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16IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

POKITDOK, INC., et al.,

No. C 12-3947 SI

Plaintiffs,

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS; GRANTING
MOTION FOR TRANSFER OF VENUE;
AND TRANSFERRING ACTION TO THE
DISTRICT OF SOUTH CAROLINA**

v.

JEREMY MARTIN,

Defendant.

Currently before the Court is defendant's motion to dismiss for lack of personal jurisdiction and improper venue, or, in the alternative, to transfer venue to the District of South Carolina. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter suitable for disposition without oral argument and therefore VACATES the hearing currently scheduled for November 8, 2012. Having considered the parties' papers, and for good cause appearing, the Court hereby DENIES the motion to dismiss, GRANTS the motion to transfer venue, and TRANSFERS this action to the District of South Carolina.

BACKGROUND

Plaintiff PokitDok, Inc. is a social networking website and application that focuses on health and wellness. Compl. ¶ 9. PokitDok is incorporated in Delaware and has its principal place of business in Menlo Park, California. Compl. ¶ 1. Defendant Jeremy Martin ("Martin"), a resident of Charleston, South Carolina, is a computer software engineer who performed uncompensated work for Plaintiffs PokitDok, Inc., Lisa Maki, and Theodore Tanner ("Plaintiffs") in 2011. Compl. ¶¶ 4, 12. During this

1 period, PokitDok’s principal place of business was in South Carolina, where Martin performed all of
2 his work for plaintiffs. Mot. at 4.

3 On June 27, 2012, after Martin’s volunteer work for plaintiffs ended, Martin sent a letter to
4 plaintiffs which (1) demanded that plaintiffs cease and desist using his intellectual property, and (2)
5 threatened to file a copyright lawsuit against plaintiffs in federal court if they did not comply. *Id.* at 1.
6 On July 26, 2012, plaintiffs filed this action against Martin; and, on August 1, 2012, Martin filed a
7 copyright infringement action against plaintiffs in the District of South Carolina. Opp’n at 4. In this
8 case Plaintiffs seek declaratory relief on most of the same claims asserted by Martin in the action before
9 the District of South Carolina Court. *See Compl.*; Mot., Ex. I.

10 Defendant now moves to dismiss this case under Rule 12(b)(2) and 12(b)(3) for lack of personal
11 jurisdiction, or transfer the case to the United States District Court for the District of South Carolina
12 pursuant to 28 U.S.C. § 1406(a), based on improper venue. Alternatively, defendant requests transfer
13 for convenience under 28 U.S.C. § 1404(a). Plaintiffs contend that dismissal and transfer should be
14 denied because this Court has specific personal jurisdiction over defendant.

16 LEGAL STANDARD

17 1. Personal Jurisdiction

18 Personal jurisdiction over a nonresident defendant may exist if the defendant has either a
19 continuous and systematic presence in the state (general jurisdiction), or minimum contacts with the
20 forum state such that the exercise of jurisdiction “does not offend traditional notions of fair play and
21 substantial justice” (specific jurisdiction). *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)
22 (citation omitted). Where there is no federal statute applicable to determine personal jurisdiction, a
23 district court should apply the law of the state where the court sits. *See Schwarzenegger v. Fred Martin*
24 *Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). California law requires only that the exercise of personal
25 jurisdiction comply with federal due process requirements. *See id.* at 800-01.

26 In order for a court to exercise specific jurisdiction in accordance with due process, a nonresident
27 defendant must have “‘minimum contacts’ with the forum state such that the assertion of jurisdiction
28 ‘does not offend traditional notions of fair play and substantial justice.’” *Pebble Beach Co. v. Caddy*,

1 453 F.3d 1151, 1155 (9th Cir. 2006) (quoting *Int'l Shoe*, 326 U.S. at 315). The Ninth Circuit employs
2 a three-part test to determine whether the defendant has such minimum contacts with a forum state.
3 First, the “nonresident defendant must do some act or consummate some transaction with the forum or
4 perform some act by which he purposefully avails himself of the privilege of conducting activities in
5 the forum,” thereby invoking the benefits and protections of the forum state. *Cybersell, Inc. v.*
6 *Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th
7 Cir. 1998)). Second, the claim must “arise out of or result from the defendant’s forum-related
8 activities,” and third, the exercise of personal jurisdiction over the defendant must be reasonable.
9 *Pebble Beach Co.*, 453 F.3d at 1155. The plaintiff bears the burden of proving the first two conditions.
10 *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008). If the plaintiff carries this burden, “the
11 defendant must come forward with a ‘compelling case’ that the exercise of jurisdiction would not be
12 reasonable.” *Id.* (citing *Schwarzenegger*, 374 F.3d at 802).

13 If a district court acts on the defendant’s motion to dismiss without holding an evidentiary
14 hearing, the plaintiff “need only demonstrate facts that if true would support jurisdiction over the
15 defendant.” *Id.* at 1129 (citation omitted). Unless directly contravened, the plaintiff’s version of the
16 facts is taken as true, and conflicts between the facts contained in the parties’ affidavits must be resolved
17 in the plaintiff’s favor for purposes of deciding whether a prima facie case for personal jurisdiction
18 exists. *Id.* (citation omitted).

19
20 **2. Transfer of Venue**

21 Civil actions arising under federal copyright laws may be brought in the district in which the
22 defendant or his agent resides or may be found. 28 U.S.C. § 1400(a). The 9th Circuit “interprets this
23 provision to allow venue in any judicial district where, if treated as a separate state, the defendant would
24 be subject to personal jurisdiction.” *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124,
25 1126 (9th Cir. 2010).

