

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

INCORP SERVICES INC., a Nevada corporation

Plaintiff,

v.

INCSMART.BIZ INC., a Nevada corporation;
DAVID OLIVER, an individual;
MICHAEL LASALA, an individual;
JO ANN OLIVER, an individual; and
DOES 1-10, inclusive,

Defendants.

) Case No. 11-CV-4660-EJD-PSG

)
) **MOTION TO DISMISS**
) **AMENDED COMPLAINT FOR LACK**
) **OF PERSONAL JURISDICTION AND**
) **IMPROPER VENUE, OR, IN THE**
) **ALTERNATIVE, TO TRANSFER**
) **VENUE**

Before the Court are motions filed by Defendant Incsmart, amongst other co-defendants ('Defendant').¹ Specifically, Defendant moves the Court to dismiss for lack of personal jurisdiction and improper venue, or, in the alternative to transfer venue. Plaintiff Incorp opposes such motions.

Having heard oral argument and reviewed the parties' materials, the abovementioned motions should be dismissed, with exception of Jo Ann Oliver. For reasons that follow, Jo Ann Oliver is the only co-defendant that remains shielded from the Court's personal jurisdiction.

¹ The term, Defendant, will apply be generally to all the Defendants unless context demands otherwise.

I. BACKGROUND

A. Procedural History

On September 20, 2011, Plaintiff filed suit against Defendant for claims under the Computer Fraud and Abuse Act and intentional interference of contract relations, amongst other claims based on Californian law.

On October 6, 2011, Plaintiff filed a motion to take early discovery. See, Discovery, Dkt Item No. 7. On November 9, 2011, the Court granted Plaintiff's motion and allowed Plaintiff to serve a subpoena on Cox Communications for the purpose of identifying the customer(s) associated with the two flagged IP addresses. See, Subpoena, Dkt Item No. 12. On January 17, 2012, Cox responded to the Subpoena and identified the Cox customers associated with the IP addresses at issue. See, Rosenfeld Decl. Dkt Item 47 ¶8 & Ex. F.

On February 3, 2012, Plaintiff filed its Amended Complaint, which added Defendants as parties and a claim for false advertising under the Lanham Act. See, Amended Complaint, Dkt Item No. 17. The Amended Complaint alleged claims for: (1) false advertising under the Lanham Act; (2) violation of the Computer Fraud and Abuse Act; (3) fraud; (4) intentional interference with prospective economic advantage; (5) intentional interference with contractual relations; and (6) breach of contract.

Following Defendants failure to respond to the Amended Complaint, the Clerk of the Court entered default against them in March 2012, and Plaintiff filed a motion for default judgment. See, Dkt Items No. 25, 28, 34.

Prior to the hearing on Plaintiff's motion for default judgment, Plaintiff was contacted by counsel for Defendants. See, Rosenfeld Decl. ¶12. The parties negotiated and filed a stipulation to set aside the default against Defendants, which the Court entered as an order on June 6, 2012. See, Stipulated Order, Dkt Item No. 40.

On June 18 2012, Defendant filed the motions that are now currently before the Court.

1 **B. Factual Allegations**

2 Plaintiff Incorp provides a variety of company formation and registration services,
3 including registered agent services across the country. Incorp describes itself as a corporation,
4 “based in Henderson, Nevada.” See, Amended Complaint, Dkt. No. 17, ¶20. It further describes
5 itself as, “the largest Nevada-based national registered agent firm...” Id. Its business involves
6 advertising its services to potential customers, primarily through online advertising, and spending
7 resources in pursuit of such advertising. Id. ¶21. Plaintiff has expended resources to advertise its
8 services on Microsoft, Google, and Yahoo! search engines – all of which are headquartered or have
9 offices in the Northern District of California. Id. See also, Rosenfeld Decl. ¶¶2-6 & Exs. A-E.²

10 Defendant Incsmart also provides incorporation services and resident agent services across
11 the country. See, Declaration of David Oliver “Oliver Decl.”, ¶ 1. The corporate office for Incsmart
12 is in Las Vegas, Nevada. See, Oliver Decl., ¶ 6. David Oliver is a resident of Las Vegas, Nevada, as
13 well as the other individual Defendants. Id. at ¶ 1. David Oliver and Michael Lasala are officers of
14 IncSmart. In addition, Jo Ann Oliver is David Oliver’s elderly mother. Id. at ¶ 3. The Defendants
15 have no meaningful ties, personally, to the State of California. The individual Defendants do not
16 own or lease any real or personal property in California, nor have they ever owed or been required
17 to pay taxes in California. See id., at ¶ 8.

18 Defendant’s Website is located at <www.incsmart.biz>, on which they advertise
19 Defendant’s services. See, Amended Complaint, Dkt Item No. 17 ¶ 50. Incsmart’s website
20 advertises that it provides registered agent services in all fifty states. For example, the website
21 states, “Our Registered Agent service is for any entity in any state,” and “Choose your Registered
22 Agent. IncSmart has Agents in all states.” See, Amendment Complaint, Dkt Item No. 17 ¶70-74.
23 The Incsmart Website is interactive, in so far that it allows a user to purchase registered agent,
24 company formation, and company management services by proceeding through standard
25 ecommerce checkout screens. See, Amended Complaint ¶54; Rosenfeld Decl. ¶9 & Ex. G.

26 _____
27 ² “The Search Engines use a pay-per-click (“PPC”) payment model, whereby advertisers allot a
28 budget for a particular advertising campaign (i.e. set of keywords) for a given period of time. Each
time a user clicks on a sponsored ad, the advertiser pays the Search Engine for that click and the
charge for that click (as determined through the auction process described below) is deducted from
the advertiser’s budget. See, Amended Complaint, Dkt. No. 17.

1 Specifically, Plaintiff alleges that Incsmart’s advertisements are false in so far that they do
 2 not provide—and in some cases cannot lawfully provide—the advertised registered agent services.
 3 Id. ¶55-56. In the vast majority of states, Incsmart is not registered to conduct business as either a
 4 domestic or foreign corporation, even where such a registration is required to serve as a registered
 5 agent or to conduct business in that state. Id. ¶57. In the vast majority of states that require a
 6 person to qualify as a commercial registered agent, Incsmart does not have the necessary
 7 qualifications and has not obtained the necessary certification. Id. ¶58. In some states, Incsmart
 8 improperly purports to accept service of process through a P.O. Box. Id. ¶60.

9 For California, the Incsmart Website advertises both specific corporate formation and
 10 registered agent services. Id. ¶67; Rosenfeld Decl. ¶10 & Ex. H. However, as alleged by Plaintiff,
 11 Defendants have not complied with the requirements of Corporation Code section 1505 for
 12 Incsmart to serve as a registered agent; nor has Incsmart registered as a Private Service Company
 13 with the California Secretary of State. Id. ¶67. Rather, instead of maintaining an office and
 14 personnel in California to act as a registered agent for its customers, Defendants have simply rented
 15 a mailbox at a UPS store, and used this mailbox for its registered agent services in circumstances
 16 where Defendants have not filed a section 1505 registration with the California Secretary of
 17 State—and thus cannot serve as a registered agent). Id. ¶67.

