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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JAN E. KRUSKA, Plaintiff, vs. PERVERTED JUSTICE FOUNDATION INCORPORATED, et al., Defendant.	No. CV-08-0054-PHX-SMM **ORDER**

Before the Court is Defendant Christopher Brocious' ("Brocious") Motion to Dismiss Plaintiff Jan E. Kruska's ("Kruska") Amended Complaint. (Dkt. 141). Brocious's motion is brought based upon lack of personal jurisdiction, improper venue, and insufficient service of process. (Id.) After consideration of the issues, the Court finds the following.

BACKGROUND

On January 10, 2008, Kruska filed a suit against a number of individuals and organizations, including Brocious. (Dkt. 1). In her Complaint, Kruska seeks relief against Brocious based on six counts: (1) intentional infliction of emotional distress, (2) defamation, (3) the Racketeer Influenced and Corrupt Organizations statutes (18 U.S.C. § 1961-1968) ("RICO"), (4) violations of federal cyberstalking and cyberharassment law (18 U.S.C. § 2261A), (5) infringement of copyright under the Digital Millennium Copyright Act ("DMCA"), and (6) common law negligence. (Id. ¶¶ 78-111).

On June 20, 2008, Brocious filed a motion to dismiss for lack of personal jurisdiction, insufficient service of process, and improper venue. (Dkt. 68). The Court granted Brocious' original motion to dismiss on the grounds of lack of personal jurisdiction, but the Court did so without prejudice to allow Kruska to amend and re-file her Complaint. (Dkt. 138). On December 16, 2008, Kruska filed an Amended Complaint. (Dkt. 140). The Amended Complaint reasserted the claims that Kruska made in the original Complaint. (Compare Dkt. 1 at 13-19, with Dkt. 140 at 32-38).

In her Amended Complaint, Kruska asserts that Brocious is a resident of Ohio. (Dkt. 140, Kruska Aff. ¶ 2). Kruska also alleges that Brocious created, owned, and operated at least four Internet websites, including www.absolutezerounited.com (Dkt. 140, Am. Compl. at 5).[1] Kruska asserts that Brocious was the moderator and webmaster of www.absolutezerounited.com at all relevant times and actively contributed by editing, modifying, publishing and re-publishing content to this website. (Dkt. 140, Kruska Aff. ¶¶ 5, 6, 24; Dkt. 144, Resp. to Def.[' s] Mot. to Dismiss at 7-8).[2]

Kruska makes multiple factual allegations in her Amended Complaint about the www.absolutezerounited.com website. Brocious' website allegedly displayed a distinct graphic icon, with the motto: "Fighting Pedophiles Around the World." (Kruska Aff. ¶ 14; Dkt 140, Ex. at 15).[3] Kruska claims that the website also displayed her home address, telephone numbers, e-mail addresses, websites owned, date of birth, physical attributes, and "known affiliates," as well as numerous defamatory comments about her. (Dkt. 140, Kruska Aff. ¶¶ 21, 34). Further, Kruska asserts that Brocious, as website owner, moderator, and

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[1]Because Kruska's paragraph numbers are inconsistent throughout her Amended Complaint, the Court will refer to the corresponding page numbers.

[2]Because Kruska's paragraph numbers are inconsistent throughout her response to Brocious' Motion to Dismiss, the Court will refer to the corresponding page numbers.

[3]Because Kruska fails to properly paginate the exhibits attached to her Amended Complaint, the Court will paginate them in the order they were submitted. This exhibit showing Brocious' website icon is on page 15 of 19.

webmaster, retrieved information created in Arizona and published this information on his website. (Dkt. 140, Kruska Aff. ¶¶ 4,6-8; Dkt. 144, Resp. to Def.[' s] Mot. to Dismiss at 7-8). Finally, Kruska claims that copyright protected photographs were used, and in some cases modified, on the www.absolutezerounited.com website, without her consent. (Dkt. 140, Kruska Aff. ¶ 23). Kruska asserts that Brocious' actions have severely harmed her reputation. (Dkt. 140, Am. Compl. at 8).

Kruska also asserts facts regarding Brocious' business relations with Arizona. The alleged facts show that Brocious purchased and registered at least four domain names through forum company, GoDaddy.com. (Id.) The purchased domain names allegedly contained files that were stored in the forum state and were remotely accessed, edited, and monitored via the internet by Brocious. (Dkt. 140, Kruska Aff. ¶¶ 2-8).

In regards to service, Kruska claims she perfected service on Brocious. (Dkt. 140, Am. Compl. at 9). The alleged facts show Kruska personally sent Brocious via certified mail, a true copy of the Complaint, summons, and waiver of service on March 6, 2008, which he received on March 18, 2008. (Id.) Moreover, the alleged facts show that Kruska also attempted to personally serve Brocious. (Id.) However, these attempts failed because Brocious avoided this personal service. (Id.)

