditional notions of fair play and
18 substantial justice.’” *Int’l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457,
19 463 (1940)). The Ninth Circuit has established a three-prong test for analyzing an assertion of
20 specific personal jurisdiction:

21 (1) The non-resident defendant must purposefully direct his activities or
22 consummate some transaction with the forum or resident thereof; or perform some
23 act by which he purposefully avails himself of the privilege of conducting activities
in the forum, thereby invoking the benefits and protections of its laws;

24 (2) the claim must be one which arises out of or relates to the defendant’s forum-
related activities; and

25 (3) the exercise of jurisdiction must comport with fair play and substantial justice,
26 i.e., it must be reasonable.

27 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). “The plaintiff bears
28 the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of
these prongs, personal jurisdiction is not established in the forum state.” *Id.* (citations omitted).

1 **(1) Purposeful Availment & Purposeful Direction**

2 This first prong of the specific jurisdiction test refers to both purposeful direction and
3 purposeful availment. *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1228 (9th
4 Cir. 2011). In trademark infringement cases involving allegations of tortious conduct, as here, the
5 Ninth Circuit focuses on “purposeful direction,” applying the “Calder-effects” test. *Id.* (“Because
6 [plaintiff] has alleged copyright infringement, a tort-like cause of action, purposeful direction ‘is
7 the proper analytical framework.’” (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*
8 *L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006))); see also *Calder v. Jones*, 465 U.S. 783,
9 788–89 (1984) (establishing an “effects doctrine” for intentional action aimed at the forum).

10 Under the “Calder-effects” test, “the defendant allegedly must have (1) committed an
11 intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows
12 is likely to be suffered in the forum state.” *Brayton Purcell LLP v. Recordon & Recordon*, 606
13 F.3d 1124, 1128 (9th Cir. 2010) (quoting *Yahoo! Inc.*, 433 F.3d at 1206).

14 In other words, defendants must not only cause harm to a person who they know will feel
15 a “judicially sufficient amount of harm” in the forum state, but the intentional activity must also
16 be directed to the forum state itself. See *Yahoo! Inc.*, 433 F.3d at 1207. Activity is not “aimed at”
17 a forum state merely because it is expected that its effects will be felt there, otherwise the third
18 element of the Calder-effects test would swallow the second. See *Poor Boy Prods. v. Fogerty*,
19 No. 3:14-CV-00633-RCJ, 2015 WL 5057221, at *3 (D. Nev. Aug. 26, 2015). Thus, the second
20 and third elements are distinct and conjunctive.

21 Here, the parties do not dispute that the intentional act element is satisfied. The court
22 agrees as it is well-established that the creation and operation of a website constitutes an intentional
23 act in this context. See, e.g., *Brayton Purcell LLP*, 606 F.3d at 1128.

24 Instead, defendants argue that plaintiff failed to show that they targeted Nevada through
25 their advertising, sales, or website. (ECF No. 7 at 8). Specifically, defendants contend that their
26 business is not located in Nevada or directed to any Nevada geographic area. (ECF No. 7 at 8).

1 In response, plaintiff asserts that defendants targeted their conduct toward known residents
2 of Nevada by advertising in the national marketplace and because defendants' website provided a
3 link to purchase tickets for a speaking engagement in Las Vegas. (ECF No. 9 at 2, 5).

4 Courts have struggled with the question of whether tortious conduct on a nationally
5 accessible website constitutes conduct that is expressly aimed at the forums in which the website
6 can be viewed. See, e.g., *Mavrix Photo, Inc.*, 647 F.3d at 1229; *Brayton Purcell LLP*, 606 F.3d at
7 1129–31; *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156–58 (9th Cir. 2006); *Rio Props., Inc.*,
8 284 F.3d at 1019–21. While maintaining a passive website alone is insufficient, “operating even
9 a passive website in conjunction with ‘something more’—conduct directly targeting the forum—
10 is sufficient.” *Rio Props., Inc.*, 284 F.3d at 1020.

11 In determining whether a nonresident defendant has done “something more,” courts
12 considered several factors, such as: “the interactivity of defendant’s website; the geographic scope
13 of the defendant’s commercial ambitions; and whether the defendant ‘individually targeted’ a
14 plaintiff known to be a forum resident.” *Mavrix Photo, Inc.*, 647 F.3d at 1229 (citations omitted).

