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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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RIGHTHAVEN LLC, a Nevada limited-  
liability company,

Plaintiff,

v.

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.

2:10-CV-01062-LRH-LRL

ORDER

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*.<sup>1</sup> 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       <sup>1</sup>Only *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