In response to Kruska's Amended Complaint, Brocious filed a Motion to Dismiss, in which he reasserts his defense that the Court lacked personal jurisdiction over him. (Dkt. 141). In the alternative, if the Court finds that it can exercise personal jurisdiction, Brocious argues insufficient service of process and improper venue under Federal Rule of Civil Procedure 12(b)(3) and (5). (Id.)

DISCUSSION

I. Motion to Dismiss for Lack of Personal Jurisdiction

It is the plaintiff's burden to establish proof that the federal district court has personal jurisdiction over the defendant. See, e.g., Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986) (citing Data Disc, Inc. v. Sys. Tech. Assocs., 557 F.2d 1280, 1285 (9th Cir. 1977)). If the court is relying on the pleadings and affidavits, and not an evidentiary hearing, the

plaintiff must only make a prima facie showing of jurisdiction to defeat a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2). Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004) (citing Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 128 (9th Cir. 1995)). For the purposes of determining whether or not the court has personal jurisdiction, undisputed facts in the Complaint will be taken as true and disputed facts will be taken in the light most favorable to the plaintiff. Id.

There is not an applicable federal statute that grants personal jurisdiction in this case. Therefore, a federal court may exercise personal jurisdiction over a non-resident if jurisdiction is proper under the state's long-arm statute and is consistent with the due process requirement of the United States Constitution. See, e.g., Fireman's Fund Ins. Co. v. Nat'l Bank of Coops., 103 F.3d 888, 893 (9th Cir. 1996). Arizona's long-arm statute permits jurisdiction over non-Arizona residents to the full extent of the United States Constitution. Ariz. R. Civ. P. 4.2(a); see, e.g., CE Distribution, LLC v. New Sensor Corp., 380 F.3d 1107, 1110 (9th Cir. 2004). Consequently, the statutory and constitutional requirements merge into a single due process test. See, e.g., Fireman's Fund Ins. Co., 103 F.3d at 893.

To determine whether the finding of jurisdiction over a non-resident is consistent with due process under the Constitution, the plaintiff must allege sufficient minimum contacts between the state and the defendant such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). If the party is acting outside of the forum, the court may exercise personal jurisdiction when the defendant should reasonably anticipate being haled into court in that particular forum. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The proper practice when judging minimum contacts is to look at the relationship between the defendant, the forum state, and the litigation. E.g., Calder v. Jones, 465 U.S. 783, 788 (1984). Under minimum contact analysis, a defendant's presence may be found to exist on two different grounds: general or specific jurisdiction. E.g., Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998).

A. General Jurisdiction

General jurisdiction applies when the defendant's contacts with the forum state are "substantial" or "continuous and systematic," and even applies if the suit is unrelated to the contacts. Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 (1984)). The standard for general jurisdiction is "fairly high" and requires that the contacts be numerous or extensive enough to approximate physical presence. Id. (quoting Brand v. Menlove Dodge, 796 F.2d 1070, 1073 (9th Cir. 1986)). Factors that would approximate physical presence include whether the business makes sales in the forum, solicits business from the forum, designates an agent for service of process in the forum, holds a license in the forum or is incorporated there. Id. If the plaintiff does not allege a sufficient level of minimum contacts, the court cannot exercise general jurisdiction. Id.

For example, in Helicopteros, the Supreme Court held that the exercise of general jurisdiction was improper when the defendant had no physical presence in the forum, but sent a corporate officer to the forum for one negotiating session, accepted checks drawn from a forum bank, purchased equipment from the forum, and sent personnel to the forum for training. Helicopteros, 416 U.S. at 416-19. This case illuminates the high standard Kruska must overcome for this Court to exercise general jurisdiction.

In his Motion to Dismiss, Brocious argues that he does not have the minimum contacts with Arizona necessary to establish general jurisdiction. (Dkt. 141, 3:19-24). The Court agrees and will not exercise general jurisdiction over Brocious because he does not have enough contacts to approximate physical presence in the forum. Kruska alleges generally that Brocious' contacts with Arizona are "systematic" and "continuous." (Dkt. 140, Am. Compl. at 17). By itself, the mere fact that Kruska makes this general allegation is not enough to establish general jurisdiction.

The Court finds that the facts alleged by Kruska do not approximate physical presence. The alleged facts show that Brocious purchased and registered at least four domain names through forum company, GoDaddy.com. (Dkt. 140, Am. Compl. at 29; Kruska Aff.

¶ 8). Further, the purchased domain names allegedly contained files that were stored in the forum state and were remotely accessed, edited, and monitored from Ohio by Brocious. (Dkt. 140, Kruska Aff. ¶¶ 2-8). Similar to Helicopteros, where the defendant purchased equipment from the forum, Brocious purchased domain names from the forum. With respect to these domain names, however, the mere activity of remotely accessing, editing, and monitoring virtual documents from Ohio via the internet is not a continuous nor a systematic contact with the forum state such that Brocious could reasonably anticipate being haled into an Arizona court. Such a finding would result in the ability to hail any defendant into a jurisdiction solely because his or her websites were hosted there. In sum, this conduct is neither continuous nor systematic to support general jurisdiction.