18 II. DISCUSSION

19 With the advent and use of the Internet, new challenges for the law regarding personal
 20 jurisdiction have evolved. Thus far, the U.S. Supreme Court has not yet entered the debate.³ Over
 21

22
 23 ³ See, A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to*
 24 *Analyze Network-Mediated Contacts*, 2006 U. Ill. L.Rev. 71, 73-74 (2006)) (Many courts and
 25 scholars have grappled with how best to evaluate for constitutionality assertions of personal
 26 jurisdiction based on the internet, “reaching a wide range of conclusions about proper standards
 27 The U.S. Supreme Court has thus far not entered this debate.”) Relevant to this case will be how
 28 Supreme Court authority in Calder v. Jones, 465 U.S. 783, 789 (1984) interplays Keeton v. Hustler
Magazine, 465 U.S. 770, 774 (1984), and the sliding scale first established in Zippo Manufacturing
Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa.1997) and applied in the Ninth Circuit’s
 decision, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir.1997) and Mavrix Photo,
Inc. v. Brand Techs, Inc., 647 F.3d 1218, 1230 (9th Cir. 2011) (“Mavrix”) cert. denied, 132 S. Ct.
 1101 (2012).

1 the past decade, however, the Ninth Circuit has begun to frame standards for establishing personal
2 jurisdiction with respect to the internet.

3 Here, the debate is made novel because it not only combines the internet with a federal false
4 advertising claim, but neither the Plaintiff, nor Defendant reside in this forum's jurisdiction.

5 **A. Subject Matter Jurisdiction**

6 As a threshold matter, courts have an affirmative duty to examine their own subject matter
7 jurisdiction. In re Tuli, 172 F.3d 707, 712 (9th Cir.1999). Pursuant to 12(b)(1) Fed. R. Civ. P., a
8 Court may dismiss an action for lack of subject matter where the court has neither constitutional,
9 nor statutory basis for a determination. See, Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039
10 (9th Cir.2004). If the Court determines that it lacks subject matter jurisdiction, the Court must dismiss
11 the action pursuant to Fed. R. Civ. P. 12(h)(3).

12 Plaintiff relies on claims under the Lanham Act and the Computer Fraud and Abuse Act
13 (CFAA) for the purposes of subject matter jurisdiction. With respect to the CFAA claim, however,
14 it is questionable whether Plaintiff has pled "a satisfactory showing of the facts necessary to
15 establish jurisdiction" under the CFAA claim. See, Laub v. U.S. Dep't of the Interior, 342 F.3d
16 1080, 1093 (9th Cir.2003). Because of reasons stated in the Ninth Circuit's recent Nosal decision,
17 the Court finds that Plaintiff's CFAA claim does require a more satisfactory showing of alleged
18 facts to establish jurisdiction under the CFAA claim. See, United States v. Nosal, 676 F.3d 854,
19 (9th Cir.2012)

20 In Nosal, the court addressed the CFAA and interpreted the phrase "exceeds authorized
21 access" within the meaning of that statute. The court held that the phrase "does not extend to
22 violations of use restrictions." Nosal, 676 F.3d 863.⁴ The court reasoned that its interpretation was
23 a more "sensible reading of the text and legislative history of a statute whose general purpose is to
24 *punish hacking* – [being] the circumvention of technological access barriers." Id.⁵

25 ⁴ The *en banc* Nosal decision reversed U.S. v. Nosal, 642 F.3d 781, 785 (9th Cir.2011) – being a
26 2:1 decision that broadly interpreted the phrase: "exceeds authorized access" to include employer
use restrictions.

27 ⁵ Nosal, 676 F.3d 858 ("But it is possible to read both prohibitions ["without authorization" and
28 "exceeds authorized access"] as applying to hackers: '*without authorization*' would apply to
outside hackers (individuals who have no authorized access to the computer at all) and '*exceeds*

1 Here, and with regard to the CFAA claim, Plaintiff has pled the following: “In clicking on
 2 Incorp’s online ads without having an actual interest in Incorp’s website or services, Defendants
 3 exceeded their authorized access to the Search Engines’ protected computers, furthered their fraud,
 4 and obtained things of value in violation of 18 U.S.C. § 1030(a)(4).” See, Amended Complaint, Dkt
 5 Item No. 17 ¶80. The Court observes that there are no direct or clear allegations of “hacking” in
 6 this passage – being, broadly, “the circumvention of technological access barriers,” not violation of
 7 “use restrictions.” Nosal, 676 F.3d 863. In light of Nosal, the Court queries how a lack of “actual
 8 interest in Incorp’s website” equates with outside or inside hacking. Id. The Amended Complaint
 9 further alleges that the Defendants used the Search Engines on Google and Yahoo to fraudulently
 10 click on Plaintiff’s ads and to display Defendants’ own ads. See, Amended Complaint, Dkt Item
 11 No. 17 ¶ 37-44.⁶ Again, these factual allegations fail to ‘flesh out’ what the Ninth Circuit has
 12 described as hacking and the specific elements of subsection 1030(a)(4).^{7 8}

13 *authorized access*’ would apply to inside hackers (individuals whose initial access to a computer is
 14 authorized but who access unauthorized information or files). This is a perfectly plausible
 15 construction of the statutory language that maintains the CFAA’s focus on hacking rather than
 turning it into a sweeping Internet-policing mandate.”

16 ⁶ Further, the Amended Complaint indicates that Defendant was a “person or entity” (albeit a non-
 17 purchasing one) that did not intend to learn about Plaintiff’s services, but “rather impose costs and
 18 deplete Incorp’s advertising budget”. Id. ¶29-37. But *compare*, Nosal, 676 F.3d 857-8 (“Congress
 19 enacted the CFAA in 1984 primarily to address the growing problem of computer hacking,
 recognizing that, “[i]n intentionally trespassing into someone else’s computer files, the offender
 obtains at the very least information as to how to break into that computer system.” S.Rep. No. 99-
 432, at 9 (1986) (Conf. Rep.)”)

20 ⁷ Nosal, 676 F.3d 857-8, Fn 4 (“Subsection 1030(a)(4) requires a person to (1) knowingly and (2)
 21 with intent to defraud (3) access a protected computer (4) *without authorization or exceeding*
authorized access (5) in order to further the intended fraud. See, 18 U.S.C. § 1030(a)(4).”)

