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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LIBERTY MEDIA HOLDINGS, LLC, a
California corporation,

Plaintiff,

vs.

CARY TABORA,

Defendant.

CASE NO. 11-cv-651 - IEG (JMA)

ORDER

**(1) GRANTING DEFENDANT’S
MOTION TO DISMISS**

[Doc. No. 9]

**(2) GRANTING PLAINTIFF’S
MOTION TO WITHDRAW FIRST
AMENDED COMPLAINT**

[Doc. No. 7]

Presently before the Court is Defendants’ motion to dismiss for lack of personal jurisdiction and improper venue. [Doc. No. 9.] The motion has been fully briefed and is suitable for disposition without oral argument under Civil Local Rule 7.1(d)(1). Plaintiff has also filed a motion to withdraw its first amended complaint. [Doc. No. 7.] For the reasons set forth below, the Court **GRANTS** Defendant’s motion to dismiss and **GRANTS** Plaintiff’s motion to withdraw its first amended complaint.

BACKGROUND

This is an action for copyright infringement. Plaintiff is the creator and publisher of adult films. [Doc. No. 1, Compl ¶ 5.] Some of Plaintiff’s films are accessible through Plaintiff’s website and others are available on DVD for purchase. [Id. ¶¶ 6-7.] Plaintiff alleges that it identified Defendant through his I.P. address as uploading onto his computer one of Plaintiff’s

1 copyrighted works, “Down on the Farm,” which is only available on DVD. [Id. ¶¶ 8-9.] Plaintiff
2 alleges that Defendant then distributed Plaintiff’s work using an online distribution system, Bit
3 Torrent, to the public without Plaintiff’s permission or consent. [Id. ¶ 12.]

4 Plaintiff brought the present action against Defendant alleging a cause of action for
5 copyright infringement. [Id. ¶¶ 9-16.] By the present motion, Defendant seeks to dismiss
6 Plaintiff’s complaint for lack of personal jurisdiction and improper venue. [Doc. No. 9.]

7 DISCUSSION

8 **I. Personal Jurisdiction**

9 Defendant argues that Plaintiff’s complaint should be dismissed for lack of personal
10 jurisdiction because Defendant is a New York resident and has no contacts with California. [Doc.
11 No. 9-2 at 3-8.] Plaintiff argues that this Court has personal jurisdiction over Defendant because
12 he agreed to a forum selection clause when he joined Plaintiff’s website. [Doc. No. 10 at 3-9.]
13 Plaintiff also argues that this Court has specific jurisdiction over Defendant because he knew that
14 his acts of copyright infringement would cause harm in San Diego and jurisdiction in San Diego is
15 reasonable. [Id. at 10-19.]

16 **A. Legal Standards**

17 “Personal jurisdiction over a nonresident defendant is tested by a two-part analysis. First,
18 the exercise of jurisdiction must satisfy the requirements of the applicable state long-arm statute.
19 Second, the exercise of jurisdiction must comport with federal due process.” Chan v. Soc’y
20 Expeditions, Inc., 39 F.3d 1398, 1404-05 (9th Cir. 1994). California’s long-arm statute, CAL. CIV.
21 PROC. CODE § 410.10, allows courts to “exercise jurisdiction on any basis not inconsistent with the
22 Constitution of [California] or of the United States.” “This provision allows courts to exercise
23 jurisdiction to the limits of the Due Process Clause of the U.S. Constitution.” Dow Chem. Co. v.
24 Calderon, 422 F.3d 827, 831 (9th Cir. 2005). Thus, the governing standard here is whether
25 exercise of personal jurisdiction comports with due process. Id.

26 “For a court to exercise personal jurisdiction over a nonresident defendant, that defendant
27 must have at least ‘minimum contacts’ with the relevant forum such that the exercise of
28 jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’”

1 Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 801 (9th Cir. 2004). “There are two
2 types of personal jurisdiction: general and specific.” Ziegler v. Indian River Cnty., 64 F.3d 470,
3 473 (9th Cir. 1995). Here, Plaintiff does not argue that the Court has general jurisdiction over
4 Defendant. Therefore, the only issue is whether the Court has specific jurisdiction over
5 Defendant.

