APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-56452

LANG VAN, INC.,
a California corporation,
Plaintiff-Appellant,
v.
VNG CORPORATION,
a Vietnamese corporation,
Respondent.

FOR PUBLICATION

Appeal from the United States District Court
for the Central District of California,
No. 8:14-cv-00100-AG-JDE
Andrew J. Guilford, District Judge, Presiding

Argued and Submitted November 17, 2021
Pasadena, California

Filed July 21, 2022
Document No. 77-1

Before: Jay S. Bybee and Mark J. Bennett, Circuit Judges, and Joseph F. Bataillon,[*] District Judge.

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[*] The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska, sitting by designation.

Opinion by Judge Bataillon

* * *

[Court Summary and counsel list omitted]

OPINION

BATAILLON, District Judge:

BACKGROUND

In 2014, Lang Van, Inc. ("Lang Van") filed a copyright infringement suit against VNG Corporation ("VNG"). VNG, prior to discovery or answer, moved to dismiss for lack of personal jurisdiction. The district court granted the motion on October 8, 2014. On October 11, 2016, the Ninth Circuit vacated and remanded the action to the district court with instructions that Lang Van be permitted to undertake jurisdictional discovery.

On remand from the Ninth Circuit, VNG filed a renewed motion to dismiss Lang Van's Second Amended Complaint, arguing (1) a lack of personal jurisdiction; (2) forum non conveniens; and (3) failure to state a claim. Senior District Judge Guilford issued an order granting the motion, finding there was no specific personal jurisdiction over VNG in California. The district court found that Lang Van failed to meet the first prong of the Ninth Circuit's specific personal jurisdiction test. The district court did not address the forum non conveniens and failure to state a claim arguments, nor did the district court address the issue of long-arm jurisdiction over VNG under Rule 4(k)(2) of the Federal Rules of Civil Procedure. VNG appealed, and we reverse.

FACTUAL SUMMARY

Lang Van, a California corporation, is a producer and distributor of Vietnamese music and entertainment. Lang Van owns copyrights to more than 12,000 songs and 600 original programs.

VNG is a Vietnamese corporation that originally developed online games but began the Zing MP3 website, which makes copyrighted music available for download, worldwide. In 2011, VNG released the Zing MP3 mobile application ("Apps") in the Apple App Store, and in 2012, in the Google Play store.

Lang Van served requests for production and special interrogatories on September 22, 2017. As of February 14, 2019, VNG had not supplied substantive information or documents. Subpoenas were also served on Google and Apple. They complied with the subpoenas and produced evidence. Lang Van contends these documents show that VNG intentionally chose to release the Apps into the United States; consented to California jurisdiction, choice of law, and venue; and allowed hundreds of thousands of downloads by Apple iOS users and tens of thousands by app-based users on Google's platform.

In addition, VNG sought and received trademark protection in the U.S. in 2010 for registration of its music-related services, which was granted; submitted screenshots of its services in the English language to the United States Patent and Trademark Office ("USPTO"); created geotargeted ads; and in 2013, admitted in correspondence that it had made Lang Van's songs available for download on Zing MP3 without Lang Van's authorization. A former VNG

employee, Phan Duc Khoa ("Khoa"), testified in his deposition that he uploaded between 125 and 500 albums per month for VNG. VNG's 30(b)(6) representative, Nguyen Con Chinh, likewise testified that VGN did not use geoblockers to restrict access by U.S. users.

STANDARD OF REVIEW

A dismissal for lack of personal jurisdiction is reviewed de novo. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). The plaintiff must show that jurisdiction is proper. *Id.* Plaintiff need only make a prima facie showing of jurisdiction. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011) (citing *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010)). To that end, "uncontroverted allegations in the complaint must be taken as true" and "[c]onflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). The factual findings underlying the dismissal, however, are reviewed for clear error. *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1207 (9th Cir. 2020).

PARTIES' POSITIONS

Lang Van contends that personal jurisdiction exists over VNG, either under minimum contacts specifically directed at the State of California and/or

under long-arm jurisdiction pursuant to Fed. R. Civ. P. 4(k)(2).[1]

VNG argues there is no evidence of intentional acts directed at California or the United States in this case. *See Calder v. Jones*, 465 U.S. 783, 787–89 (1984) (finding California is both the focal point and where the harm occurred). It further contends there is no meaningful evidence submitted by Lang Van to support specific jurisdiction. VNG asserts there is no evidence of an internal strategy to target California or the United States; no evidence that VNG generated revenue outside of Vietnam; no evidence of advertising contracts with California; and no specific instances of infringement set forth by Lang Van. VNG argues that Vietnam is the target market.

Additionally, VNG contends there is no relevant evidence to support personal jurisdiction because Lang Van has not demonstrated any downloading, streaming, or other act of infringement in the forum and "Not all material placed on the Internet is, solely by virtue of its universal accessibility, expressly aimed at every [forum] in which it is accessed." *AMA Multimedia, LLC*, 970 F.3d at 1211 (quoting *Mavrix Photo, Inc.*, 647 F.3d at 1231). VNG argues that there

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[1] Fed. R. Civ. P. 4(k)(2) states: (2) Federal Claim Outside State-Court jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

> (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
>
> (B) exercising jurisdiction is consistent with the United States Constitution and laws.

must be something more than a "foreign act with foreseeable effects in the forum state." *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 675 (9th Cir. 2012), *abrogated on other grounds by Axiom Foods, Inc. v. Acerchem International, Inc.*, 874 F.3d 1064 (9th Cir. 2017).

In utilizing Rule 4(k)(2),[2] Lang Van argues the first factor is met because the claim is clearly federal, as it involves a copyright infringement; the second factor is likewise met because VNG is a foreign defendant from Vietnam, and nothing suggests that it could be subject to general jurisdiction in a state besides California. *See Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 462 (9th Cir. 2007) ("[A]bsent any statement from . . . [defendant] that it is subject to the courts of general jurisdiction in another state, the second requirement of Rule 4(k)(2) is met.").

As for the third factor: "The due process analysis under Rule 4(k)(2) is nearly identical to the traditional personal jurisdiction analysis with one significant difference: rather than considering contacts between the [defendants] and the forum state, we consider contacts with the nation as a whole." *Holland Am. Line Inc.*, 485 F.3d at 462 (citing *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1159 (9th Cir. 2006)). However, once the plaintiff has satisfied the first two prongs, the burden then shifts to the defendant who must show that the jurisdiction would be unreasonable. *Washington Shoe Co.*, 704 F.3d at 672 (citing *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d

[2] *See supra* n.1.