22 ⁸ Nosal, 676 F.3d 863 (“For our part, we continue to follow in the path blazed by Brekka, 581 F.3d
 23 1127, and the growing number of courts that have reached the same conclusion. These courts
 recognize that the plain language of the CFAA “target[s] the unauthorized procurement or
 24 alteration of information, not its misuse or misappropriation.” Shamrock Foods Co. v. Gast, 535 F.
 25 Supp. 2d 962, 965 (D. Ariz. 2008); see also Orbit One Commc’ns, Inc. v. Numerex Corp., 692 F.
 26 Supp. 2d 373, 385 (S.D.N.Y. 2010) (“The plain language of the CFAA supports a narrow reading.
 The CFAA expressly prohibits improper ‘access’ of computer information. It does not prohibit
 27 misuse or misappropriation.”); Diamond Power Int’l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 1343
 (N.D. Ga. 2007) (“[A] violation for ‘exceeding authorized access’ occurs where initial access is
 28 permitted but the access of certain information is not permitted.”); Int’l Ass’n of Machinists &
Aerospace Workers v. Werner-Masuda, 390 F. Supp. 2d 479, 499 (D. Md. 2005) (“[T]he CFAA,
 however, do[es] not prohibit the unauthorized disclosure or use of information, but rather
 unauthorized access.”)

1 Accordingly, because hacking was the mischief the CFAA sought to remedy, the Court
2 finds that Plaintiff has not shown the facts necessary in its pleadings to establish jurisdiction. See,
3 Laub, 342 F.3d, at 1093. As such, the Court grants Plaintiff leave to amend with respect to the
4 CFAA claim.⁹

5 **B. Venue**

6 Despite the title of their motion, Defendant does not appear to argue that this district is an
7 improper forum under 28 U.S.C. §1391. Rather, Defendants only argue that the Court should
8 transfer this case for the convenience of the parties and witnesses under 28 U.S.C. §1404(a),
9 discussed later. To the extent that Defendants do argue that this district is improper, such an
10 argument would fail because a substantial part of the events which gave rise to this action occurred
11 within the Northern District of California. See, Rodriguez v. California Highway Patrol, 89 F.
12 Supp. 2d 1131, 1136 (N.D. Cal. 2000).¹⁰ Many of these reasons overlap and are outlined below
13 with respect to personal jurisdiction.

14 **C. Personal Jurisdiction: General and Specific Jurisdiction**

15 Personal jurisdiction is the ability of a court to exercise dominion over the parties so to
16 ensure compliance with a judgment. The Fourteenth Amendment's Due Process Clause permits
17 courts to exercise personal jurisdiction over a defendant who has "certain minimum contacts [with
18 the forum]... such that maintenance of the suit does not offend traditional notions of fair play and
19 substantial justice." See, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95
20 (1945) and Kulko v. Superior Court of Cal., 436 U.S. 84, 92, 98 S.Ct. 1690, 56 L.Ed.2d 132

21 _____
22 ⁹ Under Federal Rule of Civil Procedure 15(a)(2), leave to amend is to be given "freely" and "when
23 justice so requires," even if the plaintiff fails to request leave to amend. To the extent that the
24 pleadings can be cured by the allegation of additional facts, the plaintiff should be afforded leave to
amend. See, Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv. Inc., 911 F.2d
242, 247 (9th Cir.1990).

25 ¹⁰ See, also Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 639 (2d Cir.1956) ("[I]n cases
26 involving trademark infringement and unfair competition, is where the deceived customer buys the
27 defendant's product)); see Sutter Home Winery, Inc. v. Madrona Vineyards, L.P., No. C 05-0587
28 MHP, 2005 WL 701599, *4 (N.D.Cal. Mar. 23, 2005) ("[T]he fact that a substantial number of
consumers ... who reside in this district may be confused by defendant's use of the 'Mélange de
Trois' mark is sufficient to establish th[at] this jurisdiction is a proper venue for the adjudication of
plaintiff's claim.").

1 (1978). 326 U.S. 310. Personal jurisdiction may be either specific or general. See, Hirsch v. Blue
 2 Cross, Blue Shield of Kansas City, 800 F.2d 1474, 1477 (9th Cir.1986). See also, Helicopteros
 3 Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 & n. 9, 104 S.Ct. 1868, 1872 & n. 9, 80
 4 L.Ed.2d 404 (1984). The burden of establishing personal jurisdiction rests with the plaintiff.
 5 Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir.2004).

6 Personal jurisdiction in federal court must also comport with Rule 4(k) of the Federal Rules
 7 of Civil Procedure, as well as with federal due process. See id. at 800–01. Under Rule 4(k)(1)(A),
 8 the long-arm statute of the state in which the district court sits must be applied when determining
 9 whether the court has jurisdiction over out-of-state defendants. The California long-arm statute is
 10 coextensive with federal due process; so, in this Court, personal jurisdiction analysis consists solely
 11 of federal due process analysis. See, Schwarzenegger, 374 F.3d at 800–01.

12 Importantly, and absent formal discovery or an evidentiary hearing, a plaintiff need make
 13 only a prima facie showing that personal jurisdiction exists. See, Pebble Beach Co. v. Caddy, 453
 14 F.3d 1151, 1154 (9th Cir.2006) (“Pebble Beach”) and; Rio Properties, Inc. v. Rio Int'l Interlink, 284
 15 F.3d 1007, 1019 (9th Cir. 2002) (“Rio Properties”). See also, Church Bros., LLC v. Garden of
 16 Eden Produce, LLC, No. 5:11–cv–04114 2012 WL 1155656 *2 (N.D. Cal. April 5, 2012.), and,
 17 Tagged, Inc. v. Does 1 through 10, No. C 09-0171, 2010 WL 370331 *4, 2010 U.S. Dist. LEXIS
 18 5428,*11 (N.D.Cal. Jan. 25, 2010).

19 Here, Plaintiff does not contend that the Court has general jurisdiction; thus, the issue
 20 before the Court is solely whether it can assert “specific” jurisdiction for the claims arising out of
 21 Defendant's forum-related activities.¹¹ See, FDIC v. British-American Ins. Co. Ltd., 828 F.2d 1439,
 22 1441 (9th Cir.1987); Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392,
 23 1396 (9th Cir.1986.)

24 While the *overarching framework* for personal jurisdiction asks whether a defendant has
 25 minimum contacts with the forum state such that the exercise of jurisdiction “does not offend

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 27 ¹¹ See, Plaintiff's Opposition, at p10-11 Dkt No. 46. (“Plaintiff does not contend that the Court has
 28 general jurisdiction, but does contend that the Court has specific jurisdiction over all the
 Defendants.”)

1 traditional notions of fair play and substantial justice,” the Ninth Circuit employs a three-prong test
 2 to assess specific jurisdiction – a test which conforms with International Shoe and its progeny.
 3 See, Schwarzenegger, 374 F.3d at 802. To satisfy minimum contacts for specific jurisdiction, each
 4 of the following prongs are assessed:

5 (1) The non-resident defendant must a) purposefully direct his activities or consummate some
 6 transaction with the forum, or resident thereof; or b) perform some act by which he purposefully
 7 avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits
 8 and protections of its laws;

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

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

13 See, Schwarzenegger, 374 F.3d at 802 (quoting Lake v. Lake, 817 F.2d 1416, 1421 (9th
 14 Cir.1987). The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff
 15 fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state. If
 16 the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the
 17 defendant to “present a compelling case” that the exercise of jurisdiction would not be reasonable.
 18 Id. (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78, 105 S.Ct. 2174, 85 L.Ed.2d
 19 528 (1985)).

