

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF IDAHO**

BUCK KNIVES, INC., a Nevada Corporation,

Plaintiff,

v.

MODERN OUTDOORS, LLC, a Pennsylvania
limited liability company, d/b/a BucknBear,
Inc., and BucknBear Knives

Defendant.

Case No.: 2:18-CV-00511-EJL

ORDER

Pending before the Court is Defendant's Motion to Dismiss, Or In the Alternative, Transfer. (Dkt. 13). The motion is now ripe. Having fully reviewed the docket herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decision-making process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court without oral argument.

BACKGROUND

On November 19, 2018, Plaintiff Buck Knives, Inc. ("Buck Knives") filed this action against Modern Outdoors, LLC d/b/a "BucknBear" and "BucknBear Knives," ("Modern Outdoors"), raising claims of federal trademark infringement and state trademark infringement under Idaho statutory and common law. (Dkt. 1.) Buck Knives alleges that Modern Outdoors's use of "BucknBear," "BucknBear Knives," and

“BucknBear High Quality Knife Shop,” is damaging Buck Knives’ trademarks and tradenames of “Buck” and “Buck Knives.”

Buck Knives is a corporation organized under the laws of the state of Nevada and is registered and doing business in Idaho. (*Id.* ¶ 1.) Its headquarters are in Post Falls, Idaho. (Dkt 15-1 ¶ 12.)

Modern Outdoors is a corporation organized under the laws of the state of Pennsylvania and has its principal place of business in New Holland, Pennsylvania. (Dkt. 1 ¶ 2.8.) Modern Outdoors has its primary and only operating facility located in New Holland. (Dkt. 13-2 ¶ 2.) It does not own any real estate or other property in Idaho; has never had any employees in Idaho; has never participated in any trade shows in Idaho; has never sold its knives and accessories through associated stores located in Idaho; has never owed or been required to pay taxes in Idaho; and is not registered to do business in Idaho. (Dkt. 13-2 ¶¶ 5–7, 10.)

Modern Outdoor sells its knives nationwide through its website order platform. Of Modern Outdoors’ online knife sales, 25 knives, or 0.35% of its total nationwide sales, were made to Idaho residents. (Dkt. 13 at 8; Dkt. 13-2, ¶ 2.)

On January 16, 2019, Modern Outdoors filed a motion to dismiss Buck Knives’ complaint for lack of personal jurisdiction or improper venue, or, alternatively, to transfer venue, (Dkt. 13), which motion the Court now considers.

STANDARD OF REVIEW

Federal Rules of Civil Procedure 12(b)(2) allows a party to assert lack of personal jurisdiction as a defense by motion. *See* Fed. R. Civ. P. 12(b)(2). “Although the defendant

is the moving party on a motion to dismiss [for lack of personal jurisdiction], the plaintiff bears the burden of establishing that jurisdiction exists.” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002); *see also Boschetto v. Hansin*, 539 F.3d 1011, 1015 (9th Cir. 2008). Where, as here, the defendant’s motion to dismiss is based on written materials rather than an evidentiary hearing, “the plaintiff need only make ‘a prima facie showing of jurisdictional facts to withstand the motion to dismiss.’” *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010) (quoting *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006)). Generally, the court may consider the pleadings as well as any declarations submitted by the parties when deciding a motion to dismiss for lack of personal jurisdiction. *See Data Disc. Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). The plaintiff cannot “simply rest on the bare allegations of its complaint.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). However, “uncontroverted allegations in [the plaintiff’s] complaint must be taken as true, and conflicts between the facts contained in the parties’ affidavits must be resolved in [the plaintiff’s] favor.” *Rio Props.*, 284 F.3d at 1019. In other words, “for the purpose of this [prima facie] demonstration, the court resolves all disputed facts in favor of the plaintiff.” *Pebble Beach*, 453 F.3d at 1154.

DISCUSSION

1. Personal Jurisdiction: Legal Standard

“In evaluating the appropriateness of personal jurisdiction over a nonresident defendant, [courts] ordinarily examine whether such jurisdiction satisfies the ‘requirements of the applicable state long-arm statute’ and ‘comport[s] with federal due process.’”