B. Specific Jurisdiction

Even though this Court finds that it cannot exercise general jurisdiction, a court may grant specific jurisdiction if the suit arises out of the defendant's forum-related acts. Bancroft & Masters, 223 F.3d at 1086. Specific jurisdiction exists if (1) the defendant has performed some act or consummated some transaction within the forum, or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of the defendant's forum-related actions, and (3) the exercise of jurisdiction is reasonable. Id. The plaintiff has the burden of proving the first two prongs; once the first two prongs are satisfied, jurisdiction is presumptively reasonable and the burden shifts to the defendant to show that the exercise of jurisdiction would be unreasonable. Schwarzenegger, 374 F.3d at 802.

In order to prevail on the first prong of the specific jurisdiction test, the plaintiff must show that the defendant purposefully availed himself or purposefully directed his actions at the forum state. Id. The purposeful direction analysis is often used with tort suits. Id. Purposeful direction is evaluated using the three-part "effects test" that originated in the Supreme Court's decision in Calder: the defendant must 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." Yahoo! Inc. v. La Ligue Contre La Recisme Et

L'Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006) (quoting Schwarzenegger, 374 F.3d at 803).

In Calder, the United State Supreme Court held that jurisdiction in California was proper over a reporter and an editor from Florida whose intentional conduct was specifically aimed at, and actually did injure the plaintiff in California. 465 U.S. at 791. The defendants in Calder wrote and edited an article about the plaintiff which contained defamatory remarks directed at her. Id. at 788-89. The Court concluded that the article was about a California resident, her activities while in California, drawn from California sources, and the majority of the injury was suffered in California. Id. While none of the defendants' acts took place in California, the Court focused on the effects of the article in California and concluded that the totality of the effects was enough to establish the sufficient minimum contacts. Id. at 789. The Court held that where the act is intentional, expressly aimed at the forum state, and causes harm, the brunt of which is suffered in the forum state and the defendant knows is likely to be suffered in the forum state, the defendant must "'reasonably anticipate being haled into court there to answer for the truth of the statements." Id. at 790 (quoting World Wide Volkswagen, 444 U.S. at 297); Panavision, 141 F.3d at 1321.

Similarly, in Brayton Purcell LLP v. Recordon & Recordon, the Ninth Circuit held that jurisdiction in the Northern District of California was proper over the defendant Southern California law firm. The court found that the defendant's intentional act was expressly aimed at the forum, and it was foreseeable that the act would harm the plaintiff, a Northern California law firm. No. 07-15383, 2009 WL 2383035, at *3-5 (9th Cir. Aug. 5, 2009). The defendant in Brayton intentionally used unauthorized copyrighted text retrieved from the Northern California law firm's website. Id. at *3. The Ninth Circuit found that the act was expressly aimed at the forum. Id. The defendant had individually targeted the plaintiff when they "willfully, deliberately and knowingly" plagiarized the web site's text, thereby placing the defendant's law firm in competition with the plaintiff's law firm. Id. at *4. The defendant committed the infringement knowing that the plaintiff was a resident of Northern California and thereby would suffer harm to its business reputation and profits in

that forum. Id. at *5. "Purposeful direction" was found, because the defendant committed an intentional, wrongful, and targeted act of plagiarizing the plaintiff's website content which it knew would cause harm to the plaintiff in the forum. Id. at *3-5.

If the plaintiff prevails on the first prong of the specific jurisdiction test, then she must show that the actions of the defendant were the "but for" cause of her injury. Zeigler v. Indian River Country, 64 F.3d 470, 474 (9th Cir. 1995). The court must determine if the plaintiff would not have been injured but for the defendant's conduct directed towards the plaintiff. Panavision, 141 F.3d at 1322.

The third, and final, prong of the analysis evaluates the reasonableness of exercising jurisdiction. Zeigler, 64 F.3d at 474-75. If the court exercises jurisdiction, it must comport with the traditional notions of fair play and substantial justice. Schwarzenegger, 374 F.3d at 802. The court evaluates seven factors to address the reasonableness prong of the test:

> (1) The extent of a defendant's purposeful interjection;
> (2) The burden on the defendant in defending in the forum;
> (3) The extent of conflict with the sovereignty of the defendant's state;
> (4) The forum state's interest in adjudicating the dispute;
> (5) The most efficient judicial resolution of the controversy;
> (6) The importance of the forum to the plaintiff's interest in convenient and effective relief; and
> (7) The existence of an alternative forum.