6 The Ninth Circuit has established a three-prong test for analyzing a claim of specific
7 personal jurisdiction:

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

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

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

16 Schwarzenegger, 374 F.3d at 802. “The plaintiff bears the burden of satisfying the first two
17 prongs of the test.” Id. If the plaintiff fails to satisfy either of the first two prongs, personal
18 jurisdiction is not established in the forum state. Id. “If the plaintiff succeeds in satisfying both of
19 the first two prongs, the burden then shifts to the defendant to ‘present a compelling case’ that the
20 exercise of jurisdiction would not be reasonable.” Id.

21 “Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the
22 plaintiff bears the burden of demonstrating that jurisdiction is appropriate.” Schwarzenegger, 374
23 F.3d at 800. “Where, as here, the motion is based on written materials rather than an evidentiary
24 hearing, ‘the plaintiff need only make a prima facie showing of jurisdictional facts.’” Id. The
25 reviewing court need “only inquire into whether [the plaintiff]’s pleadings and affidavits make a
26 prima facie showing of personal jurisdiction.” Caruth v. Int’l Psychoanalytical Ass’n, 59 F.3d
27 126, 128 (9th Cir. 1995). “Although the plaintiff cannot ‘simply rest on the bare allegations of its
28 complaint,’ uncontroverted allegations in the complaint must be taken as true.” Schwarzenegger,
374 F.3d at 800 (citations omitted).

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1 **B. Forum Selection Clause**

2 Plaintiff first argues that this Court has personal jurisdiction over Defendant because he
3 agreed to a forum selection clause when he joined Plaintiff's website. [Doc. No. 10 at 3-9.]
4 Defendant argues that the terms and conditions agreement from Plaintiff's website does not apply
5 to this lawsuit because it is unrelated to Plaintiff's claim for copyright infringement. [Doc. No.
6 9-2 at 6-7.]

7 The Ninth Circuit has recognized that the acceptance of a forum selection clause
8 constitutes consent to personal jurisdiction in the identified forum. See SEC v. Ross, 504 F.3d
9 1130, 1149 (9th Cir. 2007); Dow Chem., 422 F.3d at 831; see also Burger King Corp. v.
10 Rudzewicz, 471 U.S. 462, 474 n.14 (1985) (stating that when contractual forum selection clauses
11 "have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,'
12 their enforcement does not offend due process.") However, for a court to give significant weight
13 to a forum selection clause, the party seeking to enforce the clause must show that the clause
14 governs plaintiff's claims. See, e.g., Alcatel Lucent USA, Inc. et al. v. Dugdale Commc'ns, Inc.,
15 2010 U.S. Dist. LEXIS 22226, at *38 (C.D. Cal. Mar. 5, 2010); Nureau Ink, LLC v. Zomba
16 Recording, LLC, 2006 U.S. Dist. LEXIS 87240, at *7-11 (S.D. Cal. Nov. 29, 2006).

17 Plaintiff has presented a declaration stating that Defendant was a member of its website for
18 two years, from October 27, 2008 until October 17, 2010. [Doc. No. 11, Declaration of Brian
19 Dunlap ("Dunlap Decl.") ¶ 5.] All members of Plaintiff's website are required to consent to the
20 terms and conditions of the website in order to join, and it is technologically impossible to join the
21 website without doing so. [Id. ¶ 7.]

22 Section 11.5.1 of Plaintiff's terms and conditions agreement as it existed on October 27,
23 2008 provides:

24 This Agreement and all matters arising out of, or otherwise relating to, this
25 Agreement shall be governed by the laws of the State of California, excluding its
26 conflict of law provisions. The sum of this paragraph is that any and all disputes
must be, without exception, brought to court and litigated in San Diego, California.