15 Here, plaintiff has sufficiently alleged a prima facie case that defendants’ conduct targeted
16 the forum state. Plaintiff alleged that defendants, in addition to maintaining their website, sold
17 tickets for a speaking engagement set to take place in Las Vegas, Nevada. (ECF No. 9 at 6).
18 Moreover, plaintiff alleged that defendants’ website solicited album sales from visitors within the
19 forum state. Further, defendants provide that the LLC’s “current average is one event in Las Vegas
20 every 5 years.” (ECF No. 10 at 5 n.8). Therefore, plaintiff has sufficiently alleged that defendants
21 engaged in “something more” than the operation of a passive website. See *Rio Props., Inc.*, 284
22 F.3d at 1020.

23 As to the third element of the “Calder-effects” test, “[o]ur precedents recognize that in
24 appropriate circumstances a corporation can suffer economic harm both where the bad acts
25 occurred and where the corporation has its principal place of business.” *Mavrix Photo, Inc.*, 647
26 F.3d at 1231 (quoting *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1113 (9th Cir. 2002)).
27 “[J]urisdictionally sufficient harm may be suffered in multiple forums.” *Id.* (quoting *Dole Food*
28 *Co., Inc.*, 303 F.3d at 1113).

1 Here, plaintiff has sufficiently alleged the third prong as its primary place of business is
2 located in Nevada. (ECF No. 9 at 7). Plaintiff alleged that defendants infringed on its trademark.
3 (ECF No. 1). The economic loss caused by the intentional infringement of a plaintiff's copyright
4 is foreseeable. See, e.g., Mavrix Photo, Inc., 647 F.3d at 1231; Brayton Purcell LLP, 606 F.3d at
5 1129–31.

6 Accordingly, plaintiff has adequately set forth a prima facie case of purposeful direction
7 by defendants. Nonetheless, plaintiff must make a prima facie case of relatedness to satisfy its
8 burden and survive a motion to dismiss for lack of personal jurisdiction.

9 **(2) Relatedness**

10 The second prong of specific jurisdiction requires plaintiff to show that its claim arises out
11 of defendants' Nevada-related activities. This prong is satisfied if plaintiff would not have been
12 injured "but-for" defendants' conduct in Nevada. See Rio Props., Inc., 284 F.3d at 1021.

13 In Rio Properties, Inc., the Ninth Circuit found that but-for defendant's activities in
14 Nevada—i.e., maintaining and promoting a gambling website injuring plaintiff in its principal
15 place of business and the capital of the gambling industry and specifically competing with plaintiff
16 by targeting Nevada consumers in radio and print media—plaintiff's injury would not have
17 occurred. 284 F.3d at 1021.

18 Here, plaintiff has not sufficiently alleged that but-for defendants' Nevada-related conduct
19 it would not have been injured. (ECF Nos. 1, 9). Plaintiff does not allege that defendants
20 advertised in radio or print media in Nevada. Nor does plaintiff assert that it would not have been
21 harmed "but-for" defendants selling tickets on their website to the Las Vegas engagement and
22 holding their engagement in Las Vegas. Further, plaintiff does not attempt to argue that Nevada
23 is the capital of the motivational speaking industry. Therefore, plaintiff has not sufficiently alleged
24 the second prong of the specific jurisdiction test.

25 In light of the foregoing, the court finds that plaintiff has failed to meet its burden of
26 satisfying the second prong of the specific jurisdiction test. Thus, personal jurisdiction is not
27 established in the forum state. See Schwarzenegger, 374 F.3d at 802. Accordingly, defendants'
28 motion to dismiss for lack of jurisdiction will be granted.

1 Further, because defendants' motion will be granted for lack of jurisdiction, the court finds
2 no need to address the improper venue argument.

3 **IV. Conclusion**

4 Accordingly,

5 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' motion to
6 dismiss for lack of jurisdiction (ECF No. 7) be, and the same hereby is, GRANTED.

7 IT IS FURTHER ORDERED that plaintiff's complaint (ECF No. 1) be, and the same
8 hereby is, DISMISSED WITHOUT PREJUDICE.

9 DATED September 30, 2016.

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12 UNITED STATES DISTRICT JUDGE
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