20 **Prong One: Whether the Plaintiff has established Purposeful Direction or Availment¹²**

21 The first prong of the specific jurisdiction test refers to both purposeful direction and
 22 purposeful availment. In cases involving tortious conduct, courts most often employ a purposeful
 23 direction analysis. Schwarzenegger, 374 F.3d at 802. In cases involving contracts, the purposeful
 24 availment analysis is most often applied. See, for e.g. Doe v. Unocal Corp., 248 F.3d 915, 924 (9th
 25

26 ¹² The Ninth Circuit has noted that the “purposeful availment” prong, “[d]espite its label ...
 27 includes both purposeful availment and purposeful direction. It may be satisfied by purposeful
 28 availment of the privilege of doing business in the forum; by purposeful direction of activities at
 the forum; *or by some combination thereof.*” Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d
 1199, 1206 (9th Cir.2006) (en banc).

1 Cir.2001). Because the parties have framed the false advertising claim as tortious conduct, the
 2 Court will apply the purposeful direction analysis to the facts in suit.¹³

3 Thus, in cases sounding in tort, as here, courts typically inquire whether a defendant
 4 “purposefully direct[s] his activities at the forum state, applying an ‘effects’ test that focuses on the
 5 forum in which the defendant’s actions were felt, whether or not the actions themselves occurred
 6 within the forum.” Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199, 1206 (9th
 7 Cir.2006) (en banc) (quoting Schwarzenegger, 374 F.3d at 803.) The “effects” test, which is based
 8 on the Supreme Court’s decision in Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804
 9 (1984), requires that “the defendant *allegedly* must have (1) committed an intentional act, (2)
 10 expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be
 11 suffered in the forum state.” Brayton Purcell, 606 F.3d at 1128 (quoting Yahoo!, 433 F.3d at 1206).

12 1. Intentional Act

13 Here, the first condition is conceded by Defendant in so far that there has been intentional
 14 acts of publication by Defendant of internet advertisements about its own products and services.¹⁴
 15 The Court agrees. “Intent” refers only “to an intent to perform an actual, physical act in the real
 16 world, rather than an intent to accomplish a result or consequence of that act.” Brayton Purcell, 606
 17 F.3d at 1128. Thus, irrespective of whether the internet advertisements are false (or not), the act of
 18 publication on the website is enough.

19 As to the remaining requirements of Calder, recent Ninth Circuit cases are instructive as
 20 reflected by Mavrix Photo, Inc. v. Brand Techs, Inc., 647 F.3d 1218, 1230 (9th Cir. 2011)
 21 (“Mavrix”) cert. denied, 132 S. Ct. 1101 (2012).

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 23
 24 ¹³ The Court observes that while the argument has not been framed as a purposeful availment case,
 25 it is worth noting that the court in Yahoo! did indicate that there may be a degree of overlap
 26 between the two forms of analyses. Yahoo! Inc., 433 F.3d1206 In the Court’s view, and if the
 27 federal advertising claim had been framed as one sounding in contract because Defendant made
 sales to California residents, which diverted sales away from Plaintiff, this would tend to trigger
 purposeful availment analysis. Perhaps this is what the Ninth Circuit hinted at when it said that
 this prong may be satisfied by ‘some combination thereof.’ Id.

28 ¹⁴ Defendant intimates in its brief that it only contests the second and third prongs. See,
 Defendant’s Motion, at p12 Dkt No. 43.

2. Expressly Aimed

The ‘expressly aimed’ condition was addressed in the Mavrix case. There, the court held that a district court in California had jurisdiction over the defendant despite both parties residing in states outside of California. 647 F.3d at 1221–23. The plaintiff (Mavrix), a celebrity photo agency with its principal place of business in Miami, brought a copyright infringement action in California against an Ohio corporation (Brand). Mavrix alleged that Brand had posted plaintiff’s copyrighted photos on its commercial, interactive website. Id. Because Mavrix had alleged copyright infringement, a tort-like cause of action, the court found that ‘purposeful direction’ was the proper analytical framework – and held that the express aiming element was satisfied. Id.

The Ninth Circuit looked to Calder and Keeton v. Hustler Magazine 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), noting that the defendant (Brand) had sought to advertise via the web and attract nationwide audiences for commercial gain – including California. See, Mavrix, 647 F.3d at 1229–30. Because Brand had cultivated a nationwide audience for commercial gain, the court found that consumption of its products (via the internet) could not be described as “random,” “fortuitous,” or “attenuated.” See, Burger King, 471 U.S. at 486, 105 S.Ct. 2174, and, therefore, that minimum contacts with a state, such as California, existed.

To satisfy the “expressly aimed’ requirement, the Mavrix court also discussed the sliding scale analysis in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa.1997) – an analysis applied to internet website cases and followed in the Ninth Circuit. See, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418–19 (9th Cir.1997).

At one end of the scale are active sites “where a defendant clearly does business over the Internet”—and “*enters into contracts* with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet” — which *supports* personal jurisdiction. Mavrix, 647 F.3d at 1229–30. (*Emphasis Added.*) At the other end, are passive sites “where a defendant has simply posted information on the Internet Web site ,which is accessible to users in foreign jurisdiction,” and which do *not* support personal jurisdiction. Id. Under the Zippo analysis, the availability of jurisdiction is thus determined by examining the “level of interactivity and commercial nature of the exchange ... that occurs on the website.” Id.

1 In applying the above principles, the Court finds that Defendant's intentional acts were
2 expressly aimed at Plaintiff for the following reasons.

3 *First*, Defendant has used a highly interactive Incsmart Website to target California
4 consumers. This view is borne out by the uncontroverted factual allegations in the Rosenfeld
5 declaration – particularly the Defendant's website exhibits, which are incorporated into the
6 declaration. See, Rosenfeld Decl. ¶¶9-10 & Exs. G-H. Defendant's website is highly interactive
7 because it offers California-specific services to California consumers (including, California
8 registered agent services and California corporate formation services). Id. ¶10 & Ex. H.
9 Consumers can purchase Incsmart's services directly through Incsmart's interactive website
10 through a typical 'shopping cart' and checkout procedure. Id. ¶9 & Ex. G. Further, the Incsmart
11 Website contains 218 different web pages that offer California-specific services or otherwise
12 discuss California. Id. ¶13 & Ex. I. All these facts are not contested by Defendant; all of which are
13 telling against Defendant's position due to the "level of interactivity and commercial nature of the
14 exchange" that occurs on the website. Id. See, Mavrix, 647 F.3d at 1229–30.

15 *Second*, the facts in this case bear a resemblance with the Keeton and Mavrix cases. The
16 latter has been discussed, above. In the former, Keeton, Defendant Hustler was sued for libel in
17 New Hampshire despite no other contacts in the forum jurisdiction. While the court conceded that
18 the circulation in New Hampshire was not enough to establish general jurisdiction, the court did
19 find specific jurisdiction because Hustler had "continuously and deliberately" exploited the New
20 Hampshire market, and thus "must [have] reasonably anticipated being haled into court there in a
21 libel action based on the contents of its magazine... aimed at a nationwide audience." Keeton, at
22 781, 104 S.Ct. 1473.

