Venkat Balasubramani (SBN 189192)
BALASUBRAMANI LAW
8426 40th Ave SW
Seattle, WA 98136
Telephone: (206) 529-4827
Facsimile: (206) 260-3966
venkat@balasubramani.com

Attorneys for David Hendricks

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IMAGELINE, INC.,

Plaintiff,

v.

DAVID HENDRICKS, et al.,

Defendants.

Case No. CV 09-1870 DSF (AGRx)
DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS
COURT: HON DALE S. FISCHER
DATE: AUGUST 10, 2009
TIME: 1:30 PM

I. INTRODUCTION

This dispute – between a Virginia corporation, and a sole proprietor based in Sedro Wooley, Washington – bears no relationship to the State of California. Imageline, Inc. ("***Imageline***") – a Virginia corporation – fails to rebut the arguments for dismissal raised by Defendant David Hendricks ("***Hendricks***"), a sole proprietor based in Sedro Wooley, Washington. Imageline improperly relies on the situs of third party service providers to argue that Hendricks is subject to general jurisdiction. Cases have rejected this approach. Imageline also fails to carry its burden of showing that specific jurisdiction is proper. Imageline puts forth no evidence to show that Hendricks took acts aimed at the State of California

which resulted in harm which Hendricks reasonably understood would be suffered in the State of California. Indeed, Imageline is based in Virginia and has no significant operations in this state. Thus, even assuming Hendricks infringed on Imageline's copyrights, Hendricks would not be reasonably aware that his acts caused harm in the State of California. Imageline's showing with respect to venue similarly falls short. Imageline ignores case law which clearly establishes the venue provision applicable in copyright cases, and fails to put any evidence that the applicable venue provision is satisfied in this case. Finally, even assuming that jurisdiction is proper and the venue statute is satisfied, Hendricks satisfies his burden of showing that a transfer based on forum *non conveninens* is appropriate. Accordingly, Hendricks respectfully requests that the Court grant his Motion.

II. DISCUSSION

A. Hendricks Has not Waived his Objections to Venue or Jurisdiction

Imageline makes a cursory argument that Hendricks waived his 12(b) objections. (Opposition, p. 2: 11-21.) Plaintiff's reading of Rule 12 is too narrow, and at odds with other sections of Rule 12. For example, Rule 12(b) itself is permissive, stating that "a party *may* assert" any of the 12(b) defenses by motion (emphasis added). Additionally, 12(b) concludes by stating that "[n]o defense or objection is waived by joining it with one or more other defenses or objections *in a responsive pleading* or in a motion" (emphasis added). Finally, Rule 12(h)(1)(B) provides that certain Rule 12(b) defenses – including the defense of lack of personal jurisdiction – are waived if a party "fail[s] to either" assert the defense in a Rule 12(b) motion or "include it in a responsive pleading . . . ." It is nearly impossible to reconcile these permissive provisions of Rule 12 with Plaintiff's assertion that the defenses are waived if not included in a pre-answer motion.

The majority of courts have chosen to reject such a strict interpretation of

Rule 12, and have considered a post-answer motion to dismiss as properly before the court as long as the movant also raised the defense in his or her answer. *See Pope v. Elabo GmbH*, 588 F. Supp. 2d 1008, 1013, n. 5 (D. Minn. 2008) (allowing post-answer motion to dismiss where defense has been previously included in the answer); *Martin v. Del. Law Sch. of Widener Univ.*, 625 F. Supp. 1288, 1296 n.4 (D. Del. 1985) (same); *In re Arthur Treacher's Franchisee Litig.*, 92 F.R.D. 398, 414 (E.D. Pa. 1981) (rejecting a "literal and restrictive interpretation" of Rule 12(b) and holding that when the defendant had raised a 12(b) defense in an answer before filing a motion to dismiss on that ground, the motion was not removed from the court's consideration). The leading treatise is in accord with this approach. *See* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 93-94 n.7 (3d ed. 2004).

Here, although Hendricks filed his Motion to Dismiss after his Answer, he included both lack of personal jurisdiction and improper venue as defenses in his Answer. By doing so, these defenses were preserved, and the Court should address the merits of Hendricks's assertions.[1]

B. Plaintiff Fails to Demonstrate Hendricks is Subject to General Jurisdiction

Imageline argues that Hendricks should be subject to general jurisdiction because Hendricks "conduct[s] business using eBay's platform and Payal's payment processing services," and because Hendricks "agreed to the jurisdiction of California courts pursuant to both entities' User Agreements." (Opposition, p. 5: 3-5.) Imageline also argues that Hendricks is subject to general jurisdiction due to the substantial nature of his sales in California. (Id. at 23.) Neither of these are

[1] Imageline also argues that Hendricks failed to comply with the twenty day waiting period. (See Opposition, p. 2, n .1.) However, Local Rule 7-3 expressly allows for a 12(b) Motion to be filed within five days of the meet and confer.

sufficient to support general jurisdiction.