1066, 1076 (9th Cir. 2011)). The district court did not address the Rule 4(k)(2) argument, and instead, relied entirely upon VNG's use of *Walden v. Fiore*, 571 U.S. 277 (2014). Since the district court utilized Walden, not Rule 4(k)(2), it only considered VNG's contacts with California and never addressed whether VNG had purposely directed its activities toward the United States as a whole. Lang Van asserts this constitutes reversible error. *See Bradford Co. v. Conteyor N. Am., Inc.*, 603 F.3d 1262, 1272 (Fed. Cir. 2010) (finding legal error where district court "failed to analyze [defendant's] contacts with the United States as a whole [under Rule 4(k)(2)] and imposed an improper burden on the plaintiff.").

VNG argues that the Ninth Circuit recently determined that specific jurisdiction under Fed. R. Civ. P. 4(k)(2) of a copyright action concerning an interactive website did not exist. *AMA Multimedia, LLC*, 970 F.3d at 1212 (affirming the dismissal for lack of 4(k)(2) specific jurisdiction). In the case at hand, argues VNG, music was uploaded in Vietnam on Vietnamese services to be used primarily by Vietnamese people residing in Vietnam. Additionally, "[d]iscovery demonstrated that only 0.2% of Zing website sessions, 0.3% of sessions on the Android App, and 1.1% of sessions on the iOS App originated in California. Even aggregating data for the United States as a whole, only 1.15% of sessions on the Website, 0.85% of sessions on the Android App, and 4.04% of sessions on the iOS App originated in the United States." Further, VNG contends that it received no revenue for Zing MP3 from California or the United States during the pre-January 22, 2014, time period.

Lang Van disagrees that *AMA Multimedia* is applicable here, as that case only considered whether one particular website provided jurisdiction and argues the Court must look to the total sum of the business contacts to see if there is "fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted). Lang Van asserts the Court must look at the aggregate contacts to determine purposeful direction under Rule 4(k)(2). *Pebble Beach Co.*, 453 F.3d at 1158; *see also UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 354 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1057 (2021) (holding that even if relevant facts, considered individually, are insufficient to confer personal jurisdiction, the same facts, considered cumulatively, can render a defendant subject to personal jurisdiction).

ANALYSIS

VNG contends that it is not subject to personal jurisdiction in any state's courts of general jurisdiction.[3] Accordingly, when assessing whether Lang Van has established a prima facie case of jurisdiction, the Court will analyze jurisdiction under

[3] The district court determined that VNG did not waive its right to object to personal jurisdiction. Lang Van argues that VNG has participated in this trial, discovery, hired attorneys, issued subpoenas, and participated in mediation. VNG argued a number of issues on the merits, and then challenged the Court's personal jurisdiction. However, although VNG appears to have been dilatory in the discovery responses on remand, in the context of this jurisdictional dispute it does not appear to rise to the level of waiver.

Fed. R. Civ. P. 4(k)(2). *See Holland Am. Line, Inc.*, 485 F.3d at 461 ("If . . . the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2)." (quoting *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551 (7th Cir.), *as amended* (July 2, 2001))).

A. Jurisdiction under Rule 4(k)(2)

Rule 4(k)(2) was established in "respon[se] to the Supreme Court's suggestion that the rules be extended to cover persons who do not reside in the United States, and have ample contacts with the nation as a whole, but whose contacts are so scattered among states that none of them would have jurisdiction." *ISI Int'l, Inc.*, 256 F.3d at 551 (citing *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987)); *see also* Fed. R. Civ. P. 4(k)(2) advisory committee's note to 1993 amendment.

Accordingly, Rule 4(k)(2) uses virtually the same analysis as the *Calder* effects test for traditional state court personal jurisdiction, *see* 465 U.S. at 788–90, but the Court looks at the nation as a whole when reviewing contacts. Under Rule 4(k)(2), the plaintiff must prove: (1) the claim at issue arises from federal law; (2) the defendants are not subject to any state's courts of general jurisdiction; and (3) invoking jurisdiction upholds due process (namely, that jurisdiction is not unreasonable). *Pebble Beach Co.*, 453 F.3d at 1159. The plaintiff has the burden to show the first two prongs; the burden then shifts to the defendant to show application of jurisdiction would be unreasonable.

Prong 1: Federal law claim

Under Rule 4(k)(2), the claim at issue must arise from federal law in order to exercise personal jurisdiction. *AMA Multimedia, LLC*, 970 F.3d at 1208. The first prong is met, as this matter clearly involves copyright infringement, which is a claim under federal law.

Prong 2: Not subject to state jurisdiction elsewhere

The second prong is also met. "[A]bsent any statement from . . . [defendant] that it is subject to the courts of general jurisdiction in another state, the second requirement of Rule 4(k)(2) is met." *Holland Am. Line Inc.*, 485 F.3d at 462. Although Lang Van contends that VNG is subject to personal jurisdiction in California, VNG asserts that it is not subject to the personal jurisdiction of any state court of general jurisdiction in the United States. For the sake of our Rule 4(k)(2) analysis, we accept VNG's argument that it is not subject to specific personal jurisdiction in California. Since no other states have jurisdiction over this claim, and VNG did not concede that any other state has jurisdiction, this element is likewise met.

Prong 3: Due process

"The due process analysis under Rule 4(k)(2) is nearly identical to the traditional personal jurisdiction analysis with one significant difference: rather than considering contacts between the . . . [defendants] and the forum state, we consider contacts with the nation as a whole." *Holland Am. Line Inc.*, 485 F.3d at 462 (citing *Pebble Beach Co.*, 453 F.3d at 1159). First, there must be purposeful activities or transactions with the United States, with an act that shows

defendant purposefully availing itself of the privileges of doing business in the United States, and thereby invoking the benefits and protections of its laws; second, the claim must arise out of activities that are related to the United States; and third, the exercise of jurisdiction must comport with notions of fair play and substantial justice. *Washington Shoe Co.*, 704 F.3d at 672; *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). There must also be "intentional conduct by the defendant that creates the necessary contacts with the forum." *Walden*, 571 U.S. at 286. Walden requires the defendant to have ties to the forum "in a meaningful way," apart from simply knowing the plaintiff has ties to the forum. *Id.* at 290.

In actions for claims such as copyright infringement, there must be "purposeful direction" under the "[*Calder*] effects test." *Axiom Foods, Inc.*, 874 F.3d at 1069 (quotation marks omitted); *Calder*, 465 U.S. at 787–89. A defendant must have committed an intentional act that is aimed at the forum, and caused harm that defendant knew would occur in the forum. *See Axiom Foods, Inc.*, 874 F.3d at 1069.