Panavision, 141 F.3d at 1323 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985)). The court must weigh all seven factors because no single factor is dispositive. Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1488 (9th Cir. 1993). If all three prongs are satisfied, the court may exercise specific jurisdiction. See, e.g., Panavision, 141 F.3d at 1324.

1. Purposeful Direction and the "Effects Test"

Brocious purposefully directed his conduct at Kruska and Arizona. The Court agrees with Kruska that the Calder "effects test" satisfies the first prong of the test for specific jurisdiction. Brocious acted intentionally, expressly aimed his actions at the forum state, and knew that the damage he caused would affect Kruska in Arizona.

First, Brocious committed an intentional act. Intent means performing "an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act." Brayton Purcell LLP, 2009 WP 2383035, at *3 (quoting Schwarzenegger, 374 F.3d at 806). Brocious allegedly created a website for his cause, which displayed a distinct icon with the motto: "Fighting Pedophiles Around the World." (Dkt. 140, Kruska Aff. ¶ 12). It appears that Brocious accessed, edited, and monitored content regarding Kruska, and displayed Kruska's copyrighted images on his website. (Dkt. 140, Am. Compl. at 5-6, Dkt. 144, Resp. to Def.[' s] Mot. to Dismiss at 7-8; Dkt. 140, Ex. at 10). Brocious, as website owner, moderator, and webmaster allegedly retrieved information created in the forum state, including various copyrighted images and personal information about Kruska, and published this information on his website. (Dkt. 140, Kruska Aff. ¶¶ 4-6, 23; Dkt. 144, Resp. to Def.['s] Mot. to Dismiss at 7-8). Moreover, Brocious, acting as website moderator, purportedly approved defamatory comments about Kruska, including threats of bodily injury and threats of death, to be published on his website for public view. (Dkt. 140, Kruska Aff. ¶¶ 17-21).

As determined in Brayton, the sole act of posting copyrighted materials on a website is an intentional act. Here, not only did Brocious post copyrighted materials on his website, but he posted, edited, monitored, and approved personal information and defamatory content regarding Kruska. (Dkt. 140, Kruska Aff. ¶¶ 17-24, 34; Dkt. 140, Am. Compl. at 5-6).

Second, Brocious expressly aimed his actions at Arizona and individually targeted Kruska. In Bancroft & Masters, the court reasoned that the Calder "effects test" does not apply when the action is untargeted; the action must individually target the plaintiff. Bancroft & Masters, 223 F.3d at 1087-88. The court relied upon Cybersell, Inc. v. Cybersell, Inc. to demonstrate what constitutes an untargeted act. Bancroft & Masters, 223 F.3d at 1088; see Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997).

In Cybersell, the plaintiff, a corporate entity residing in Arizona, alleged that the Florida defendant's use of "Cybersell" infringed on one of the plaintiff's service marks. Cybersell, 130 F.3d at 415. The plaintiff was in the process of registering the service mark,

but when the defendant created his website, the plaintiff neither had a website nor had the United States Patent and Trademark Office granted the request to federally protect the mark. Id. The court held that specific jurisdiction could not be exercised using the "effects test." Without evidence to show that the defendant knew about the plaintiff, let alone specifically targeted the plaintiff, the Calder "effects test" did not apply. Cybersell, 130 F.3d at 420.

The court reached the opposite conclusion in Bancroft & Masters.[4] 223 F.3d at 1088. In Bancroft & Masters, the California plaintiff, a corporate entity, sought a declaratory judgment against the Georgia defendant for misuse of the defendant's federally registered mark. Id. at 1085. The plaintiff owned a domain name which included the defendant's mark and was hosted by a third party in Virginia. Id. The defendant sent a the third party a letter requesting that the plaintiff's website be taken down as it infringed on the defendant's mark. Id. The court held that the defendant knew about the plaintiff and that letter individually targeted the California plaintiff. Id. at 1088. Unlike in Cybersell, the court reasoned that Calder applied and allowed the "effects test" to be utilized; the effects of the letter were enough to satisfy the required minimum contacts.

Kruska's case is more similar to Calder, Brayton Purcell, and Bancroft & Masters than Cybersell. Brocious' website purportedly existed to attract the public, including Arizona residents, to join the fight against pedophiles. (Dkt. 140, Kruska Aff. ¶ 12; Dkt. 140, Ex. at 15). Like Calder and Brayton, the website content regarding Kruska was allegedly obtained from the forum state. (Dkt. 144, Resp. to Def.[' s] Mot. to Dismiss at 7-8). It appears that Brocious specifically named Arizona resident Kruska and repeatedly posted her personal information, including her Arizona home address, telephone numbers, and e-mail addresses, on his website. (Dkt. 140, Kruska Aff. ¶¶ 21, 34).

