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DEPARTMENT 51 - LAW AND MOTION RULINGS

1. If you wish to submit on the tentative ruling, please email the clerk at SMCdept51@lacourt.org (and "cc" all other parties in the same email) and notify all other parties in advance that you will not be appearing at the hearing. Include the word "SUBMISSION" in all caps in the subject line and include your name, contact information, the case number, and the party you represent in the body of the email. If you do not have access to the internet, you may call the clerk at (213) 633-0351.

If you submit on the tentative and elect not to appear at the hearing, the opposing party may nevertheless appear and argue the motion, and the Court may decide not to adopt the tentative ruling. Please note that the tentative ruling is not an invitation, nor an opportunity, to file any further documents relative to the hearing in question which are not authorized by statute or Rule of Court.

2. For any motion where no parties submit to the tentative ruling in advance, and no parties appear at the motion hearing, the Court may elect to either adopt the tentative ruling or take the motion off calendar, in its discretion.

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Case Number: 24STCV01606 Hearing Date: July 2, 2024 Dept: 51

Tentative Ruling

Judge Upinder S. Kalra, Department 51

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FILED
Superior Court of California
County of Los Angeles
JUL 02 2024
David W. Slayton, Executive Officer/Clerk of Court
By: C. Crow, Deputy

HEARING DATE: July 2, 2024

CASE NAME: Marielita Palacios v. Lolliprops, Inc.

CASE NO.: 24STCV01606

MOTION TO DISMISS THE ACTION ON THE GROUND OF INCONVENT FORUM AND QUASH SERVICE OF SUMMONS ON THE GROUND OF LACK OF PERSONAL JURISDICTION PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE § 418.10(a)(1)

MOVING PARTY: Defendant Lolloprops Inc. d/b/a WWW.TEMPAPER.COM

RESPONDING PARTY(S): Plaintiff Marielita Palacios

REQUESTED RELIEF:

- An Order Dismissing the Complaint due to inconvenient forum;
- An Order Quashing service of the summons.

~~TENTATIVE~~ RULING:

- Motion to Dismiss is DENIED;
- Motion to Quash is GRANTED.

07/05/2024

STATEMENT OF MATERIAL FACTS AND/OR PROCEEDINGS:

On January 22, 2024, Plaintiff Marielita Palacios (Plaintiff) filed a Complaint against Lolliprops Inc., d/b/a www.tempaper.com (Defendant) for Violation of California Invasion of Privacy Act, Penal Code Sec. 638.51.

According to the Complaint, Defendant uses spyware on its website to obtain user data in real-time and share it with others. Plaintiff is a consumer privacy advocate who works as a tester to ensure that companies abide by the privacy obligations imposed by law.

On May 6, 2024, Defendant filed the instant Motion to Dismiss, or Alternatively, Motion to Quash Service of Summons. On June 18, 2024, Plaintiff filed an opposition. On June 25, 2024, Defendant filed a reply.

LEGAL STANDARD:**Request for Judicial Notice**

The court grants Plaintiff's requests for judicial notice. (Evid. Code § 452(c), (d); See *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23,37.) However, the court only takes judicial notice of the foregoing documents only as to "the existence, content and authenticity of public records and other specified documents"; it does not take judicial notice of the truth of the factual matters asserted in those documents. (*Dominguez v. Bonta* (2022) 87 Cal. App. 5th 389, 400.)

Motion to Dismiss

CCP § 410.30(a) provides that "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside the state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

Plaintiff's choice of forum will not be disturbed unless the court is convinced that: (1) a "suitable" alternative exists, and (2) the balance of private and public interest factors makes it "just" that the litigation proceed in the alternative forum. (*Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744,751 (*Stangvik*).) After balancing the relevant factors, the trial court decides which party will be more inconvenienced. (*Rinauro v. Honda Motor Co.* (1995) 31 Cal.App.4th 506, 510.)

Defendant bears the burden of proving the action should be tried elsewhere. (*Fox Factory, Inc. v. Superior Court* (2017) 11 Cal.App.5th 197, 204; see also *Stangvik*, *supra*, 54 Cal.3d at p. 751.)

Motion to Quash

"A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: ¶ To quash service of summons on the ground of lack of jurisdiction of the court over him or her." (Code Civ. Proc., § 418.10, subd. (a)(1).) A defendant has 30 days after the service of the summons to file a responsive pleading, or 40 days if service was effectuated by substitute service. (Code Civ. Proc., § 412.20, subd. (a)(3); Code Civ. Proc., § 415.20, subd. (b).)