Under Rule 4(k)(2), however, once the plaintiff has satisfied the first two prongs, the burden then shifts to the defendant to show that the jurisdiction would be unreasonable. *Washington Shoe Co.*, 704 F.3d at 672 (citing *CollegeSource, Inc.*, 653 F.3d at 1076); *see also Schwarzenegger*, 374 F.3d at 802 (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). The facts of this case demonstrate that jurisdiction is reasonable.

VNG purposefully targeted American companies and their intellectual property. Khoa, a former employee of VNG testified that his job entailed sourcing, identifying, cataloging, and distributing content through Zing MP3 without regard to authorization from content owners, including Lang Van. According to Khoa's declaration, "Lang Van music was among the music that VNG specifically sought to obtain [for Zing MP3]." VNG offered over 2,800 of Lang Van's songs to the public through Zing MP3 and uploaded over 1,600 of Lang Van's songs to Zing MP3.

Although VNG argues its primary audience is in Vietnam, VNG released its Zing MP3 in English to the United States. Absent release by VNG, this app was not available in the United States. Making Zing MP3 accessible to those living in the United States was purposeful. Zing MP3 was downloaded more than 320,000 times in the United States by its mobile users, allowing these users to hold a voluminous collection of copyrighted material.

In addition, VNG contracted with U.S. businesses in conjunction with Zing MP3. Likewise, VNG chose not to geoblock access to Lang Van's content on Zing MP3 which would have restricted the use of Zing MP3 in the United States or elsewhere outside of Vietnam. The First Circuit has stated that "[i]f a defendant tries to limit U.S. users' ability to access its website . . . that is surely relevant to its intent not to serve the United States" and that the "converse is [also] true," such that the defendant's "failure to U.S. business, provides an objective measure of its intent to serve customers in the U.S. market." *Plixer Int'l, Inc. v. Scrutinizer*

GmbH, 905 F.3d 1, 9 (1st Cir. 2018). VNG clearly did not attempt to limit U.S. users' ability to access its website, even though deposition testimony indicates that it had the ability to geoblock users as of 2013, if not earlier.

In *AMA Multimedia*, which the Court finds to be easily distinguishable, the customers uploaded the content themselves. *AMA Multimedia, LLC*, 970 F.3d at 1210. In the present case, the defendant uploaded the content. VNG targeted the United States. VNG did not choose to opt out of the United States or geoblock the content. VNG thus had substantial contacts with the United States.

Moreover, VNG was well aware that its practice might violate U.S. law and, at the very least, affect U.S. interests. In 2015, VNG sent a letter to the United States Trade Representative ("USTR") regarding its contacts with the United States. It asked USTR to take VNG off the international list of internet pirates. In this letter, VNG states that it has "signed license contracts with U.S. studios like Sony Music and Universal Music to have copyrighted music streaming on Zing.MP3's sites." The letter further states its understanding of "the importance of working with U.S. Content Owners. Since 2012, Zing.vn has worked closely with Content Owners of online streaming and video on demand services. Zing.vn has worked with U.S. and non-U.S. companies on resolving specific IP concerns and improving standards for the protection of Intellectual Property." VNG also stated that it "would welcome opportunities for further cooperation with U.S. Content Owners and will continue to seek such opportunities." VNG admits

in this 2015 letter that 10% of its revenue comes from "selling traffic to advertisers" [for] "Western and other Asian content." These contacts clearly distinguish the *AMA Multimedia* case relied on by VNG.

During the trademark application process, VNG was asked to show that its brand name was used in commerce in the United States. In response, VNG sent screenshots in English to the USPTO. VNG intentionally sought support from the USTR in 2015 based upon its record "since 2012" of "signed license contracts" and "cooperation deals" with "U.S. studios" and its purported "long-term plan of lawful co-operation with the right holders . . . in the West."

Two courts have determined that a defendant "purposefully availed itself of the privilege of conducting business in the United States by distributing the Infringing [content] on platforms such as the Google Play store and Microsoft App store." *Blizzard Ent., Inc. v. Joyfun Inc Co., Ltd.*, No. SACV191582JVSDFMX, 2020 WL 1972284, at *6 (C.D. Cal. Feb. 7, 2020); *Goes Int'l, AB v. Dodur Ltd.*, No. 3:14-CV-05666-LB, 2015 WL 5043296, at *9 (N.D. Cal. Aug. 26, 2015). VNG failed to geoblock users in the United States from the Zing MP3 app but did geoblock U.S. users' access to certain U.S. studios, such as Universal Music. This selective geoblocking indicates purposeful conduct. Further, in 2012, VNG and Lang Van had been involved in negotiations and communications regarding the licensing of Lang Van's content on Zing MP3.

The Court finds that there is substantial evidence of intentional direction into the United States market. This evidence clearly supports Rule 4(k)(2)

jurisdiction. Defendant's position is not only inconsistent but unreasonable in this regard. Jurisdiction, in accordance with Rule 4(k)(2), is reasonable given the defendant's contacts with the United States, as set forth herein.

B. Venue

The Court rejects defendant's argument regarding forum non conveniens in Vietnam. VNG argues that the more appropriate venue is Vietnam and is an alternative to dismissal of this case. While the district court acknowledged this argument, it did not specifically address it on the merits. This Court has "discretion to reach *forum non conveniens* even if the district court declined to consider it." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076 (9th Cir. 2015). VNG contends that the majority of witnesses and evidence are in Vietnam, and issues of Vietnamese contracts and copyright law would be better decided in Vietnam.

Lang Van argues that these claims are without merit. It is clearly not more convenient for Lang Van, which is a California corporation, with its principal place of business in California. Further, Lang Van disagrees that alleged infringements of U.S. copyrights should be prosecuted in Vietnam. *See Halo Creative & Design Ltd. v. Comptoir Des Indes Inc.*, 816 F.3d 1366, 1373 (Fed. Cir. 2016) ("It is largely for this reason that district courts have routinely denied motions to dismiss on *forum non conveniens* grounds when United States intellectual property rights form the crux of the dispute."). Further, in 2018, the International Intellectual Property Alliance found, with regard to copyright enforcement, that "[Vietnamese] civil and criminal courts are not a

realistic avenue for copyright owners . . . . To date, there have been relatively few civil court actions involving copyright infringement in Vietnam. The main reasons for this are complicated procedures, delays, and a lack of certainty as to the expected outcome. Building IP expertise must be a part of the overall judicial reform effort."