Similar to the letter in Bancroft & Masters, the article in Calder, and the website in Brayton Purcell, Brocious' website content was dedicated to Kruska and individually

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[4]The Ninth Circuit in Panavision held that a trademark case is akin to a tort suit. 141 F.3d at 1321. The heft of Kruska's claims are tort actions.

targeted her, thus satisfying the "express aiming" requirement of the effects test. For example, in Brayton Purcell, Defendant's use of the plaintiff's copyrighted materials, drawn from the forum state, was found directly targeted at the plaintiff because the action threatened the plaintiff's reputation. Similarly, Brocious' asserted use of Kruska's copyrighted materials, drawn from Arizona, has harmed Kruska's reputation. (Dkt. 140, Am. Compl. at 8). Moreover, various alleged defamatory comments targeting Kruska were made publicly available for Arizona residents to read on Brocious' website. (Dkt. 140, Kruska Aff. ¶¶ 21,40). Such unflattering information regarding Kruska served no purpose but to target Kruska and harm her reputation where she lives and works.

Third, Kruska was harmed and suffered the brunt of the injury in Arizona. Brocious' website displayed a distinct icon with the motto: "Fighting Pedophiles Around the World." (Dkt. 140, Kruska Aff. ¶ 12; Dkt 140, Ex. 15). Brocious knew his actions would cause injury in Arizona where the target of his actions resides. Brocious did not allege any facts that would suggest that she is a public figure outside of Arizona. Brocious knew that Kruska was an Arizona resident and any of his actions against her would be felt where she lived and worked. It is unreasonable to conclude otherwise. Because all three requirements of the Calder "effects test" are satisfied, Kruska has demonstrated that Brocious purposefully directed his actions at the forum.

2. "But For" Causation

Brocious is the "but for" cause of Kruska's injury. But for the Absolute Zero website, owned by Brocious, which published the allegedly defamatory comments and infringed Kruska's copyrighted photographs, this suit would not have been brought. See Zeigler, 64 F.3d at 474; Schwarzenegger, 374 F.3d at 802. It is clear Kruska alleged enough evidence to satisfy the second prong of the specific jurisdiction test.

3. Reasonableness Analysis

It is reasonable for the Court to exercise personal jurisdiction over Brocious. The balance of the seven Burger King factors, which the court articulated previously, tip the scale

in favor of exercising personal jurisdiction. Panavision, 141 F.3d at 1324; Burger King, 471 U.S. at 476-77.

i. Purposeful Interjection

"Even if there is sufficient 'interjection' into the state to satisfy the purposeful availment prong, the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the reasonableness prong." Panavision, 141 F.3d at 1323 (quoting Core-Vent, 11 F.3d at 1488). According to Kruska, Brocious took aim at her and intentionally acted to interject unflattering information into Arizona that had the potential to cause harm to Kruska in the forum. The Court finds that the degree of interjection was substantial and strongly favors Kruska.

ii. Burden of Defending in Forum

The burden on the defendant in litigating in the forum is a factor in the reasonableness analysis. However, to overcome the presumption that the plaintiff chooses the forum, the defendant must show that the inconvenience is so great that it would deprive the defendant of due process. Id.; cf. Altmann v. Republic of Austria, 317 F.3d 954, 973 (9th Cir. 2002) (reasoning in a discussion about the doctrine of *forum non conveniens*, that the plaintiff's choice of forum should not be disturbed unless, "when weighing the convenience of the parties and the interest in justice, 'the balance is strongly in favor of the defendant.'" (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947))). In his Motion to Dismiss, Brocious suggests that he would be significantly burdened to travel from Ohio to Arizona to defend this suit, but fails to present any compelling reasons to show how exercising jurisdiction would be so inconvenient that it would deprive him of due process. (Dkt. 141, 6: 23-24). Without any evidence to show that litigating this case in an Arizona court would be a burden, this factor favors Kruska.

iii. Sovereignty

This factor determines the extent to which the district court in Arizona would be at conflict with the exercise of jurisdiction in Ohio. Panavision, 141 F.3d at 1323. The federal analysis would be the same in either Ohio or Arizona. In addition, Brocious presents nothing

in his motion indicating that there would be a conflict between the states on the state law claims. Because there is not a conflict, there are not sovereignty concerns with an Arizona court exercising personal jurisdiction. This factor favors Kruska.

iv. Forum State's Interest

Arizona has a substantial interest in adjudicating the dispute of one of its residents alleging an injury resulting from the tortious conduct of another. Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1133 (9th Cir. 2003). Kruska's primary place of residence is in Arizona and the injury took place in Arizona. This factor favors Kruska.

v. Efficient Resolution

This factor focuses on the location of evidence and witnesses, but is no longer given as much weight due to the advances in communication technologies and efficient means of transportation. Panavision, 141 F.3d at 1323. The injury that Kruska alleges largely took place over the internet. Unlike a car accident where the tangible evidence is difficult and burdensome to move, all the evidence likely to be presented at trial is in digital form on the internet, and is accessible from around the world. Witnesses that are likely to be called would also be from many forums, not exclusively Arizona or Ohio. While this factor does not favor either side strongly, it tips slightly in favor of Kruska because the evidence is globally accessible and no one district has an overwhelming number of witnesses that are likely to be called.