26 If the court determines that venue is improper, the court may either dismiss or, if it is in the
27 interests of justice, transfer an action to a district or division in which it could have been brought. 28
28 U.S.C. § 1406(a). Courts should consider the basic equities of the case in deciding whether to transfer

1 or dismiss, including any statute of limitations bar and the harshness of dismissal in light of such a bar,
2 and the relative injustice imposed on the parties. *King v. Russell*, 963 F.2d 1301, 1304-05 (9th Cir.
3 1992).

4 5 DISCUSSION

6 1. Specific Personal Jurisdiction

7 Plaintiffs concede that there is no general jurisdiction over defendant Martin. They contend,
8 instead, that this Court has specific jurisdiction over him. Opp'n at 6, 9. Plaintiffs assert that Martin
9 subjected himself to personal jurisdiction in this Court by sending the cease and desist letter to Northern
10 California residents PokitDok, Inc. and Lisa Maki. *Id.* at 9. Martin argues that this Court lacks personal
11 jurisdiction over him because sending a cease and desist letter, without more, is insufficient to subject
12 an individual to personal jurisdiction. Mot. at 12.

13 Under the first prong of the three-part specific jurisdiction test, plaintiff must establish that the
14 defendant either purposefully availed himself of the privilege of conducting activities in California, or
15 purposefully directed his activities toward California. *Schwarzenegger*, 374 F.3d at 802. A purposeful
16 availment analysis is most often used in suits sounding contract; a purposeful direction analysis is used
17 in suits sounding in tort. *Id.* Here, the declaratory claims for copyright infringement sound in tort, and
18 therefore, the Court will apply a purposeful direction analysis. *Id.*; *see also Lang v. Morris*, 823 F.
19 Supp. 2d 966, 969 (N.D. Cal. 2011) (applying purposeful direction analysis to copyright claim).

20 Purposeful direction analyses are guided by the Supreme Court's "effects" test set forth in
21 *Calder v. Jones*, 465 U.S. 783 (1984). Under the *Calder* effects test, the defendant must have (1)
22 committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm
23 which is suffered and which the defendant knows is likely to be suffered in the forum state. *Bancroft*
24 *& Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (holding modified by *Yahoo!*
25 *Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006)). "Each of the
26 three tests must be satisfied to permit a district court to exercise limited personal jurisdiction over a
27 non-resident defendant." *See Peterson v. Kennedy*, 771 F.2d 1244, 1261 (9th Cir. 1985).

1 Plaintiffs rely on *Yahoo!*, 433 F.3d 1199 to argue that Martin’s cease and desist letter is a proper
2 basis for personal jurisdiction. Opp’n at 7. In *Yahoo!*, the Ninth Circuit held that the district court had
3 personal jurisdiction over defendants who sent a cease and desist letter to a California plaintiff, when
4 coupled with French court orders directing Yahoo! to take action in California. *Yahoo!*, 433 F.3d at
5 1210-11. The court reasoned that the first two requirements of purposeful direction – an intentional act
6 expressly aimed at the forum state – were satisfied because the foreign defendants filed suit in France
7 (an intentional act), which was “expressly aimed at California” as it sought “orders directing Yahoo!
8 to perform significant acts in California.” *Id.* at 1209. The third requirement – that the foreign
9 defendants’ acts caused harm they knew would likely be suffered in the forum state – was also satisfied
10 because of the possibility of a substantial penalty arising out of one of the French orders and the
11 “shadow on the legality of Yahoo!’s current policy.” *Id.* at 1209-11. *See also Bancroft*, 223 F.3d at 1087
12 (upholding personal jurisdiction over the defendant because, in addition to sending plaintiff a cease and
13 desist letter, the defendant triggered a third-party dispute resolution process which would have aimed
14 to prevent plaintiff from using defendant’s website).

15 Here, unlike in *Yahoo!*, the cease and desist letter sent to plaintiffs by Martin was not sent in
16 conjunction with any enforcement action that would cause plaintiffs to take action in California. The
17 letter merely alerted plaintiffs that defendant might file a legal action against them for copyright
18 infringement. *See Reply*, Ex. A. Therefore, none of the purposeful direction requirements have been
19 satisfied, and sending a cease and desist letter, without more, does not establish personal jurisdiction
20 over defendant. *Yahoo!*, 433 F.3d at 1208 (9th Cir. 2006) (citing *Red Wing Shoe Co. v.*
21 *Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed.Cir.1998) (“A patentee should not subject itself
22 to personal jurisdiction in a forum solely by informing a party who happens to be located there of
23 suspected infringement.”)).

24
25 **2. Transfer Preferred Over Dismissal**

26 Defendant argues that this case should be transferred, pursuant to 28 U.S.C. § 1406(a), because
27 venue is improper under 28 U.S.C. § 1400(a). This Court agrees that venue is improper because this
28 Court lacks personal jurisdiction over defendant. To avoid the necessity of plaintiff having to file and

1 serve a new action, this Court hereby DENIES defendant's motion to dismiss and GRANTS defendant's
2 motion to transfer under 28 U.S.C. § 1406(a).

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CONCLUSION

5 For the foregoing reasons and for good cause shown, the Court hereby DENIES defendant's
6 motion to dismiss, GRANTS defendant's motion to transfer venue, and TRANSFERS this action to the
7 District of South Carolina.

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IT IS SO ORDERED.

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Dated: November 6, 2012

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SUSAN ILLSTON _____
United States District Judge

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