23 The Keeton case was followed in Mavrix, where the court also held that Brand
24 "continuously and deliberately exploited" the California market through its interactive website, via
25 targeted advertisements to Californian consumers (albeit third party advertisements).¹⁵ Mavrix, 647

26 _____
27 ¹⁵ Defendant, Brand allowed third parties to advertise "jobs, hotels, and vacations in California on
28 its website along with "third-party vendors" who sold tickets to California events on its website. It
also employed a California firm to design its website, which had business relationships with a
California-based national news organization. While the court held that the "highly interactive
website did not confer general jurisdiction", the third party advertisements were considered a

1 F.3d at 1229–30. The fact that the advertisements targeted California residents indicated that
 2 Brand knew—either actually or constructively—about its California user base, and that it exploited
 3 that base for commercial gain by “selling space on its website for advertisements.” *Id.*¹⁶

4 Similarly, here, Defendant Incsmart has “continuously and deliberately exploited” the
 5 California market with its website. The fact that consumers can purchase Incsmart’s services
 6 directly through a website using a typical ‘shopping cart’ and checkout procedure, coupled with
 7 218 different web pages that offer California-specific services or otherwise discuss California tends
 8 to suggest that the website was deliberately directed at the forum state. *See*, Rosenfeld Decl. ¶ 9
 9 and 13, Ex. I. & Ex. G. As such, Defendant had actual knowledge about its California user base
 10 and must have “reasonably anticipated being haled into court” for the false advertising claim based
 11 on the content on Defendant’s website for California-specific services. *See*, *Keeton*, at 781, 104
 12 S.Ct. 1473.¹⁷

13 *Third*, the Court is not persuaded by Defendant’s assertion that there has been no “express
 14 aiming” by Defendant because Plaintiff is not a forum resident. *See*, Defendant’s Motion at p12
 15 Dkt Item No.43. Defendant’s bald proposition is not analyzed in the context of the *Mavrix* case,
 16 nor *Keeton* – both of which held that a district court *may* have jurisdiction irrespective of where the
 17 plaintiff and defendant reside. While these cases involved copyright infringement and defamation,
 18 respectively, there is no reason why these holdings should not be extended to false advertising
 19 claims. Like a trademark claim, a false advertising claim stems from the same federal statute –
 20 namely the Lanham Act. Both claims – as the parties agree – are claims ‘sounding’ in tort so to

21
 22 deliberate exploitation of “the California market”; and thus afforded specific jurisdiction. *See*,
 23 *generally*, *Mavrix*, 647 F.3d at 1226–31.

24 ¹⁶ *See also*, *Brayton Purcell*, 606 F.3d at 1130 (nonresident defendant subject to specific
 25 jurisdiction “had every reason to believe prospective clients in [the forum] would see the website—
 26 indeed, attracting new business was the point”).

27 ¹⁷ Moreover, and in the Court’s view, the exploitation of the commercial gain is even more acute in
 28 this case than *Mavrix* because Defendant is engaging in contracts with California residents. This is
 not a case where there has been indirect benefit from ‘third party advertisers’ (and revenue drawn
 from them); rather, it is one where Defendant allows for an interactive website which cultivates
 “nationwide audiences for commercial gain”, including California. *See*, *Mavrix*, 647 F.3d at 1229–
 30.

1 invoke purposeful direction analysis, which tends to show that a false advertising claim should be
 2 treated much like other claims under the Lanham Act with respect to personal jurisdiction.
 3 Likewise, a false advertising claim also bears some similarities with a defamation claim in so far
 4 that falsity can underlie both these causes of action.¹⁸ This, too, would tend to show that courts
 5 should be permitted to exercise jurisdiction over false advertising claims, irrespective of the
 6 parties' residency. See, Keeton 465 U.S. at 772, 104 S.Ct. 1473.

7 As a corollary of the above, the Court is equally not persuaded by Defendant's specific
 8 argument that Plaintiff "has not submitted any admissible evidence that any of the statements
 9 contained on [Defendant's] website are false or misleading." See, Plaintiff's Reply at p7, Dkt Item
 10 49. This argument is misplaced because Defendant wrongly seeks to take the present analysis into
 11 assessment of the substantive merits of the claim. That argument does not carry weight at the 'front
 12 end' of these proceedings; ever more so where Plaintiff need only make a *prima facie* showing of
 13 jurisdictional facts (which is all that is required for motions such as the present). See, Doe v.
 14 Unocal Corp., 248 F.3d 915, 922 (9th Cir.2001).

15 In sum, the Due Process Clause should "not readily be wielded as a territorial shield to
 16 avoid interstate obligations that have been voluntarily assumed." Id. See, Burger King, 471 U.S. at
 17 473-74, 105 S.Ct. 2174. Therefore, and for the reasons stated above, this condition is satisfied.

18 **3. Causing harm that the defendant knows is likely to be suffered in the forum**
 19 **state.**

20 The final Calder condition requires that Plaintiff show that a sufficient level of
 21 jurisdictional harm in the forum state. See, Yahoo!, 433 F.3d at 1206. This element does not
 22 require that the "brunt" of the harm be suffered in the forum jurisdiction. Importantly, if a
 23 jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even
 24 more harm might have been suffered in another state. Id., at 1208. This was the holding in Yahoo!,
 25 which was buttressed by the Supreme Court's holding in Keeton, where the Court sustained the
 26

27
 28 ¹⁸ A similar analogy was intimated by the court in Mavrix between a copyright claim and
 defamation claim.) Mavrix, 647 F.3d at 30 ("The Court's decision in Keeton is directly relevant.")

1 exercise of personal jurisdiction in New Hampshire even though “the bulk of the harm occurred
2 outside New Hampshire.” Id. See also, Mavrix 647 F.3d 1218, 1231.

3 Here, Defendant's intentional act has “foreseeable effects” in the forum. Specifically, it is
4 foreseeable that Plaintiff would be harmed by Defendant’s sales of incorporation and registration
5 services in so far that false advertising by Defendant – in violation of the Lanham Act – may
6 “possibl[y] decrease profits” of Plaintiff’s business. See, Brayton Purcell, 606 F.3d 1124. See, also,
7 Sanho Corp. v. Cimo Technologies, Inc. 2012 WL 3075094, N.D.Cal., Jul. 30, 2012.

8 To reinforce the Court’s view on harm, the present case is also analogous to Mavrix.
9 There, and despite plaintiff’s principal place of business being in Florida – the court held that it
10 was “foreseeable” that economic loss would be “inflicted” in California because of defendant
11 posted photos on the defendant’s website causing copyright infringement. The court further held
12 that defendant’s actions “destroyed California-based value” which was a “jurisdictionally
13 significant amount”. Mavrix 647 F.3d 1218. Similarly, here, Defendant has allegedly diverted
14 sales away from Plaintiff by allegedly making false advertisements – allowing for California
15 consumers to enter into contracts with Defendant. Plaintiff has made a prima facie showing of such
16 harm, and anything more would only take the motion for personal jurisdiction into substantive
17 merits analysis. Accordingly, the foreseeable harm element is made out; and with that, prong one
18 of the test espoused in Schwarzenegger is also satisfied.