vi. Convenient and Effective Relief for the Plaintiff

In evaluating this factor, the Court notes that Kruska chose her home forum. "Litigating in one's home forum is obviously most convenient." CE Distribution., 380 F.3d at 1112. This factor does not have paramount importance, and receives little weight in the overall computation. Id.; Panavision, 141 F.3d at 1324. It may be more expensive for Kruska to litigate in a foreign forum because she may have to pay for travel arrangements. While the factor favors Kruska, the factor is not a significant component in the reasonableness analysis.

vii. Alternative Forum

Kruska has not argued that there are not alternative forums available for her to litigate her claim. Even though it might be more expensive or inconvenient for her, she could likely litigate her claim in an Ohio court. This factor favors Brocious.

In total, five of the Burger King factors favor Kruska (*i, ii, iii, iv, vi*), even though factor *vi* carries very little weight. Factor *v*, almost by default, slightly favors Kruska. Factor *vii* favors Brocious. After balancing the factors, the Court finds that exercising personal jurisdiction is reasonable and would not offend the traditional notions of fair play and substantial justice. Consequently, the Court also finds that all three prongs of the specific jurisdiction test are met. The Court can properly exercise personal jurisdiction over Brocious and will now evaluate Brocious' Motion to Dismiss for improper venue.

II. Motion to Dismiss for Improper Venue

This Court is permitted to dismiss or transfer on the basis of improper venue. Fed. R. Civ. P. 12(b)(3). In federal courts, venue is governed exclusively by statute. Abrams Shell v. Shell Oil Co., 165 F. Supp. 2d 1096, 1102 (C.D. Cal. 2001). The rules governing venue appear in the general venue statute (28 U.S.C. § 1391), in special claim-specific venue provisions, and in the improper venue and change of venue statutes (28 U.S.C. §§ 1404 & 1406). Id. If venue is found improper, a court must dismiss or transfer the case. 28 U.S.C. § 1406(a); Abrams Shell, 165 F. Supp. 2d at 1102. Even if venue is found proper, a court may transfer the case to another district for reasons of convenience. 28 U.S.C. § 1404(a); Abrams Shell, 165 F. Supp. 2d at 1102. In both cases, the districts where venue is proper is determined by the general venue statute or the special venue statutes that are applicable for a particular claim. Abrams Shell, 165 F. Supp. 2d at 1102.

For cases arising under federal law, § 1391(b) provides that venue is proper is a district where:

> (1) any defendant resides if all defendants reside in the same state;
> (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated; or

> (3) any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). This general venue provision applies except as otherwise provided by special venue rules.

For Kruska's state law claims, venue is proper in this Court. Venue may be proper in a district where "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). A district court found venue proper in Hawaii when an article written, circulated, and published in New York made its way to Hawaii and harmed the plaintiff in Hawaii. Miracle v. N.Y.P. Holdings, Inc., 87 F. Supp. 2d 1060, 1063, 1072-73 (D. Haw. 2000). No copies of the article were sold at Hawaii newsstands, but the article made its way to Hawaii because two copies were individually ordered by subscription in Hawaii. Id. at 1063. The article caused the plaintiff to suffer public ridicule, contempt, and lose business opportunities in Hawaii. Id. Because the harm was subsequently was felt in Hawaii, even though the article originated in New York and was primarily circulated in New York, a substantial part of the events giving rise to the claim was found sufficient in Hawaii. Likewise, Kruska alleges that she has been harmed in Arizona due to content posted on the internet that was viewed in Arizona. (Dkt. 140, Am. Compl. at 5-9; Kruska Aff. ¶¶ 21, 34). Brocious' postings on the internet were made publically viewable in this venue, which purportedly harmed Kruska in this venue. (Id.) Therefore, a substantial part of the events giving rise to Kruska's claims occurred in this venue and renders venue proper in this Court.

For Kruska's federal copyright claim, venue is proper "in the district in which the defendant . . . may be found." 28 U.S.C. § 1400(a). The Ninth Circuit interprets this provision to render venue proper in any district in a state where a defendant would be subject to personal jurisdiction. Brayton Purcell LLP, 2009 WL 2383035, at *1. Because, Kruska is subject to personal jurisdiction in Arizona, venue is proper for her federal copyright claim.