Bauman v. Daimler Chrysler Corp., 644 F.3d 909, 919 (9th Cir. 2011) (alteration in original) (quoting *Chan v. Soc’y Expeditions, Inc.*, 39 F.3d 1398, 1404–05 (9th Cir. 1994)). The Ninth Circuit has recognized that the Idaho Legislature intended to exercise all of the jurisdiction available under the Due Process Clause. *See Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987). Thus, resolution depends upon the issue of due process. *See Pebble Beach*, 453 F.3d at 1155. “For due process to be satisfied, a defendant, if not present in the forum, must have ‘minimum contacts’ with the forum state such that the assertion of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’” *Id.* (quoting *Int’l Shoe Co. v. State of Wash., Office of Unemp’t Comp. & Placement*, 326 U.S. 310, 316 (1945)).

Applying the ‘minimum contacts’ analysis, a court may obtain either general or specific jurisdiction over a defendant.” *Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001). “If the defendant’s activities in the forum are substantial, continuous and systematic, general jurisdiction is available; in other words, the foreign defendant is subject to suit even on matters unrelated to his or her contacts to the forum.” *Id.* On the other hand, “[a] court may exercise specific jurisdiction over a foreign defendant if his or her less substantial contacts with the forum give rise to the cause of action before the court.” *Id.* The Ninth Circuit applies a three-part test to determine whether a district court can exercise specific personal jurisdiction over a nonresident defendant:

- (1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some 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;

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

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

Schwarzenegger, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). “The plaintiff bears the burden of satisfying the first two prongs of the test.” *Id.* “If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be reasonable.” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)). Where a court is exercising specific jurisdiction over a defendant, “the fair warning that due process requires arises not at the time of the suit, but when the events that gave rise to the suit occurred.” *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987).

Modern Outdoors argues that Buck Knives fails to allege facts establishing either general or specific jurisdiction over it. (Dkt. 13-1.) In its opposition, Buck Knives argues only that this Court has specific jurisdiction over Modern Outdoors. Thus, the Court will focus on whether it has specific jurisdiction over Modern Outdoors.

2. *Specific Jurisdiction Analysis*

The first requirement for specific jurisdiction is purposeful availment or direction. *See Schwarzenegger*, 374 F.3d at 802. The phrase “purposeful availment” includes both purposeful availment and purposeful direction, which are distinct concepts. *See Schwarzenegger*, 374 F.3d at 802. While a purposeful availment analysis is used in suits sounding in contract, a purposeful direction analysis is used in suits sounding in tort. *See*

id. Misappropriation of a trademark is an intentional tort and, as a result, tracks the purposeful direction analysis. See *Nissan Motor Co. v. Nissan Computer Corp.*, 246 F.3d 675, 675 (9th Cir. 2000) (applying purposeful direction analysis to trademark infringement lawsuit); see also *Precision Craft Log Structures, Inc. v. Cabin Kit Co., Inc.*, 2006 WL 538819 (D. Idaho 2006).

Purposeful direction is evaluated under the three-part “effects” test drawn from *Calder v. Jones*, 465 U.S. 783 (1984). The Ninth Circuit described *Calder* and its three-part test as follows:

Calder stands for the proposition that purposeful availment[/direction] is satisfied even by a defendant “whose only ‘contact’ with the forum state is the ‘purposeful direction’ of a foreign act having effect in the forum state.” ... [Under] *Calder*, the “effects” test requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.

Schwarzenegger, 374 F.3d at 803 (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)); see also *Panavision Intern., L.P. v. Toepfen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (“It is not required that a defendant be physically present or have physical contacts with the forum, so long as his efforts are ‘purposefully directed’ toward forum residents.”); *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (Purposeful direction analysis focuses on “the forum in which the defendant’s actions were felt, whether or not the actions themselves occurred within the forum.”). Keeping in mind that not every “foreign act with foreseeable effects” in the forum state will support a finding of specific jurisdiction, Modern Outdoors’ alleged conduct will be

contrasted against the *Calder* “effects” test to determine the appropriateness of finding specific jurisdiction here, in the District of Idaho. *Dole*, 303 F.3d at 1112.

i. Intentional Act

The word “act” “denote[s] an external manifestation of the actor’s will and does not include any of its results, even the most direct, immediate, and intended.” *Schwarzenegger*, 374 F.3d at 806 (quoting *Restatement (Second) of Torts* § 2). The Ninth Circuit therefore “construe[s] ‘intent’ in the context of the ‘intentional act’ test as referring to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act.” *Id*; see also *Washington Shoe Co. v. A–Z Sporting Goods, Inc.*, 704 F.3d 668, 674 (9th Cir. 2012) (“[A]n intentional act is an external manifestation of the actor’s intent to perform an actual, physical act in the real world, not including any of its actual or intended results.”).