1. A third party service provider's form agreement is insufficient to support general jurisdiction.

A finding of general jurisdiction over a non-resident defendant requires a plaintiff to satisfy an "exacting standard," since "general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world." *Schwarzenegger v. Fred Martin Co.*, 374 F.3d 797, 801 (9th Cir. 2004). The Ninth Circuit regularly rejects a finding of general jurisdiction based on a non-resident's relationship with third party service providers. *See, e.g.*, *Schwarzenegger*, 374 F.3d at 801 (relationship with California importer, California-based direct marketing company, California-based sales training company insufficient to support a finding of general jurisdiction, notwithstanding). In *Schwarzenegger*, the Ninth Circuit found that the non-resident automobile dealer's contacts with third party service providers insufficient to support jurisdiction, notwithstanding – as here – the existence of a California choice of law provision in these service provider contracts. A district court in California – construing the California long-arm statute – came to a similar conclusion, squarely rejecting arguments identical to those asserted here. *See Salu, Inc. v. Original Skin Store*, 2008 U.S. Dist. LEXIS 73225 (E.D. Cal. Aug. 13, 2008) (rejecting general jurisdiction based on non-resident defendant's contacts with eBay and Google).

In *Salu*, a California-based skin care company ("***Salu***") sued the Original Skin Store ("***TOSS***") an Arizona-based competitor alleging trademark infringement. In arguing TOSS was subject to general jurisdiction in California, Salu pointed to alleged contractual arrangements between TOSS and Google and eBay, which contained California choice of law provisions. The court rejected this as a basis for general jurisdiction:

> plaintiff's reliance on TOSS' purported contractual relationship with Google and eBay is misplaced. As an initial matter, there is no evidence that the "terms and conditions" proffered by plaintiff applies to defendant; these are generic documents discovered by plaintiff's counsel through a Google search and by clicking on eBay's policy page. However, even assuming these terms dictate the choice of law and forum selection disputes between TOSS and its service providers, such contracts are insufficient to approximate physical presence in the state, even in conjunction with the sales and distribution of advertising in shipments. . . . . plaintiff has failed to cite a single case to support its argument that the exercise of general jurisdiction would be appropriate under these or similar facts.

Salu, 2008 U.S. Dist. LEXIS 73225, * 8-9. As in *Salu*, Imageline here fails to cite a single case for the proposition that jurisdiction is appropriate under similar facts, and fails to carry its burden of showing facts sufficient to support general jurisdiction.

2. Imageline's reliance on the situs of the Freedom Vending website's host is inapposite.

Imageline argues that Hendricks maintains a relationship with Inktomi Corporation (in Sunnyvale, California) and thus "[Hendricks's website's servers indicate that [Hendricks's] website is hosted on Yahoo! Inc. servers located in Sunnyvale, California." (Opposition, p. 5: 9-17; Wang Decl., ¶ 5.) As set forth above, under Ninth Circuit law, this is insufficient to support a finding of general jurisdiction. Imageline's arguments regarding Inktomi illustrate how Imageline is attempting to overreach in asserting jurisdiction. The website in question – www.freedomvending.com – provides information regarding a "locally owned" vending machine service, that obviously has nothing to do with the present dispute. Moreover, the website is obviously under construction, as a quick click on the various links on the website will readily indicate.

3. Henricks's contacts do not "approximate physical presence".

Imageline also seeks to rely on the extent of Hendricks's purportedly infringing sales into the State of California. (*See* Opposition, pp. 5-6.) But the Ninth Circuit has a "fairly high" standard, which Imageline fails to satisfy here.

MGM Studios Inc. v. Grokster, Ltd., 243 F. Supp. 2d 1073, 1083 (C.D. Cal. 2003) (subsequent history omitted). Indeed, if the two million downloads failed to satisfy the standards of general jurisdiction in *Grokster*, it is difficult to see how the sales relied on by Imageline suffice here.