* * *

The Court finds that venue in this case is not proper in Vietnam. Copyright cases concerning alleged unlawful activities purposely directed toward the United States are more amenable to suit in the United States for the reasons set forth herein. We reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-56770

LANG VAN, INC.,
a California corporation,
Plaintiff-Appellant,
v.
VNG CORPORATION,
a Vietnamese corporation,
Defendant-Appellee,
and
INTERNATIONAL DATA GROUP, INC.,
a Massachusetts corporation,
Defendant.

NOT FOR PUBLICATION

MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California,
No. 8:14-cv-00100-AG-RNB
Andrew J. Guilford, District Judge, Presiding

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted October 6, 2016[**]
Pasadena, California

Filed October 11, 2016
Document No. 29-1

Before: REINHARDT, OWENS, and FRIEDLAND, Circuit Judges.

Appellant Lang Van, Inc. ("Lang Van") appeals the district court's order dismissing its copyright infringement claims against Appellee VNG Corporation ("VNG") for lack of personal jurisdiction. Lang Van challenges that order on the merits and, alternatively, argues that the district court abused its discretion by refusing to permit jurisdictional discovery of VNG. Because the district court's order finally disposed of Lang Van's claims, we have jurisdiction under 28 U.S.C. § 1291. We now vacate and remand.

Lang Van, incorporated and headquartered in California, is a leading producer and distributer of Vietnamese music and entertainment.[1] VNG is a Vietnam corporation with its principal place of business in Ho Chi Minh City, Vietnam, that owns and operates the website mp3.zing.vn ("Zing"). Zing is an online portal that enables users to search, stream, and

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[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[1] Because the district court did not hold an evidentiary hearing, this court considers only whether Lang Van's "pleadings and affidavits make a prima facie showing of personal jurisdiction." *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) (quoting *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 127-28 (9th Cir. 1995)).

download music. Lang Van alleges that VNG willfully engaged in large-scale copyright infringement by making thousands of Lang Van's copyrighted works available to users around the world—including in the United States—without compensating Lang Van.

VNG moved to dismiss for lack of personal jurisdiction. In opposing that motion, Lang Van requested jurisdictional discovery. Specifically, Lang Van sought information about the extent of Zing's use in California. The district court granted the motion to dismiss without holding an evidentiary hearing and did not address Lang Van's request for discovery.

We review a district court's decision to grant or deny jurisdictional discovery for abuse of discretion. *Boschetto*, 539 F.3d at 1020. We are mindful that a district court has "broad discretion to permit or deny discovery," but "[d]iscovery should be granted when . . . the jurisdictional facts are contested or more facts are needed." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003).

Here, the record is not sufficiently developed to enable us to determine whether VNG purposefully directed its activities at California and, therefore, whether specific jurisdiction lies with respect to VNG. *See Boschetto*, 539 F.3d at 1016 (specific jurisdiction requires a showing that the defendant "purposefully direct[ed] his activities" at the forum (internal quotation marks and citation omitted)). Further discovery on the number of Zing users in California, the number of music downloads by and revenue derived from California users, advertising arrangements with California companies, and internal VNG strategy concerning the California

market might demonstrate facts sufficient to constitute a basis for jurisdiction. *See id.* at 1020 (observing that "it might be jurisdictionally relevant if [the defendants] had used [the website] to conduct a significant quantity of . . . sales to California residents"); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229-30 (9th Cir. 2011) (holding that specific jurisdiction was properly exercised in California where the defendant maintained an interactive website, a substantial number of hits to the website came from California residents, and the defendant "continuously and deliberately exploited" the California market for its website by selling advertising space to third-party advertisers who targeted California residents (citation omitted)). Moreover, VNG contested many of Lang Van's contentions relevant to the district court's jurisdictional inquiry.

Because additional discovery would be useful to establish specific jurisdiction and the nature of VNG's connections with California was contested, we conclude that the district court should have permitted limited jurisdictional discovery, and we therefore remand. *See Laub*, 342 F.3d at 1093. On remand, the district court may exercise its discretion to manage jurisdictional discovery as appropriate. *See Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1181 (9th Cir. 1988) ("District court judges possess broad authority to regulate the conduct of discovery.").

VACATED AND REMANDED.

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 8:14-cv-00100-AG-JDE

LANG VAN, INC.,
a California corporation,
Plaintiff,
v.
VNG CORPORATION,
a Vietnamese corporation,
Defendant.

Filed November 21, 2019
Document 212

CIVIL MINUTES - GENERAL

Present: The Honorable	ANDREW J. GUILFORD	
Melissa Kunig	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

[IN CHAMBERS] ORDER REGARDING DEFENDANT'S MOTION TO DISMISS (DKT. NO. 172)

In this copyright action, Plaintiff Lang Van, Inc. alleges that Defendant VNG Corporation ("VNG"),

through its Zing Music App, infringed on thousands of Plaintiff's copyrights in musical recordings. In July 2014, Plaintiff filed a First Amended Complaint that was nearly identical to the original complaint. A few months later, this Court dismissed the case for lack of personal jurisdiction, but that decision was appealed and vacated to allow for additional jurisdictional discovery. Now, Defendant moves to dismiss Plaintiffs Second Amended Complaint (Dkt. No. 145-1, "SAC") for lack of personal jurisdiction, *forum non conveniens*, and failure to state a claim.

The Court GRANTS Defendant's renewed Motion to Dismiss. (Dkt. No. 172.)

1. PRELIMINARY MATTERS

Both parties spent over 80 pages on evidentiary objections and responses to each other's briefs. (*See* Plaintiffs' Evidentiary Objections, Dkt. No. 194.; Defendant's Evidentiary Objections, Dkt. No. 205.) Where, as here, the parties file numerous objections to a motion, it's "often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." *See Doe v. Starbucks, Inc.*, No. SACV 08-00582 AG (CWx), 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009). That is particularly true when most of the objections appear to be boilerplate. For example, Document 194 includes "Lack of foundation" on almost every objection, without any explanation. And twice, when the objections don't state "Lack of foundation," it states only "Relevance." This Court relies on only relevant evidence, and where there is such relevance, such objection is overruled. In all events, during extensive oral argument over all issues in this Order, no

mention was made concerning objections. So here, the Court notes the following. To the extent any of the objected-to evidence is relied on in this order, those objections are overruled. Any remaining objections are also overruled as moot. *See Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1118 (E.D. Cal. 2006).

Further, Plaintiff asserts that Defendant has waived the right to re-assert lack of personal jurisdiction as a defense in this case, while at the same time concedes that Defendant "may have complied with the technical requirements of [Federal] Rule [of Civil Procedure] 12(h)." (Dkt. No. 186 at 14-15.) The Court finds that Defendant has not waived the right to re-assert lack of personal jurisdiction.