19 **Prong Two: Whether the claims arise out of or relate to Defendant’s forum-related**
20 **activities**

21 In order to satisfy the second prong of the three-part Schwarzenegger test, Plaintiff must
22 establish that the contacts giving rise to purposeful direction are those that give rise to the current
23 claims. Bancroft, 223 F.3d at 1088. The Ninth Circuit relies “on a *but for* test to determine whether
24 a particular claim arises out of forum-related activities and thereby satisfies the second requirement
25 for specific jurisdiction.” Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir.1995). See also, Rio
26 Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1021 (9th Cir.2002) (holding that defendant's contacts
27 in California – namely its interactive website and direct sales to California consumers – resulted in
28

1 the alleged violation of plaintiff's trademark at issue, thus the action arose out of defendant's
2 contacts with California.)

3 Plaintiff asserts that its claims arise out of Defendants' California-related contacts (which
4 have been addressed above with respect to the first prong). Specifically, Plaintiff asserts that the
5 false advertising claim arises out of Defendants' advertisements on the Incsmart Website, which
6 specifically target California consumers by offering California related services (e.g. California
7 registered agent services, California incorporation services). See, Amended Complaint, Dkt Item
8 No. 17 ¶67. Plaintiff has further alleged that Defendants' advertisements about these California
9 related services were false. Id.

10 Defendant asserts that because there are insufficient contacts with California, Plaintiff's
11 claims cannot arise out of any forum related activities. The argument (which goes to the second
12 prong), 'piggy-backs' on the argument made on the first prong. This has been addressed above, at
13 length. Since both arguments rise and fall together – and because the Defendant's argument on the
14 first prong was rejected – it also fails on the second prong.

15 In addition, the court is persuaded by Plaintiff's argument. As discussed above, minimum
16 contacts with the forum state do exist because Defendant targeted California consumers. Plaintiff
17 need only provide a prima facie showing of a claim to establish personal jurisdiction. With respect
18 to the false advertising claim, it is clear that the claim arises from Defendant's activities via its
19 internet website. Because there are sufficient activities by Defendant in California of which the
20 claim arises, this prong is also satisfied.

21 **Prong Three: Whether the exercise of jurisdiction is reasonable and comports with**
22 **fair play and substantial justice**

23 Given that Plaintiff has satisfied the first two prongs, Defendant must now present a
24 compelling case that other considerations render jurisdiction unreasonable. See, Dole Food Co.,
25 Inc. v. Watts, 303 F.3d 1104, 1114 (9th Cir. 2002). To that end, courts consider several factors
26 when making this determination: (1) the extent of the defendant's purposeful interjection into the
27 forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of
28 conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating

1 the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the
2 forum to the plaintiffs interest in convenient and effective relief; and (7) the existence of an
3 alternative forum. See, CE Distrib., LLC., 380 F.3d at 1112.

4 The above factors are addressed as follows.

5 ***(1) Purposeful interjection into the forum state's affairs***

6 Here, Defendants specifically targeted California consumers by advertising California-
7 specific services through its highly interactive website. See, Rosenfeld Decl. ¶¶9-10 & Exs. G-H.
8 Much of the discussion made earlier with respect to purposeful availment is equally applicable to
9 this analysis. See, Dole Food Co., Inc., 303 F.3d at 1114-15.

10 As such, this factor points heavily towards Plaintiff – a view that is buttressed by the
11 holding in Ziegler v. Indian River County, 64 F.3d 470, 476 (9th Cir. 1995), where the court held
12 that once purposeful availment has been established, the forum's exercise of jurisdiction is
13 presumptively reasonable.

14 ***(2) Burden on the defendant of defending in the forum***

15 Unless the “inconvenience is so great as to constitute a deprivation of due process, it will
16 not overcome clear justifications for the exercise of jurisdiction.” Panavision Int'l, L.P. v. Toeppen,
17 141 F.3d 1316, 1323 (9th Cir. 1998). In particular, where the defendant is able to speak and read
18 English and is located in close geographic proximity to the forum, this factor does not weigh
19 against the exercise of jurisdiction. See, Dole Food Co., Inc., 303 F.3d at 1115. Modern advances
20 in communications and transportation have also significantly reduced the burden of litigation in
21 another country—let alone an adjacent state. See, Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191,
22 1199 (9th Cir.1988).

23 Defendant is a company that not only provides specific advertising in the state of
24 California, but many other states throughout the country. No evidence has been proffered to
25 indicate that Defendant is without means to litigate this case, other than assertions made in
26 Defendant's motions that IncSmart is a “small business...of modest means.” See, Defendants'
27 Motion, Dkt No. 43. Moreover, given modern advances in communication, the inconvenience on
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1 Defendant is lessened. Because arguments going to this factor have not risen to the level of being
2 so great as to constitute deprivation of due process, this factor is viewed as neutral.

3 ***(3) Extent of conflict with the sovereignty of the defendant's state***

4 Defendant fails to make any real argument of this factor; other than stating that it is neutral
5 and that no apparent conflict exists. Plaintiff, on the other hand, argues that the Defendant has
6 failed to make the necessary showing for this factor – an argument that the Court leans towards in
7 the reasonableness calculus.

8 ***(4) Forum state's interest in adjudicating the dispute***

9 California has a strong interest in redressing misconduct that targets its citizens, in
10 particular for false advertising where California courts have held that it is a paramount concern to
11 protect its citizens from deception. See, Indiana Plumbing Supply, Inc. v. Standard of Lynn, Inc.,
12 880 F. Supp. 743, 749 (C.D. Cal. 1995). Even where none of the parties is a California citizen, this
13 factor will weigh in favor of jurisdiction where the misconduct occurred in California and affected
14 California consumers. See, Allstar Mktg. Group, LLC, 666 F. Supp. 2d at 1125, Nissan Motor Co.
15 Ltd. v. Nissan Computer Corp., 89 F.Supp.2d 1154, 1161 (C.D.Cal.2000) (“California has a strong
16 interest in protecting its citizens from trademark infringement and consumer confusion.”)