For Kruska's federal RICO claim, venue is proper in "any district in which such person resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a). "The RICO venue provision is supplemental to the general federal venue provision found in 28

U.S.C. § 1391," meaning venue is proper over Brocious in accordance with the RICO venue provision, 18 U.S.C. § 1965, or the general venue provision, 28 U.S.C. § 1391. eBay Inc. v. Digital Point Solutions, Inc., 608 F. Supp. 2d 1156, 1162 (N.D.Cal. 2009) (citing City of New York v. Cyco.Net, Inc., 383 F. Supp. 2d 526, 543-544 (S.D.N.Y. 2005). Congress intended 18 U.S.C. § 1965 "to be a liberalization to the federal venue statute 28 U.S.C. § 1391." City of New York, 383 F. Supp. 2d at 544. Because venue is found proper in this district over Brocious pursuant to the general venue provision, 18 U.S.C. § 1391, venue must be found proper over Brocious for Kruska's federal RICO claim.

Brocious has not requested a transfer, nor has he shown that a transfer would be warranted for this suit. (Dkt 141, Mot. to Dismiss at 10:2-3). It is the defendant's burden to show that a transfer of venue is warranted. Adachi v. Carlyle/Galaxy San Pedro L.P., 595 F. Supp. 2d 1147, 1151 (S.D. Cal. 2009). Transfer of venue may be warranted "[f]or the convenience of the parties and witnesses and in the interest of justice." Id. (citing Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F. Supp. 503, 506 (C.D. Cal. 1992)). Because Brocious is subject to personal jurisdiction in this Court and has not asserted why this forum would be so inconvenient for him to warrant a transfer, the Court will not transfer this suit.

III. Motion to Dismiss for Insufficient Service of Process

The Court is permitted to dismiss an action for insufficient service of process. Fed. R. Civ. P. 12(b)(5). Kruska believes she perfected service on Brocious. (Dkt. 140, Am. Compl. at 9). Following Federal Rule of Civil Procedure 4(d), Kruska sent Brocious a request to waive service on March 6, 2008.[5] (Id.). Brocious allegedly received this waiver on March 18, 2008, but did not waive service. (Dkt. 140, Am. Compl. at 9; Dkt. 140, Ex. at 2-3; Dkt. 141, Mot. To Dismiss at 8:27-28). Next, Kruska attempted to effectuate service

[5] "An individual . . . that is subject to service under Rule 4(e). . . has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons." Fed. R. Civ. P. 4(d).

pursuant to Federal Rule of Civil Procedure 4(e)[6] and Ohio Rule of Civil Procedure 4.1(A) when she personally sent, via certified mail, Brocious a true copy of the Complaint and summons on March 6, 2008. (Dkt. 140, Am. Compl. at 9; Dkt. 140, Ex. at 2-3). But, Kruska, a *pro se* litigant, did not perfect service on Brocious under Ohio law, because Kruska failed to involve the court clerk. See Oh. R. Civ. P. 4.1(A)[7]. Finally, Kruska tried to perfect service by hiring a process server to deliver a copy of the Complaint and summons to Brocious personally, but these attempts also failed. (Dkt. 140, Am. Compl. at 10). The deadline for Kruska to serve Brocious was May 9, 2008, which has now expired.[8]

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[6]"Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." Fed. R. Civ. P. 4(e)(1).

[7]Service pursuant to Ohio Rule of Civil Procedure 4.1(A) includes the following: "Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action. All postage shall be charged to costs. If the parties to be served by certified or express mail are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage." Ohio R. Civ. P. 4.1(A).

[8]Kruska's initial Complaint against Brocious was filed January 10, 2008. (Dkt. 1). Kruska had 120 days to perfect service on Brocious, which expired May 9, 2009. Fed. R. Civ. P. 4(m).

Pursuant to Federal Rule of Civil Procedure 4(m), "If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. *But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period*." Fed. R. Civ. P. 4(m) (emphasis added). If no good cause is found, the district court still has discretion to extend the time of service or to dismiss without prejudice. In re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001) (citing Petrucelli v. Bohringer & Ratzinger, GMBH, 46 F.3d 1298, 1305 (3d Cir. 1995)).

1. Good Cause

Kruska has shown good cause to extend her time to perfect service. The plaintiff must demonstrate the existence of "good cause" for the failure to timely serve process. Fimbres v. United States, 833 F.2d 138, 139 (9th Cir. 1987). "Good cause" under Rule 4(m), has been defined by the Ninth Circuit as "excusable negligence." Boudette v. Barnette, 923 F.2d 754, 756 (9th Cir. 1991). For an excuse to amount to the level of "good cause" or "excusable negligence," a plaintiff is required to show; "[1] the party to be served personally received actual notice of the lawsuit, [2] the defendant would suffer no prejudice, and [3] plaintiff would be severely prejudiced if his complaint were dismissed." Id. (citing Hart v. United States, 817 F.2d 78, 80-81(9th Cir. 1987)); Borzeka v. Heckler, 739 F.2d 444, 447 (9th Cir. 1984).