2. BACKGROUND

Headquartered in Westminster, California, Lang Van is a leading producer and distributor of Vietnamese music and entertainment. (SAC ¶¶ 11-12.) It has the "largest library of content of any Vietnamese production company, owning the copyrights to more than 12,000 songs and 600 original programs." (*Id.* ¶ 16.) Lang Van also has contracts with "various Vietnam-based production companies to distribute their titles internationally." (*Id.* ¶ 15.)

VNG is a Vietnam corporation with its principal place of business in Ho Chi Minh City, Vietnam. (*Id.* ¶ 6.) While it began in 2004 as a gaming company, VNG launched the Zing Music Website (Zing.vn) in 2007 to make "massive amounts of music available for download to site visitors." (*Id.* ¶¶ 17-20.) This content includes thousands of Lang Van's copyrighted works, offered to site visitors for free. (*Id.* ¶¶ 2, 81.) The

website has approximately 20 million users and is one of the most popular sites in Vietnam. (*Id.* ¶¶ 24, 26.) Lang Van has received no compensation from VNG for the use of its copyrighted works. (*Id.* ¶ 9.)

3. PERSONAL JURISDICTION

Defendant asks the Court to dismiss the case against it for lack of personal jurisdiction. Plaintiff argues that the Court has specific jurisdiction over Defendant. The Court finds, once again, that jurisdiction over Defendant is lacking.

3.1 Legal Standard

A district court has personal jurisdiction over an out-of-state defendant if two things are true: (1) jurisdiction exists under the forum state's long-arm statute, and (2) the assertion of personal jurisdiction is consistent with the limitations of the due process clause. *Pac. Atl Trading Co. v. M/ V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985). "Because California's long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01 (9th Cir. 2004).

"For a court to exercise personal jurisdiction over a nonresident defendant consistent with due process, that defendant must have 'certain minimum contacts' with the relevant forum 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011)

(quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1954)).

3.2 Specific Jurisdiction Over Defendant

Plaintiff argues the Court has specific jurisdiction over Defendant because its claims relate to Defendant's contacts with California. The Court disagrees. Specific jurisdiction exists where the following three prong test is satisfied.

> (1) The non-resident 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 v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). "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.* (internal quotations omitted).

3.2.1 Purposeful Direction

Plaintiff argues the first prong of the specific jurisdiction test, requiring the defendant's purposeful direction of activities to the forum state, is satisfied

under the "effects test" established by the Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984), and applied by the Ninth Circuit in various cases. Defendant argues the Supreme Court's decision in *Walden v. Fiore*, 134 S. Ct. 1115 (2014) clarifies the rule and counsels the Court against exercising jurisdiction based on the "effects test." The Court agrees with Defendant.

3.2.1.1 The Effects Test

The effects test arises from *Calder v. Jones*, where the Supreme Court held that a California court properly asserted jurisdiction in a libel case concerning an article written in Florida. 465 U.S. at 791. The defendants were employees of the National Enquirer, a newspaper publisher incorporated in Florida that enjoyed its highest circulation in California. *Id.* at 785. Aside from their article that circulated in California, the defendants had few contacts with the state. The plaintiff, on the other hand, lived and worked in California, and suffered harm when the article was distributed there. *Id.* at 786, 789-90. In deciding that jurisdiction was proper, the Supreme Court reasoned that the defendants "knew that the brunt of [plaintiffs] injury would be felt . . . in the state in which she lives and works and in which the National Enquirer has its largest circulation." *Id.* at 789-90.

Relying on *Calder*, the Ninth Circuit has applied a three-part effects test to similar cases, requiring that "(1) [the defendant] 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." *Washington Shoe*, 704 F.3d at 673

(internal quotations omitted). This test has been applied to numerous copyright cases, with varying results. *Compare Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668 (9th Cir. 2012) (upholding jurisdiction); *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218 (9tl1 Cir. 2011) (same); *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124 (9th Cir. 2010) (same); *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997) (same), *rev'd on other ground sub nom.*, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998); *with Pebble Beach Co. v. Caddy*, 453 F.3d 1151 (9t11 Cir. 2006) (no jurisdiction); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004) (same).

3.2.1.2 *Walden v. Fiore*

In *Walden v. Fiore*, the Supreme Court reversed the Ninth Circuit's holding that personal jurisdiction could be exercised in Nevada over a DEA agent who allegedly harmed the plaintiffs—Nevada residents—by intentionally filing a false affidavit against them in Georgia. *Walden v. Fiore*, 134 S. Ct. 1115, 1124 (2014). The agent had no connections of his own to Nevada, but the Ninth Circuit panel thought it sufficient that he knew of the plaintiffs' connection to that forum. *Id.* In reversing, the Supreme Court emphasized that "[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." *Id.* at 1125. Furthermore, it stated, "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Id.* at 1126. The Supreme Court found

insufficient contacts between the defendant and Nevada, and so reversed the Ninth Circuit.

The Supreme Court distinguished *Walden* from *Calder*—the libel case concerning the National Enquirer article—by noting that the defendants in *Calder* actually had meaningful contacts with the forum state concerning the events that gave rise to the claims. In *Calder*, "the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens." *Id.* at 1124. Moreover, "because publication to third persons is a necessary element of libel, . . . the defendants' intentional tort actually occurred *in* California." *Id.* Thus, the grounds for jurisdiction in *Calder* were not defendants' knowledge that they were harming a plaintiff who happened to live in California, but rather their intentional act of writing a libelous article for broad publication in California. In other words, jurisdiction was based on their own contacts with California.

3.2.1.3 Application to Defendant

While Plaintiff acknowledges in its Opposition that jurisdiction under the effects test "requires something more" than a link between the harmed plaintiff and the forum, it still offers only tenuous connections between Defendant and California. Plaintiff points to: (1) downloads of the Zing MP3 App and visits to Zing MP3 by U.S. users; (2) Defendant's app developer agreements with Google and Apple; (3) advertisements on Zing MP3 directed at California; and (4) Defendant's U.S. trademark application for "VNG." (Dkt. No. 186 at 11-25.) But

these facts don't show that Defendant expressly aimed its conduct at California.