17 As has been addressed earlier, the Amended Complaint alleges that Defendants falsely
18 advertised that they offered various California registered agent services. These advertisements
19 targeted California residents. Plaintiff rightly argues that California has a strong interest in ensuring
20 that California registered agents are qualified to serve as registered agents, that they fulfill the
21 obligations prescribed by California law, and that no confusion exists as to the ability of a company
22 (Incsmart) to lawfully provide the services it purports to make on its website. As such, this factor
23 weighs in favor of the exercise of jurisdiction. Cf, Keeton v. Hustler Magazine, 465 U.S. 770,
24 780–781, 104 S.Ct. 1473, 1481–82, 79 L.Ed.2d 790 (1984) (holding, albeit in defamation, that
25 where defendant circulates magazines in a state, it must reasonably anticipate answering for the
26 truth of its publications and that the state will have an interest in adjudicating the dispute.)
27
28

1 ***(5) Most efficient judicial resolution of the controversy***

2 This factor focuses on the location of the evidence and witnesses. In recent years, it “is no
3 longer weighed [as] heavily” given the modern advances in communication and transportation.
4 Panavision, 141 F.3d at 1323 (citing Caruth v. International Psychoanalytical Ass'n, 59 F.3d 126,
5 129 (9th Cir.1995)). While Defendant contends that their witnesses and evidence are located
6 primarily in Nevada, Plaintiffs contends that it plans to seek discovery and call witnesses from
7 Google, Yahoo!, and California UPS Store(s), all of whom are based in the forum state of
8 California.

9 Plaintiff also asserts that requiring it to re-file a lawsuit in Nevada would only serve to
10 delay the resolution of this case. Given that Plaintiff first filed this lawsuit in September 2011,
11 there is some merit in this argument – especially where, on the eve of default judgment,
12 Defendant’s Counsel appeared for Incsmart, and the parties agreed to a stipulated order allowing
13 the matter to proceed. See, Stipulated Order Dkt No.39.

14 Consequently, this factor is neutral in assessing whether exercising jurisdiction over
15 defendants is reasonable.

16 ***(6) Importance of the forum to the plaintiff’s interest in convenient and effective relief***

17 While plaintiff’s convenience is not of paramount importance, it is still a factor that the
18 courts must address. See, Dole Food Co., 303 F.3d at 1116. Again, it is important to reiterate that
19 this matter commenced in September 2011 and there has been no formal response to Plaintiff’s
20 Amended Complaint. As stated above, Defendant’s counsel contacted Plaintiff on the eve of
21 motion for default judgment and agreed to a stipulated order allowing for the matter to proceed. Id.
22 Forcing Plaintiff to now re-file and recommence an action in another forum would be inconvenient,
23 particularly given the delay that would be caused to Plaintiff. This factor weighs in favor of
24 exercising jurisdiction.

25 ***(7) The existence of an alternative forum***

26 Plaintiff concedes this factor since Nevada is a viable alternative forum. See, Plaintiff’s
27 Opposition, at p18 Dkt.
28

1 ***Conclusion on reasonableness factors***

2 While the last factor goes to Defendant, the remaining factors are either neutral or fall in
3 Plaintiff's favor – particularly, the first factor and fourth factors of the reasonableness calculus. As
4 such, Defendant has *not* presented a compelling case that other considerations render jurisdiction
5 unreasonable.

6 Accordingly, the Court dismisses Defendant's motion for lack of personal jurisdiction and
7 concludes that parties can proceed this matter in the Northern District of California.

8 **D. Personal jurisdiction over David Oliver, Michael Lasala and Jo Ann Oliver**

9 Given that the Court can exercise jurisdiction over Incsmart, it also finds that jurisdiction
10 can be exercised over the directors/officers of Incsmart – namely David Oliver and Michael Lasala.
11 See, generally, Allstar Mktg. Group, LLC v. Your Store Online, LLC, 666 F. Supp. 2d 1109, 1121-
12 23 (C.D. Cal. 2009) (stating that a commercial website through which sales of infringing product
13 were made to customers in forum state, non-resident corporate officers purposefully directed
14 conduct toward forum state).

15 The Court finds, however, that Plaintiff has not provided a prima facie showing of
16 jurisdictional facts to withstand the motion to dismiss with respect to Jo Ann Oliver. See, Ballard v.
17 Savage, 65 F.3d 1495, 1498 (9th Cir.1995); see also AT & T v. Compagnie Bruxelles Lambert, 94
18 F.3d 586, 588 (9th Cir.1996). As such, the Court grants Plaintiff leave to amend.

19 **E. Transfer Motion**

20 The Court next turns to Defendant's motion to transfer these proceedings to Nevada. To
21 determine the merits of this motion, the Court applies 28 U.S.C. § 1404(a). That provision
22 provides: "For the convenience of parties and witnesses, in the interest of justice, a district court
23 may transfer any civil action to any other district or division where it might have been brought."

24 Section 1404(a) affords a court broad discretion to transfer a case to another district where
25 venue is also proper. See, e.g., Sparling v. Hoffman Constr. Co., 864 F.2d 635, 639 (9th Cir.1988).
26 A court must "adjudicate motions for transfer [of venue] according to an 'individualized, case-by-
27 case consideration of convenience and fairness.'" Jones v. GNC Franchising, Inc., 211 F.3d 495,
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1 498 (9th Cir.2000) (quoting Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29, 108 S.Ct. 2239, 101
2 L.Ed.2d 22 (1988)).

3 In deciding a motion to transfer venue, the court must weigh multiple factors, including (1)
4 the plaintiff's choice of forum; (2) the convenience of the parties; (3) the convenience of the
5 witnesses; (4) the location of books and records; (5) which forum's law applies; (6) the interests of
6 justice; and (7) administrative considerations. See also, Jones, 211 F.3d at 498-99.

7 The burden is on the moving party to establish that a transfer will allow a case to proceed
8 more conveniently and better serve the interests of justice. See, Commodity Futures Trading
9 Comm. v. Savage, 611 F.2d 270, 279 (9th Cir.1979); STX, Inc. v. Trik Stik, Inc., 708 F.Supp.
10 1551, 1555-56 (N.D.Cal.1988) (“In seeking to transfer a case to a different district, a defendant
11 bears a heavy burden of proof to justify the necessity of the transfer.”)

12 ***(1) The plaintiff's choice of forum***

13 The plaintiff's choice of forum should not be easily overturned. Id. Courts must treat
14 transfers for convenience as an exceptional tool to be employed sparingly. See, In re Air Crash at
15 Taipei, Taiwan, No. 01 MDL 1394-GAF, 2003 WL 25781233, *1 (C.D. Cal. Mar. 27, 2003). A
16 plaintiff's choice of forum is rarely disturbed, unless the balance is strongly in favor of the
17 defendant. See, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947);
18 and Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir.1987).

19 Here, Defendant argues that this factor should be afforded less weight because Plaintiff is
20 not a California resident. Although there is some merit in this argument, it does not mean that there
21 is no weight in Plaintiff's choice of forum. Even though Plaintiff is a Nevada corporation, it is
22 registered to conduct business in the State of California and to serve as a commercial registered
23 agent in California. See, Rosenfeld Decl. ¶16-17 & Exs. K-L. Plaintiff generates a significant
24 portion of its business from California. See, Declaration of Tennie Sedlacek, ¶4, Dkt No. 48
25 (“Sedlacek Decl.”). There has also been alleged deception of California consumers giving rise to
26 the Lanham Act claim in the forum jurisdiction. Thus, contrary to Defendant's argument, Plaintiff
27 has significant connections to California to rebut Defendant's position. This vindicates Plaintiff's
28 choice of forum and sways this factor in its favor.