C. Specific Jurisdiction is not Proper Under the Effects Test

Imageline argues that Hendricks is subject to specific jurisdiction because he "publish[ed] offers in California for infringing products . . . [and took acts] expressly aimed at the forum . . . with specific intent." (Opposition, p. 10: 7-12.)

Imageline cites to numerous cases (*Schwarzenegger v. Fred Martin Co*, *Keeton v. Hustler Magazine, Inc.*, and *Mattel, Inc. v. MCA Records, Inc.*) finding personal jurisdiction proper over a non-resident defendant. (Opposition, p. 10: 17-27.) These cases all found jurisdiction proper based on the "effects test," but there is a critical distinction between these cases and the present case: a resident plaintiff. All of these cases found that the non-resident took acts outside the state which effected harm in the state because the plaintiff was a resident of, or domiciled in the state. *See Mattel, Inc. v. MCA Records*, 296 F.3d 894, 899 (9th Cir. Cal. 2002) ("This conduct was expressly aimed at, and allegedly *caused harm in, California, Mattel's principal place of business.*") (emphasis added); *Schwarzenegger*, 374 F.3d at 807 ("In *Bancroft & Masters*, the letter sent to Virginia by Augusta National "was expressly aimed at California because it individually targeted [Bancroft & Masters], *a California corporation doing business almost exclusively in California*" . . .) (emphasis added). The contours of the effects test in intellectual property cases was aptly summarized by Judge Matz:

> "[a]pplying the *Calder* effects test, the Ninth Circuit has held that specific jurisdiction exists where a plaintiff files suit in its home state against an out-of-state defendant and alleges that defendant intentionally infringed its intellectual property rights knowing it was located in the forum state."

Amini Innovation Corp. v. Cosmos Furniture, Ltd., 2009 U.S. Dist. LEXIS 29812, 91 U.S.P.Q.2D (BNA) 1150 (C.D. Cal. Mar. 16, 2009) (citing *Amini Innovation Corp. v. JS Imports, Inc.*, 497 F. Supp. 2d 1093 (C.D. Cal. 2007)). The critical element present in the cases finding personal jurisdiction appropriate based on the effects of a non-resident defendant's actions is missing here. Imageline is not a California corporation, and Hendricks could not have had any awareness – even assuming he infringed on Imageline's intellectual property – that Hendricks's acts would cause harm in the State of California.

D. Venue is Not Proper Under the Copyright Statute

In moving for dismissal for improper venue, Hendricks cited to cases which clearly articulate the appropriate venue analysis in copyright cases (28 U.S.C. §1400(a)). Imageline argues that "the rule proposed by Defendant that every copyright . . . action must satisfy 28 U.S.C. §1400(a) is contrary to the letter of the law. . . ." (Opposition, p. 15: 6-10.) Imageline's reading of the law is incorrect.

Hendricks argued – citing *Milwaukee Concrete Studios, Ltd. v. Fjeld Manuf. Co.* – that the venue analysis is distinct from the personal jurisdiction analysis and that in copyright cases, the plaintiff's choice of venue must comply with 28 U.S.C. §1400(a). While Imageline argues that this rule does not apply, the principal case cited by it (*Amini Innovation*) quotes *Fjeld Manufacturing* with approval. *See Amini Innovation Corp. v. JS Imps., Inc.*, 497 F. Supp. 2d 1093, 1107, fn 37 (C.D. Cal. 2007) (citing *Fjeld Manufacturing*). Hendricks has not located a single Ninth Circuit case rejecting a non-resident defendant's argument that venue in a copyright lawsuit must be determined under section 1400, and Imageline does not cite to any such case.

Imageline ignores that "[t]he plaintiff bears the burden of showing that venue is proper in the chosen district." *Koresko v. Realnetworks, Inc.*, 291 F. Supp.

2d 1157, 1160 (E.D. Cal. 2003). Imageline puts forth absolutely no evidence and does not make any argument that Hendricks – a sole proprietor located in Sedro Wooley, Washington – took acts aimed at the Central District of California sufficient to support venue in the Central District. Imageline argues that venue is proper because "the underlying investigation (and evidence thereof)," and the "the events giving rise to the claim occurred" in the Central District. (Opposition, p. 16: 10.) This ignores that the "test for venue . . . is not whether the works were copied and displayed in the forum." *Brackett v. Hilton Hotels Corp.*, Civ. No. 08-02100 WHA, 2008 U.S. Dist. LEXIS 88143, at *6 (N.D. Cal. June 30, 2008). The fact that Imageline's investigator and counsel are located in the Central District are irrelevant to the venue analysis. Because Imageline fails to satisfy the test for venue in 28 U.S.C. §1400(a), venue is improper.