Buck Knives alleges that Modern Outdoors intentionally acted when it created infringing products and marketed them on its infringing website for direct purchase. (Dkt. 15 at 3.) Simply creating an infringing website is sufficient to be an intentional act. See *Mavrix Photo, Inc. v. Brand Tech., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011) (finding an intentional act where defendant reposted allegedly infringing photographs on website); *Brayton Purcell LLP*, 606 F.3d at 1128 (finding that the “‘intentional act’ element is easily satisfied” where defendant “created” and posted elder law section on its website that infringed [plaintiff’s] copyright.”). Accordingly, Buck Knives satisfies the first prong of the “purposeful direction” test.

ii. Expressly Aimed at the Forum State

The second prong of the *Calder* effects test, asks whether defendant “expressly aimed its intentional act at the forum.” *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064, 1069 (9th Cir. 2017). In general, express aiming requires more than “‘untargeted negligence’ that merely happened to cause harm to [a plaintiff].” *Schwarzenegger*, 374 F.3d at 807 (quoting *Calder*, 465 U.S. at 789). For instance, the delivery or consumption of products in the forum state that are “‘random,’” “‘fortuitous,’” or “‘attenuated’” does not satisfy the express aiming analysis. *Mavrix*, 647 F.3d at 1230 (9th Cir. 2011) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 (1985)). To determine whether the defendant expressly aims at the forum state, “[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.” *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014). Thus, “mere injury to a forum resident is not a sufficient connection to the forum,” nor is defendant’s knowledge of plaintiff’s strong forum connections, combined with the foreseeable harm the plaintiff suffered in the forum. *See id.* Post-*Walden*, express aiming at a forum resident is “jurisdictionally relevant only insofar as it constitutes a single contact with the forum state, and is insufficient without more [contacts] . . . created by the defendant directly with the forum state, and not merely with a forum-state resident.” *Control Sols., Inc. v. MicroDAQ.com, Inc.*, 126 F. Supp. 3d 1182, 1191 (D. Or. 2015) (citing *Walden*, 134 S.Ct. at 1122–23, 1125; *Picot*, 780 F.3d at 1214).

“The ‘express aiming’ analysis depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue.” *Schwarzenegger*, 374 F.3d at 807. In cases

involving tortious conduct on a nationally accessible website, “operating even a passive website in conjunction with ‘something more’—conduct directly targeting the forum—is sufficient to confer personal jurisdiction.” *Rio Properties, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002). In determining whether a nonresident defendant has done “something more,” the court considers several factors such as “the interactivity of the defendant’s website, . . . the geographic scope of the defendant’s commercial ambitions, . . . and whether the defendant ‘individually targeted’ a plaintiff known to be a forum resident[.]” *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011) (internal citations omitted).

Whether a website’s interactivity is enough to confer specific jurisdiction is based on a sliding scale. *Mavrix Photo, Inc.*, 647 F.3d at 1226–27 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)). At one end of the spectrum, there are passive sites “where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdiction,” On the other end, there are active sites “where a defendant clearly does business over the Internet” by entering “into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet.” *Id.* Where a site is interactive, “[t]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997) (internal citation and quotation marks omitted).

Modern Outdoors' website falls in the middle of the sliding scale of interactivity. It offers products for sale and informs users about products. The quality and quantity of business done in *Idaho*, however, does not connect Modern Outdoors to the forum state in a meaningful way. Modern Outdoors has made only twenty-five online sales to Idaho residents, which amounts to approximately 0.35% of its nationwide sales. (Dkt. 13 at 8.) "Not all material placed on the Internet is, solely by virtue of its universal accessibility, expressly aimed at every state in which it is accessed." *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1231 (9th Cir. 2011). Personal jurisdiction is more often found where a "substantial" amount of business is done in the forum state. For example, in *Mavrix*, specific jurisdiction was appropriate where "[a] substantial number of hits to [defendant's] website came from [the forum state's] residents" and where the website's "economic value turns, in significant measure, on its appeal to [the forum state's residents]." *Id.* at 1230 (9th Cir. 2011).