1 (2) *The convenience of the parties*

2 Both parties reside in Nevada. While they each have contacts in California, this factor
3 would tilt towards Defendant.

4 (3) *The convenience of the witnesses*

5 Two types of witnesses exist for the purposes of this factor: a) party witnesses and b) non-
6 party witnesses. Both are relevant to the present motion to transfer. But, as outlined below, each
7 has varying weight when considering this factor.

8 a) Party Witnesses: Defendant argues that all the party witnesses reside in Nevada, and thus
9 transfer is appropriate. Plaintiff cites recent case-law, however, which finds that
10 (in)convenience must be demonstrated through affidavits. Specifically, the affidavit must
11 state: “who the key witnesses will be, and what their testimony will generally include.”
12 Adoma v. Univ. of Phoenix, Inc., 711 F.Supp.2d 1142, 1151 (E.D.Cal.2010). Given that
13 the burden for transfer is on the moving party, it follows that the moving party should be
14 required to demonstrate the particulars noted in the Adoma case. Defendant’s failure to do
15 so, in this case, does not support its motion for transfer.¹⁹

16 b) Non-Party Witnesses: In balancing the convenience of witnesses, “the convenience of non-
17 party witnesses is a more important factor than the convenience of party witnesses.” Metz
18 v. U.S. Life Ins. Co. in City of New York, 674 F. Supp. 2d 1141, 1147 (C.D. Cal. 2009).
19 Here, Defendants have failed to identify any non-party witnesses that would be
20 inconvenienced by this litigation. By contrast, Plaintiff has identified several non-party
21 witnesses located in California. For example, Google, Inc., based in Mountain View, CA,
22 and Yahoo! Inc., based in Sunnyvale, CA – both of whom Plaintiff expects will testify
23 about Plaintiff’s online advertising program. See, Rosenfeld Decl. ¶15 & Exs. A,B and E.
24 In addition, Plaintiff has identified both the UPS Store (located in Dublin, CA) and
25 Incsmart’s purported California Affiliate to testify about Defendants’ rental mailbox; the
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27 ¹⁹ See, also, Skyriver Techn. Solutions, LLC v. OCLC Online Computer Library Ctr. , Inc., No.
28 CV 10–03305 JSW, 2010 WL 4366127, at *3 (N.D.Cal. Oct.28, 2010.) (Noting that “the
convenience of a litigant's employee witnesses are entitled to little weight because litigants are able
to compel their employees to testify at trial, regardless of forum”).

1 use of that mailbox to accept service of legal documents and the affiliate's qualification to
2 serve as a commercial registered agent in California, along with the revenue derived from
3 that service. Id. This evidence will no doubt be highly relevant and potentially dispositive
4 of this matter.

5 Because several non-party witnesses do exist in California – and since the convenience of non-
6 party witnesses is an important consideration – Defendant's position is further weakened by the
7 facts going to this factor.

8 ***(4) The location of books and records***

9 Both parties indicate that location of documentary evidence does not weigh heavily; ever
10 more so where advances in technology have made it easy for documents to be transferred to distant
11 locations. See, Metz, 674 F. Supp. 2d at 1149. However, Plaintiff does point out that Defendant
12 has not particularized the location of documents and the difficulty of transportation of those
13 documents in declaration form. Again, this would cut against Defendant in so far that there are less
14 facts supporting the discharge of Defendant's burden for transfer.

15 ***(5) Which forum's law Applies and predominates***

16 The fifth factor addresses which forum's law applies to the plaintiff's claims. Where claims
17 are grounded in federal statutory law – as some of the claims are here – this factor carries little
18 weight. See, Allstar Mktg. Group, LLC, 666 F. Supp. 2d 1109, 1133 (C.D. Cal. 2009) (applying
19 little weight to fifth factor where plaintiff's claims were primarily trademark and copyright claims.)

20 With respect to Plaintiff's state law claims, this Court is arguably more familiar than a
21 Nevada court with California's choice-of-law rules – which will determine whether Plaintiff's
22 claims should be adjudicated under California or Nevada law – regardless of whether the case is
23 transferred. Id., at 1133 n.54. See also, Costco Wholesale Corp., 472 F.Supp.2d 1183, 1191
24 (S.D.Cal.2007)).

25 Thus, as to the state claims, this factor weighs slightly against transferring this case.
26
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28

1 **(6) *The interests of justice***

2 “The ‘interest[s] of justice’ include such concerns as ensuring speedy trials, trying related
3 litigation together, and having a judge who is familiar with the applicable law try the case.” See,
4 Allstar Mktg. Group, LLC, 666 F. Supp. 2d at 1134 (quoting Heller Financial, Inc. v. Midwhey
5 Powder Co., Inc., 883 F.2d 1286, 1293 (7th Cir.1989)).

6 This matter commenced in September 2011. There has been no formal response to
7 Plaintiff’s Amended Complaint. As stated earlier, Defendant’s counsel contacted Plaintiff on the
8 eve of motion for default judgment and both agreed to a stipulated order allowing for the matter to
9 proceed. See, Stipulated Order, Dkt Item No. 40. If this proceeding is transferred to another forum,
10 it would only delay the litigation. Thus, this factor weighs against transfer.

11 **(7) *Administrative considerations***

12 Typically, administrative considerations, such as docket congestion, are given little weight
13 in assessing the grant of a transfer motion. See, Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1335
14 (9th Cir.1984) cert. denied, 471 U.S. 1066, 105 S.Ct. 2143, 85 L.Ed.2d 500 (1985); see also,
15 Allstar Mktg. Group, LLC, 666 F. Supp. 2d at 1134. While little weight is given, the median case
16 time for actions in this district is essentially the same for cases in the District of Nevada. See,
17 Rosenfeld Decl. ¶18 & Ex. M. For cases that require court action, the median case time until
18 resolution is also essentially the same. Id. Accordingly, this would be neutral and thus does not
19 favor Defendant’s motion.

20 **Conclusion on Transfer Motion**

21 Because the above factors tilt towards Plaintiff, the necessary burden imposed on
22 Defendant has not been discharged and the motion to transfer the proceedings is dismissed. See,
23 generally, STX, Inc. 708 F.Supp. at 1555-56 and Gulf Oil Corp. 330 U.S. at 508.

III. CONCLUSION

For the reasons stated above, Defendants’ motion to dismiss for lack or personal jurisdiction, or, in the alternative to transfer the venue to the District of Nevada is *denied* with respect to Incsmart, David Oliver and Michael Lasala.

Defendants’ motion to dismiss for lack of personal jurisdiction is *granted* with respect to Jo Ann Oliver.

The Court also grants Plaintiff leave to amend with respect to subject matter jurisdiction (i.e. the Computer Fraud and Abuse Act claim) and personal jurisdiction with regard to Jo Ann Oliver.

IT IS SO ORDERED.

Dated: August 24, 2012



EDWARD J. DAVILA
United States District Judge

United States District Court
For the Northern District of California

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