First, Brocious, the party to be served, received actual notice of the lawsuit. If no evidence exists that the defendant was actually notified or was attempting to evade service, the court cannot find actual knowledge. Efaw v. Williams, 473 F.3d 1038, 1041 (9th Cir. 2006). Further, the court cannot find actual knowledge when only the defendant's attorney was served and no evidence existed showing that the defendant was made aware of the suit against him. In re Sheehan, 253 F.3d at 512.

In contrast, Brocious received a true copy of the summons, Complaint, and waiver of service, on March 18, 2008 as evidenced by Brocious' signed USPS certified mail return

receipt. (Dkt. 140, Ex. at 2-3; Dkt. 140, Am. Compl. at 9). Unlike the defendant in In Re Sheehan, Brocious himself signed the certified mailing thereby personally receiving notice of the filed suit against him. Thus, Brocious, the party to be served, received actual notice of the instant lawsuit.

Second, Brocious would suffer no prejudice if a limited time extension to perfect service is given to Kruska. The Ninth Circuit found a defendant would suffer prejudice when there was an "extraordinary" time delay of seven years to perfect service after the plaintiff filed the complaint. Efaw, 473 F.3d at 1041. This seven-year delay severely prejudiced the defendant because evidence had grown stale as witnesses forgot details of the events giving rise to the claim, and an eyewitness had died. Id. Brocious has not argued in his Motion to Dismiss that he would suffer any prejudice by Kruska being granted a limited extension of time to properly serve him. Unlike the evidence stalling over a seven-year period in Efew, a limited extension of time to perfect service would not similarly stale evidence. Moreover, because Brocious had actual knowledge on March 18, 2008, 52 days before the time to serve process expired on May 9, 2008, it is further unlikely that he would suffer prejudice. Therefore, Brocious would suffer no prejudice due to a limited time extension to perfect service.

Third, Kruska would be severely prejudiced if the court dismissed her Complaint. The Ninth Circuit found it unlikely that a plaintiff would be unfairly prejudiced when the reason for not perfecting service was that the plaintiff's attorney had a busy schedule and a severely ill secretary. In re Sheehan, 253 F.3d at 512.

In contrast, Kruska allegedly attempted vigilantly to serve the defendant. (Dkt. 140, Am. Compl. at 9-10). After sending a true copy of the summons, Complaint, and waiver of service via certified mail, Kruska hired a process server who allegedly made thirteen further attempts to serve Brocious in Ohio. (Id.) The process server's sworn affidavit expresses that he exercised due diligence in attempting to serve Brocious. (Dkt. 140, Ex. at 4). Further, the process server believes Brocious tried to evade service. (Id.) This is a clear contrast from

the plaintiff in In Re Sheehan who blamed his mistake to perfect service on the attorney's busy schedule and severely ill secretary.

Furthermore, Kruska would be severely prejudiced because some of Kruska's claims against Brocious would be time-barred.[9] Even with the remaining claims Kruska *could* refile against Brocious, Kruska would have to refile in Ohio. Because Kruska has claims pending against other Defendants in Arizona, Kruska may be unable to leave Arizona to refile her claim against Brocious in Ohio. Thus, Kruska would be severely prejudiced if a time extension to perfect service upon Brocious was not granted.

Because Kruska has shown good cause for her failure to timely serve Brocious, the Court must extend the time for service.

CONCLUSION

As it relates to Brocious, Kruska has alleged enough facts to show that this Court has specific jurisdiction over Brocious. Similarly, venue is proper. Finally, Kruska has alleged enough facts to show good cause for failing to perfect service. Therefore, this Court must grant Kruska a limited extension of time to perfect service.

The Court continues to give Kruska extensive latitude due to her status as a *pro se* litigant. However, she continues to consume a disproportionate amount of the Court's resources, as there are 200 docket entries since the case's inception less than two years ago. (See Dkt. 1-200).

Accordingly,

IT IS HEREBY ORDERED that Defendant Brocious' Motion to Dismiss Amended Complaint is **DENIED**. (Dkt. 141).

IT IS FURTHER ORDERED that Defendant Brocious' Motion to Dismiss Amended Complaint is **DENIED** as to lack of personal jurisdiction.

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[9]According to Kruska, Brocious' acts against her were discovered on or around August 22, 2007. (Dkt. 140, Am. Compl. at 5). Kruska's claim for defamation would be time-barred because of a one-year statute of limitations. See Ohio Rev. Code Ann. § 2305.11.

IT IS FURTHER ORDERED that Defendant Brocious' Motion to Dismiss Amended Complaint is **DENIED** as to improper venue.

IT IS FURTHER ORDERED that Defendant Brocious' Motion to Dismiss Amended Complaint is **DENIED** as to failure to timely serve process.

IT IS FURTHER ORDERED that Kruska shall have until **November 6, 2009** in which to serve Christopher Brocious.

DATED this 22nd day of September, 2009.

Stephen M. McNamee
United States District Judge