[Id. Ex. L § 11.5.1 (emphasis added).]

27 However, section 1.1 of the terms and conditions agreement states "[t]he provisions of this
28 Agreement will govern your use of our website." [Id. § 1.1; see also id. § 5 ("Restriction on Use

1 of Website(s)].] Plaintiff's sole claim for copyright infringement is based on the alleged copying
2 of Plaintiff's copyrighted work, "Down on the Farm." [Compl. ¶¶ 8-16.] The complaint alleges
3 that this work is only available in DVD format. [Id. ¶ 8.] Plaintiff's complaint and supporting
4 affidavits provide no facts linking the DVD to its website. Accordingly, Plaintiff's claim is based
5 on Defendant's use of one of Plaintiff's DVDs not the use of its website, and the forum selection
6 clause in Plaintiff's terms and conditions agreement does not govern Plaintiff's claim. Therefore,
7 the forum selection clause does not confer personal jurisdiction over Defendant in the present
8 action.

9 C. Specific Jurisdiction

10 Plaintiff argues that this Court has specific jurisdiction over Defendant because he knew
11 that his acts of copyright infringement would cause harm in San Diego and jurisdiction in San
12 Diego is reasonable. [Doc. No. 10 at 10-19.] Defendant argues that there is no specific
13 jurisdiction because he did not purposefully direct his conduct towards California and did not
14 know that Plaintiff was located in California. [Doc No. 9-2 at 4-6.]

15 The first prong of the three-part Schwarzenegger test looks at whether Defendant
16 "purposefully availed itself of the privilege of conducting activities in California, or purposefully
17 directed its activities toward California." Schwarzenegger, 374 F.3d at 802. The Ninth Circuit has
18 explained that "purposeful direction" is the proper analytical framework for claims of copyright
19 infringement, which are often characterized as a tort. Brayton Purcell LLP v. Recordon &
20 Recordon, 606 F.3d 1124, 1128 (9th Cir. 2010).

21 Courts evaluate "purposeful direction using the three-part 'Calder-effects' test," from the
22 Supreme Court's decision in Calder v. Jones, 465 U.S. 783 (1984). Brayton Purcell, 606 F.3d at
23 1128. Under this test, "the defendant allegedly must have (1) committed an intentional act, (2)
24 expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be
25 suffered in the forum state." Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433
26 F.3d 1199, 1206 (9th Cir. 2006) (en banc) (internal quotation marks omitted).

27 The "intentional act" element of the Calder test is easily satisfied in a copyright
28 infringement case. See Brayton Purcell, 606 F.3d at 1128. Plaintiff alleges that Defendant

1 committed an intentional act when he upload Plaintiff's copyrighted work from a DVD and
2 distributed it over the internet without Plaintiff's permission or consent. [Compl. ¶¶ 8, 12.]

3 The second element of the Calder test "requires that the defendant's conduct be expressly
4 aimed at the forum." Brayton Purcell, 606 F.3d at 1129. Plaintiff's complaint contains no
5 allegation that Defendant's conduct was expressly aimed at California. The complaint only alleges
6 that Defendant distributed Plaintiff's copyrighted work through an online distribution system.
7 [Compl. ¶ 12.] However, "mere web presence is insufficient to establish personal jurisdiction."
8 Holland Am. Line Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 460 (9th Cir. 2007). Without
9 allegations or affidavits stating that Defendant distributed or aimed to distribute the work to
10 California, Plaintiff has failed to satisfy the second element of the Calder test. See, e.g., Mavrix
11 Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1229-31 (9th Cir. 2011) (finding defendant's
12 conduct was expressly aimed at California where "it is clear from the record that [defendant]
13 operated a very popular website with a specific focus on the California-centered celebrity and
14 entertainment industries").