E. Even if Venue is Authorized Under the Applicable Venue Provisions, Hendricks Makes a Showing Sufficient to Warrant a Transfer

Even assuming venue is proper under the Copyright Act, Hendricks argues that the Court should exercise its discretion and transfer this lawsuit. However, Imageline fails to rebut the compelling facts and argument by Hendricks that this lawsuit does not belong in the Central District of California.

First, Imageline is a Virginia corporation with no significant operations, or other entrenched interests in the Central District of California. As such, its choice of forum is not entitled to the deference traditionally accorded to plaintiffs, and the State of California has no interest in adjudicating this dispute.

Second, Imageline does not dispute the additional burden that would be placed on Hendricks, who does not have any employees. Courts clearly consider any disparity of means in the context of the venue analysis, and Imageline's suggestion to the contrary lacks support in case law. *See Popular Leasing USA,*

Inc. v. Terra Excavating, Inc., No. 4:04-CV-1625 CAS, 2005 U.S. Dist. LEXIS 32267, at *23 (E.D. Mo. Jun. 28, 2005); *Wells' Dairy Inc. v. Estate of Richardson*, 89 F. Supp. 2d 1042, 1056 (N.D. Iowa 2000).

Finally, Imageline does not dispute that it is a Virgina-based company, and its principal witness is based in Virginia. The only reason for Imageline to have sued in California is to make this litigation more burdensome for out of state defendants, such as Hendricks.

As such, Hendricks makes a sufficient showing that proceeding in the Central District of California would be overly burdensome to him. Given the minimal (if any) deference to which Imageline's choice of forum is entitled, Imageline makes an insufficient showing to warrant proceeding in this forum.

F. Imageline's Opposition is Supported by Inadmissible Hearsay Evidence, Which Should be Stricken

Imageline's Opposition is replete with hearsay, which should be disregarded or stricken. These include the following statements:

- "I am informed and believe that eBay, Inc., PayPal, Inc. and Yahoo! Inc. have all published User Agreement or Terms of Services. Attached hereto collectively as Exhibit E are these User Agreements and Terms of Services . . ." (Johnson Decl., ¶ 6);
- "I calculated that approximately 10% of Defendants' entire, global clip art business was conducted in California, and approximately 4% in the Central District of California alone." (Wang Decl., ¶ 3).

Imageline Opposition also contains documents purportedly from PayPal, Inc., Yahoo! Inc., eBay, Inc. that are not properly authenticated. The foregoing evidence violates the basic evidentiary rule that a party may only testify as to matters that are within his or her personal knowledge, and may only submit

documents that can be authenticate by the declarant. There is no way that Ms. Wang or Mr. Johnson could have had personal knowledge regarding Hendricks's purported interactions with third parties such as PayPal, Inc., Yahoo! Inc., or eBay, Inc. No facts demonstrating personal knowledge are included in the declarations.

The Court should disregard the hearsay statements in the Wang and Johnson Declarations, as well as the hearsay documents submitted along with those declarations.

IV. CONCLUSION

As set forth above, Hendricks – a sole proprietor based in Sedro Wooley, Washington, has not purposefully directed his actions to the State of California. Because Imageline is not a California corporation and has no relationship to the State of California, there is no way that Hendricks's allegedly infringing acts could put him on notice that anyone would suffer harm in the State of California. Accordingly, he is not subject to personal jurisdiction in this state. Even assuming Hendricks is subject to jurisdiction, venue is improper in this judicial district. Under the venue rules applicable to copyright claims, venue is proper only in the "district where [a] defendant . . . resides or may be found." Hendricks does not reside in this judicial district and may not "be found" here for purposes of the venue analysis. Imageline does not satisfy its burden of showing that venue is proper. Finally, even assuming personal jurisdiction and venue satisfy the applicable rules, the Court should exercise its jurisdiction and transfer this action based on the convenience of the parties. For the reasons set forth herein, Hendricks respectfully requests that the Court grant his Motion.

Respectfully submitted, and dated: July 27, 2009.

BALASUBRAMANI LAW

By: */s/ Venkat Balasubramani*
For David Hendricks

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 27, 2009, I caused the foregoing Reply in Support of Motion to Dismiss or Transfer to be filed via the CM/ECF system and served on opposing counsel via electronic notification.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that this declaration was executed on July 27, 2009 at Seattle, Washington.

/s/ Venkat Balasubramani
Venkat Balasubramani