Concerning point (1), Plaintiff cites purported evidence of users in the U.S. generally accessing Zing MP3 or downloading the Zing MP3 App but identifies no specific allegations in the SAC or evidence that any U.S. user (other than someone acting at Plaintiffs direction) used Zing MP3 to stream or download any of the recordings at issue. Where, as here, the plaintiff fails to link the defendant's forum contacts with the allegedly infringing activity, courts properly dismiss for failure to establish specific jurisdiction. *See Werner v. Dowlatsingh*, 2:18-CV-03560-CAS(FFMx), 2018 WL 6975142, *7-8 (C.D. Cal. Sept. 17, 2018) (finding no jurisdiction where defendant's California connections were not specific to allegedly infringing videos); *Rosen v. Terapeak, Inc.*, No. CV-15-00112-MWF (Ex), 2015 WL 12724071, at *8-9 (C.D. Cal. Apr. 28, 2015).

Defendant's app developer contracts with Google and Apple are also insufficient to establish that Defendant expressly aimed its conduct at California. Defendant's agreement to a forum selection clause for disputes with Apple and Google is not relevant to claims asserted by Plaintiff, which is not a party to the app developer agreements. *See Bibiyan v. Marjan Television Network, Ltd.*, No. CV 18-1866-DMG (MRWx), 2019 WL 422664, at *3-4 (C.D. Cal. Feb. 4, 2019) (finding availability of defendant's app on Google Play Store and Apple's App Store had "no bearing on whether Defendant intended to exploit Persian music video viewership market in California"); *Goes Int'l AB v. Wuzla*, CV 13-7102 PA (Ex), 2014 WL 12617386, at *1 (C.D. Cal. Apr. 7, 2014).

Finally, Defendant's purported advertising and trademark application are insufficient to establish jurisdiction over this action. First, "there is no evidence that advertising gave rise to Plaintiffs claims, i.e., that the advertising itself is a relevant contact for purposes of jurisdiction over the copyright claims." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1086 (C.D. Cal. 2003). Because Plaintiff isn't suing Defendant over the display or content of any advertising on Zing MP3, these contacts aren't relevant to jurisdiction. *See id.* Second, Defendant's trademark application isn't sufficient to establish jurisdiction. Defendant registered "VNG" as a trademark in the United States under the Madrid Protocol, which allowed Defendant to submit its application in Vietnam and to select the United States as one of several countries in which to apply for trademark protection. (*See* Dkt No. 200 at 8.)

Therefore, Plaintiff has failed to meet the first prong of the Ninth Circuit's specific jurisdiction test, the "purposeful direction" prong. Because all three prongs must be satisfied to establish jurisdiction, thus failure alone warrants dismissal.

3.2.3 Conclusion

In sum, Plaintiff has failed to show that Defendant has enough contacts with California for the Court to exercise jurisdiction on these claims. Most importantly, Defendant didn't purposely direct its activities toward California. Therefore, Defendant's renewed Motion to Dismiss is GRANTED.

4. OTHER ARGUMENTS

In their very extensive papers, the parties make many arguments. For example, Defendant asserts the Court should dismiss this case on *forum non conveniens* grounds and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The Court has considered all arguments in making this Order.

5. DISPOSITION

Defendant VNG's renewed Motion to Dismiss is GRANTED. (Dkt. No. 172.)

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Appendix D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 8:14-cv-00100-AG-JDE

LANG VAN, INC.,
a California corporation,
Plaintiff,
v.
VNG CORPORATION,
a Vietnamese corporation,
Defendant.

Filed October 8, 2014
Document 56

CIVIL MINUTES - GENERAL

Present: The Honorable	ANDREW J. GUILFORD	
Lisa Bredahl	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

Proceedings:
[IN CHAMBERS] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Plaintiff Lang Van, Inc. ("Plaintiff") brings this copyright infringement action against Defendants

VNG Corporation ("VNG") and International Data Group, Inc. ("IDG"). There are now four motions to dismiss before the Court: (1) Defendants' joint Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. No. 14), (2) VNG's first Motion to Dismiss for Lack of Proper Service and Lack of Personal Jurisdiction (Dkt. No. 37), (3) VNG's second Motion to Dismiss for Lack of Jurisdiction ("VNG's Motion", Dkt. No. 42), and (4) IDG's Amended Motion to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim ("IDG's Motion," Dkt. No. 44).

Motions (1) and (2) are largely redundant with Motions (3) and (4). Thus the Court focuses on the latter motions, which are GRANTED.

PRELIMINARY MATTERS

VNG raised several objections to evidence presented by Plaintiff in opposition to VNG's Motion. None of this evidence would have a material effect on the Court's ruling, but nevertheless, only admissible evidence is considered in deciding the Motion.

BACKGROUND

Headquartered in Westminster, California, Lang Van is a leading producer and distributor of Vietnamese music and entertainment. (FAC ¶¶ 12-13.) It has the "largest library of content of any Vietnamese production company, owning the copyrights to more that 12,000 songs and 600 original programs." (*Id.* ¶ 17.) Lang Van also has contracts with "various Vietnam- based production companies to distribute their titles internationally." (*Id.* ¶ 16.)

VNG is a Vietnam corporation with its principal place of business in Ho Chi Minh City, Vietnam. (*Id.* ¶ 6.) While it began in 2004 as a gaming company, VNG launched the Zing Music Website (Zing.vn) in 2007 to make "massive amounts of music available for download to site visitors." (*Id.* ¶¶ 18-20.) This content includes thousands of Lang Van's copyrighted works, offered to site visitors for free. (*Id.* ¶¶ 91-92, 97.) The website has approximately 20 million users and is one of the most popular sites in Vietnam. (*Id.* ¶¶ 25, 27.) Lang Van has received no compensation from VNG for the use of its copyrighted works. (*Id.* ¶ 93.)

IDG is a Massachusetts corporation and a limited partner in IDG Ventures. (*Id.* ¶¶ 7, 41.) When VNG began as a small underfunded start-up, IDG Ventures invested $500,000 in the company on behalf of its limited partners. (*Id.* ¶¶ 35, 41, 46.) IDG's wholly-owned subsidiary, IDG Ventures Vietnam, "install[ed]" employee Bryan Pelz "to run VNG" and Managing General Partner Nguyen Bao Hoang to sit on VNG's board of directors. (*Id.* ¶¶ 47-56.) The IDG entities helped establish "VNG's playbook for success, which included growth by rampant copyright infringement," and they "directed and supervised the willful copyright infringement." (*Id.* ¶¶ 57-58.) Today, IDG Ventures Vietnam lists VNG as one of its portfolio companies. (*Id.* ¶ 59.)

PERSONAL JURISDICTION

VNG and IDG both ask the Court to dismiss the case against them for lack of personal jurisdiction. Plaintiff argues that the Court has specific jurisdiction over VNG and general jurisdiction over IDG. The

Court finds that jurisdiction over both defendants is lacking.