15 "The final element requires that [Defendant's] conduct caused harm that it knew was likely
16 to be suffered in the forum." Brayton Purcell, 606 F.3d at 1131. Plaintiff argues that it was
17 foreseeable that Defendant's infringement would cause harm in California because Defendant
18 knew that Plaintiff was located in San Diego. [Doc. No. 10 at 12-14.] There are no allegations in
19 the complaint stating that Defendant committed infringing acts knowing Plaintiff was a resident of
20 California. [See Compl.] In support of its argument, Plaintiff has only produced a declaration
21 stating that its website records show that Defendant has downloaded 157 videos from its website,
22 144 of which contain a title screen indicating that Plaintiff's company is located in San Diego,
23 California, and 13 of which contain a title screen indicating that the company is located in Tampa,
24 Florida. [Doc. No. 15, Declaration of Erika Dillon ("Dillon Decl.") ¶ 6.] The declaration says
25 nothing about the DVD at issue in this case and what its title screen says. This evidence by itself
26 is insufficient to show that Defendant knew that the DVD was Plaintiff's copyrighted work and
27 Plaintiff was a resident of California. Absent allegations that Defendant knew Plaintiff was a
28 California resident, Plaintiff has not satisfied the "forseeability" element of the Calder test. See

1 Brayton Purcell, 606 F.3d at 1131; see also CYBERSitter, LLC v. P.R.C., 2011 U.S. Dist. LEXIS
2 84722, at *35-36 (C.D. Cal. Aug. 1, 2011) (finding foreseeability where “Plaintiff has alleged that
3 [Defendants] knew Plaintiff was an American company and that their actions would cause injury
4 to Plaintiff within California”).

5 In sum, the Court concludes that Plaintiff has failed to satisfy the second and third elements
6 of the Calder-effects test. Therefore, Plaintiff has not shown that Defendant purposefully directed
7 his activities toward California, and Plaintiff has not made a prima facie showing that this Court
8 has specific jurisdiction over Defendant. Accordingly, because Plaintiff has not shown that this
9 Court has specific jurisdiction over Defendant or that Defendant consented to personal jurisdiction
10 in this action through a forum selection clause, the Court **DISMISSES WITHOUT PREJUDICE**
11 Plaintiff’s complaint for lack of personal jurisdiction.

12 **II. Venue**

13 Defendant also argues that Plaintiff’s complaint should be dismissed for improper venue
14 pursuant to 28 U.S.C. § 1406(a). [Doc. No. 9-2 at 8-10.] Because the Court dismisses Plaintiff’s
15 complaint for lack of personal jurisdiction, the Court does not address Defendant’s arguments
16 regarding improper venue.

17 **III. Plaintiff’s Motion to Withdraw First Amended Complaint**

18 On July 18, 2011, Plaintiff filed a first amended complaint. [Doc. No. 4.] On August 12,
19 2011, Plaintiff filed a motion to withdraw its first amended complaint. [Doc. No. 7.] In the
20 motion, Plaintiff concedes that its amended pleading was filed in violation of Federal Rule of Civil
21 Procedure 15(a) because it was filed more than 21 days after service of the complaint and without
22 leave of the Court or consent of the opposing party. [Id.] See FED. R. CIV. P. 15(a)(1)-(2).
23 Accordingly, the Court **GRANTS** Plaintiff’s motion to withdraw its first amended complaint.

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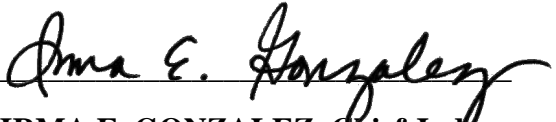
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CONCLUSION

For the reasons above, the Court **GRANTS** Defendant's motion to dismiss, and **DISMISSES WITHOUT PREJUDICE** Plaintiff's complaint for lack of personal jurisdiction. The Court also **GRANTS** Plaintiff's motion to withdraw its first amended complaint. Plaintiff may file an amended complaint within (20) calendar days from the date of this Order.

IT IS SO ORDERED.

DATED: October 4, 2011


IRMA E. GONZALEZ, Chief Judge
United States District Court