As for Modern Outdoors' geographic ambitions, its website certainly makes its products available on a national level. However, Buck Knives has not alleged any facts that Modern Outdoors has deliberately directed its efforts towards Idaho residents or that its website was directed at Idaho consumers specifically rather than at nationwide consumers generally. Modern Outdoors' twenty-five sales to Idaho residents were not a result of specifically directed contacts with the forum state, but instead occurred only because the purchasers of Modern Outdoors' goods happened to reside in Idaho. The economic value of Modern Outdoors' website does not turn, in significant measure, on its appeal to Idaho residents as less than half a percentage of its nationwide total sales are to Idaho residents.

(Dkt. 13-1 at 8.) Weighed against the minimal level of commercial activity in Idaho, the lack of a specific connection to the Idaho market, or any offline activities relevant to Idaho, Modern Outdoors' interest in making its products available on a national level is not sufficient to show purposeful direction.

Finally, Modern Outdoors' twenty-five sales to Idaho residents do not show purposeful targeting of the forum state. "[R]andom, fortuitous, or attenuated" contacts with individuals in the forum are insufficient to support personal jurisdiction. *Walden*, 134 S. Ct. at 1123 (citing *Burger King*, 471 U.S. at 475); *Picot*, 780 F.3d at 1212. The Ninth Circuit has held that a sale into the forum is not a substantial contact where it "involved the forum state only because that is where the purchaser happened to reside." *Boschetto*, 539 F.3d at 1019. District courts have extended this principle to cases involving multiple sales entering the forum simply because the purchasers happened to live in the forum. *See Imageline, Inc. v. Hendricks*, No. CV 09-1870 DSF (AGRx), 2009 WL 10286181, at *3, 5 (C.D. Cal. Aug. 12, 2009) (holding that "Defendant has not purposefully directed sales into California in a sufficient manner to allow it to be sued over those sales in California," despite the fact that 10% of Defendants' sales, comprising 1,071 transactions over an approximately eight-year period, were made to California residents); *Control Solutions*, No. 3:15-cv-748-PK, 2015 WL 5092593, at *7 (finding no personal jurisdiction over defendant with 1.6% of total sales directed at the forum).

Because the Court finds that Modern Outdoors did not purposefully avail itself of the laws of Idaho, the Court need not address the remaining two prongs of the personal jurisdiction test. *See Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008) ("[I]f the

plaintiff fails at the first step, the jurisdictional inquiry ends and the case must be dismissed.”). The Court lacks specific jurisdiction over Modern Outdoors.

3. *Motion to Transfer Venue*

In lieu of dismissal, Defendants move to transfer this case to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1631 or 28 U.S.C. § 1404(a). (Dkt. 13.) Because the Court lacks personal jurisdiction over Modern Outdoors, the Court only addresses § 1631.

Under § 1631, if jurisdiction is lacking, a district court must transfer a civil action if “(1) the court to which the action is to be transferred would have had jurisdiction ‘at the time the [action] was filed,’ and (2) ‘it is in the interest of justice’ to transfer.” *Munns v. Kerry*, 782 F.3d 402, 414 (9th Cir. 2015) (citing 28 U.S.C. § 1631).

This matter could have been brought in the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1391(b) at the time the action was filed because Modern Outdoors is a Pennsylvania corporation with its principal place of business in Pennsylvania. Modern Outdoors has requested the matter be transferred, acknowledging that a live controversy in fact does exist between the parties that must be resolved in a court of law. The Court, in the interest of justice, transfers this case to the United States District Court for the Eastern District of Pennsylvania.

CONCLUSION

The Court finds it does not have personal jurisdiction over the Modern Outdoors because it did not purposefully direct any activities to Idaho. The Court denies Modern Outdoors’ Motion to Dismiss. The request to transfer the case to the Eastern District of Pennsylvania is granted.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Defendant's Motion to Dismiss, Or In the Alternative, Transfer, (Dkt. 13), is **DENIED IN PART** and **GRANTED IN PART**.

The Clerk of Court is directed to transfer this matter to the Eastern District of Pennsylvania and to close this file.



DATED: April 18, 2019

A handwritten signature in black ink, reading "Edward J. Lodge". The signature is written in a cursive style and is positioned above a horizontal line.

Honorable Edward J. Lodge
U.S. District Judge