1. Legal Standard

A district court has personal jurisdiction over an out-of-state defendant if two things are true: (1) jurisdiction exists under the forum state's long-arm statute, and (2) the assertion of personal jurisdiction is consistent with the limitations of the due process clause. *Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir.1985). "Because California's long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01 (9th Cir. 2004). "For a court to exercise personal jurisdiction over a nonresident defendant consistent with due process, that defendant must have 'certain minimum contacts' with the relevant forum 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1954)). Jurisdiction can exist in a given forum under a theory of general or specific jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984).

2. Specific Jurisdiction Over VNG

Plaintiff argues that the Court has specific jurisdiction over VNG because its claims relate to VNG's contacts with California. The Court disagrees.

Specific jurisdiction exists where the following three-prong test is satisfied:

> (1) The non-resident 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 v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). "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.* (internal quotations omitted).

2.1 Purposeful Direction

Plaintiff argues that the first prong of the specific jurisdiction test, requiring the defendant's purposeful direction of activities to the forum state, is satisfied under the "effects test" established by the Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984), and applied by the Ninth Circuit in various cases. VNG argues that the Supreme Court's recent decision in *Walden v. Fiore*, 134 S. Ct. 1115 (2014) clarifies the rule and counsels the Court against exercising

jurisdiction based on the "effects test." The Court agrees with VNG.

2.1.1 The Effects Test

The effects test arises from *Calder v. Jones*, where the Supreme Court held that a California court properly asserted jurisdiction in a libel case concerning an article written in Florida. 465 U.S. at 791. The defendants were employees of the National Enquirer, a newspaper publisher incorporated in Florida that enjoyed its highest circulation in California. *Id.* at 785. Aside from their article that circulated in California, the defendants had few contacts with the state. The plaintiff, on the other hand, lived and worked in California, and suffered harm when the article was distributed there. *Id.* at 786, 789-90. In deciding that jurisdiction was proper, the Supreme Court reasoned that the defendants "knew that the brunt of [plaintiff's] injury would be felt . . . in the state in which she lives and works and in which the National Enquirer has its largest circulation." *Id.* at 789-90.

Relying on *Calder*, the Ninth Circuit has applied a three-part effects test to similar cases, requiring that "(1) [the defendant] 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." *Washington Shoe*, 704 F.3d at 673 (internal quotations omitted). This test has been applied to numerous copyright cases, with varying results. *Compare Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668 (9th Cir. 2012) (upholding jurisdiction); *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218 (9th Cir. 2011)

(same); *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124 (9th Cir. 2010) (same); *Columbia Pictures Television v. Krypton Broad. of Birmingham*, Inc., 106 F.3d 284 (9th Cir. 1997) (same), *rev'd on other grounds sub nom.*, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998); *with Pebble Beach Co. v. Caddy*, 453 F.3d 1151 (9th Cir. 2006) (no jurisdiction); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004) (same).

Plaintiff relies heavily on *Washington Shoe*—an infringement action by a Washington shoe manufacturer against an Arkansas retailer—where a Ninth Circuit panel held that the three-prong effects test was satisfied where an out-of-state defendant willfully infringed on the copyright of an in-state corporation. In that case, the first and third prongs were easily met because it was a willful infringement action where the defendant knew the plaintiff would suffer harm in Washington, the forum state. After extended discussion, the panel held that the "express aiming" prong was satisfied as well, basing its decision primarily on defendant's knowledge that its infringement would harm the plaintiff in Washington. *Id.* at 678 ("Because the harm caused by an infringement of the copyright laws must be felt at least where the copyright is held, we think the impact of a *willful* infringement is necessarily directed there as well.") Plaintiff argues that *Washington Shoe* controls this case because VNG willfully infringed on copyrights it knew were held by a California corporation. (Opp. to VNG's Motion, Dkt. No. 45, 14:3-19.) Because the Supreme Court recently clarified the effects test, the Court disagrees.

2.1.2 *Walden v. Fiore*

In *Walden v. Fiore*, the Supreme Court reversed the Ninth Circuit's holding that personal jurisdiction could be exercised in Nevada over a DEA agent who allegedly harmed the plaintiffs—Nevada residents—by intentionally filing a false affidavit against them in Georgia. *Walden v. Fiore*, 134 S. Ct. 1115, 1124 (2014). The agent had no connections of his own to Nevada, but the Ninth Circuit panel thought it sufficient that he knew of the plaintiffs' connection to that forum. *Id.* In reversing, the Supreme Court emphasized that "[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." *Id.* at 1125. Furthermore, it stated, "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Id.* at 1126. The Supreme Court found insufficient contacts between the defendant and Nevada, and so reversed the Ninth Circuit.

The Supreme Court distinguished *Walden* from *Calder*—the libel case concerning the National Enquirer article—by noting that the defendants in *Calder* actually had meaningful contacts with the forum state concerning the events that gave rise to the claims. In *Calder*, "the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens." *Id.* at 1124. Moreover, "because publication to third persons is a necessary element of libel, . . . the defendants' intentional tort actually occurred *in* California." *Id.* Thus, the grounds

for jurisdiction in *Calder* were not defendants' knowledge that they were harming a plaintiff who happened to live in California, but rather their intentional act of writing a libelous article for broad publication in California. In other words, jurisdiction was based on their own contacts with California.

2.1.3 Application to VNG

While Plaintiff acknowledges in its Opposition that jurisdiction under the effects test "requires something more" than a link between the harmed plaintiff and the forum, it offers only tenuous connections between VNG and California. Plaintiff points to (1) VNG's knowledge that it was infringing the copyrights of a California company; (2) VNG's "interactive" website, which is accessible in California; and (3) various communications between VNG and Lang Van discussing the infringement issues. (Opposition to VNG's Motion, Dkt. No. 45, 19:5-13.) But these facts do not show that VNG expressly aimed its conduct at California.

Concerning point (1), this is precisely the sort of argument rejected by the Supreme Court in *Walden*. The Supreme Court made clear in *Walden* that jurisdiction is not conferred by defendant's mere knowledge that the party harmed by its acts resides in a certain forum. In *Walden*, the defendant intentionally filed a false affidavit against the forum's resident. Here, VNG allegedly infringed upon the copyright of the forum's resident. In both cases, the defendant knew of the plaintiff's connections to the forum. There is little relevant difference between the cases, and thus, without more, the Court is bound to follow *Walden*.

VNG's interactive website is also insufficient to establish that VNG expressly aimed its conduct at California. VNG's website has a Vietnam address on Vietnam servers and is in the Vietnamese language. It cannot serve as a jurisdictional hook in California simply because it is interactive and accessible from the state. *DFSB Kollective Co. v. Bourne*, 897 F. Supp. 2d 871, 881 (N.D. Cal. 2012) ("If the defendant merely operates a website, even a highly interactive website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution.") (quoting *be2LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011)). Plaintiff must show, in addition to the website's existence, that it targets the forum state. Plaintiff fails to do that. Finally, the alleged communications between VNG and Lang Van are insufficient to establish jurisdiction over this action. Plaintiff points to various meetings and emails between the parties, ostensibly aimed at resolving this copyright dispute. But Plaintiff cites no authority showing that such contacts give rise to jurisdiction. Instead, Plaintiff cites cases stating only the uncontroversial proposition that emails give rise to jurisdiction where they directly lead to the harm caused. *See Global Acquisitions Network v. Bank of Am. Corp.*, CV 12-8758 DDP, 2013 WL 3450402 (C.D.Cal. July 9, 2013) (emails used to perpetrate fraud); *SeQual Techs., Inc. v. Stern*, 10-cv-2655 DMS, 2011 WL 1303653, at *2 (S.D. Cal. Apr. 4, 2011) (emails used to market product at center of dispute); *Roberts v. Synergistic Int'l, LLC*, 676 F.Supp.2d 934 (E.D. Cal. 2009) (emails and phone calls used to initiate fraud). Plaintiff points to no cases where

discussions intended to resolve a dispute later give rise to specific jurisdiction in a case concerning that dispute. Thus the Court finds that the contacts in this case are insufficient. *Cf. Digit-Tel Holdings, Inc. v. Proteq Telecomms. (PTE), Ltd.*, 89 F.3d 519, 524 (8th Cir. 1996) ("Courts have hesitated to use unsuccessful settlement discussions as 'contacts' for jurisdictional purposes.").

Therefore, Plaintiff has failed to meet the first prong of the Ninth Circuit's specific jurisdiction test, the "purposeful direction" prong. Because all three prongs must be satisfied in order to establish jurisdiction, this failure alone warrants dismissal. Nevertheless, the Court will briefly address the second and third prongs.

2.2 Relatedness

To satisfy the second prong of the specific jurisdiction test, Plaintiff must show that the claim arises out of, or relates to, the defendant's forum-related activities. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Plaintiff has failed to show that its claims arise from Defendant's very limited contacts with California. To the contrary, it appears that the claims arise primarily from Defendant's activities targeting Vietnam.

2.3 Fair Play and Substantial Justice

Finally, under the third prong of the specific jurisdiction test, the Court considers whether exercising jurisdiction would "comport with fair play and substantial justice." *Id.* The Court understands the difficulty of Plaintiff's position. Plaintiff has a strong interest in protecting its copyrights and

legitimate concerns that effective relief cannot be found in Vietnam. But the Court cannot say that it is reasonable to exercise jurisdiction over a foreign entity for acts that occur in, and target, a separate sovereign nation.

2.4 Conclusion

In sum, Plaintiff has failed to show that VNG has enough contacts with California for the Court to exercise jurisdiction on these claims. Most importantly, VNG never purposely directed its activities toward California. Therefore, VNG's Motion to Dismiss is GRANTED.

3. General Jurisdiction Over IDG

General jurisdiction arises when a defendants' "affiliations with the State . . . are so constant and pervasive 'as to render [it] essentially at home in the state.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations. S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)). Only in an "exceptional case" will a court have general jurisdiction over a corporation in a state other than the corporation's state of incorporation or principal place of business. *Id.* at 761 n.19. "This is an exacting standard, as it should be, because a finding of 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 Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004).

Plaintiff argues that the Court has general jurisdiction over IDG, but Plaintiff's arguments fall far short of the demanding standard. After acknowledging that IDG's state of incorporation and

principal place of business is Massachusetts, Plaintiff points only to scarce contacts between IDG and California. For example, Plaintiff asserts that some officers and employees temporarily lived in the state eight years ago, that some "high-level executives" occasionally travel to California, that the corporation leases several properties in California, and that it "holds meetings in California." (Pl.'s Opp. to Motion to Dismiss, Dkt. No. 46, at 10:17-11:19.) These are the types of forum-related activities that might support specific jurisdiction in a different case, but they do not approach the high standard for general jurisdiction.

Neither is Plaintiff's alter-ego theory persuasive. Plaintiff cites no evidence indicating that IDG has anything more than a usual parent-subsidiary relationship with its California-based subsidiaries. *See Doe v. Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001) ("The existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum."). Having directors in common and sharing a trademark does not make a subsidiary an alter-ego of the parent. Nor does sharing some office space. Plaintiff alleges no commingling of funds, failure to follow corporate formalities, undercapitalization, or other hallmarks indicating that IDG's control over its subsidiaries "render[s] the latter the mere instrumentality of the former." *Id.* at 926; *See also Assoc. Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 838-40 (Cal. Ct. App. 1962) (listing various factors considered in alter ego cases).

Therefore, this Court lacks personal jurisdiction over IDG. IDG's Motion to Dismiss for Lack of Personal Jurisdiction is GRANTED.

OTHER GROUNDS FOR DISMISSAL

VNG and IDG both argue that there other grounds for dismissal. VNG contends it was improperly served, while IDG asserts a 12(b)(6) failure to state a claim. Because the Court has already decided it lacks jurisdiction over the defendants, these arguments will not be considered.

DISPOSITION

VNG's Motion to Dismiss and IDG's Motion to Dismiss are GRANTED.

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Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-56452

LANG VAN, INC.,
a California corporation,
Plaintiff-Appellant,
v.
VNG CORPORATION,
a Vietnamese corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California, Santa Ana
No. 8:14-cv-00100-AG-JDE

Filed November 23, 2022
Document No. 83

ORDER

Before: BYBEE and BENNETT, Circuit Judges, and BATAILLON,* District Judge.

Defendant-Appellee has filed a petition for panel rehearing and a petition for rehearing en banc. [Dkt. 82]. The panel has voted to deny the petition for panel rehearing. Judge Bennett votes to deny the

* The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska, sitting by designation.

petition for rehearing en banc, and Judges Bybee and Bataillon so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is DENIED.

Appendix F

Relevant Constitutional Provisions & Rules

U.S. Const., amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to

vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation

incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Fed. R. Civ. P. 4(k)(2)

(2) *Federal Claim Outside State-Court Jurisdiction.* For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.