"A motion to quash service of summons lies on the ground that the court lacks personal . . . jurisdiction over the moving party." (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1036, citing to Code of Civil Procedure § 418.10.) "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States." (Code Civ. Proc., § 410.10.) "The exercise of jurisdiction over a nonresident defendant comports with these Constitutions if the defendant has such minimum contacts with the state that the

assertion of jurisdiction does not violate traditional notions of fair play and substantial justice." (*Elkman v. National States Ins. Co.* (2009) 173 Cal.App.4th 1305, 1313.) "An essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that state." (*Kulko v. Superior Court of California in and for City and County of San Francisco* (1978) 436 U.S. 84, 92.)

"Personal jurisdiction may be either general or specific. [Citation.] 'The nature and quality of the defendant's contact determine whether jurisdiction, if exercised, is general or specific. General jurisdiction exists when a defendant is domiciled in the forum state or his activities there are substantial, continuous, and systematic.' [Citation.] Where the contacts are sufficiently substantial, continuous, and systematic, it is not necessary that the cause of action alleged be connected with the defendant's business relationship to the forum. [Citation.] However, 'contacts that are random, fortuitous, or attenuated do not rise to the minimum level, and general jurisdiction cannot be exercised under these circumstances.' [Citation.] If a defendant's contacts with the forum state are not substantial, continuous, and systematic, the defendant may be subject to specific jurisdiction. 'A court may exercise specific jurisdiction over a nonresident defendant only if: (1) "the defendant has purposefully availed himself or herself of forum benefits" [citation]; (2) "the 'controversy is related to or 'arises out of" [the] defendant's contacts with the forum' " [citations]; and (3) " 'the assertion of personal jurisdiction would comport with "fair play and substantial justice." ' " [Citations.]' " (*Shisler v. Sanfer Sports Cars, Inc.* (2006) 146 Cal.App.4th 1254, 1258-59.)

Although the defendant is the moving party, the burden of proof is on the plaintiff to demonstrate sufficient minimum contacts exist. (*Milhon v. Superior Court* (1985) 169 Cal.App.3d 703, 710 ["[W]hen jurisdiction is challenged by a nonresident defendant, the burden of proof is upon the plaintiff to demonstrate that 'minimum contacts' exists between defendant and the forum state to justify imposition of personal jurisdiction."]; see also *Floveyor International, Ltd. V. Superior Court* (1997) 59 Cal.App.4th 789, 793.) If the plaintiff is able to meet this burden, the burden shifts to the defendant to demonstrate the exercise of jurisdiction would be unreasonable. (*Buchanan v. Soto* (2015) 241 Cal.App.4th 1353, 1362.)

ANALYSIS:

Motion to Dismiss

Defendant contends that the court should dismiss this action because there is an enforceable forum selection clause in their website's Terms of Use (the Terms). Plaintiff argues that the Terms are unenforceable because they are a browsewrap agreement.

A browsewrap agreement assumes a website user's assent to terms and conditions of use by using the website. (*Long v. Provide Commerce, Inc.* (2016) 245 Cal.App.4th 855, 862 (*Long*)). There is no other affirmative action required by the user. (*Ibid.*) As such, courts enforce browsewrap agreements if "the website puts a reasonably prudent user on inquiry notice of the terms of the contract." (*Id.* at p. 863.) Hyperlinks to the terms on a website alone is insufficient to enforce a browsewrap agreement. (*Id.* at p. 865.) This is especially true for inconspicuous hyperlinks. (*Id.* at p. 865-866.)

Here, the browsewrap agreement is unenforceable because it is inconspicuous. Notably, Defendant appears to concede this point and instead asks this court to confer heightened knowledge on Plaintiff as a "tester." (Mot. P. 6:2-7:17.) This argument lacks authority and is implicitly disregarded by *Long*. (See *Long, supra*, 245 Cal.App.4th at p. 865 [noting that hyperlinks must be conspicuous even for "an especially observant Internet consumer."] Additionally, the Terms here are one of thirty-one hyperlinks at the bottom of Defendant's website and is included under the "Contact" heading. (Declaration of Scott J. Ferrell (Ferrell Decl.) ¶ 2, Exhibit 1.) As in *Long*, this is not conspicuous.

Accordingly, the court DENIES Defendant's Motion to Dismiss.

Motion to Quash

Alternatively, Defendant contends that the court lacks personal jurisdiction over Defendant because it did not purposefully avail itself of California as a forum. Plaintiff argues that Defendant does have sufficient minimum contacts to warrant personal jurisdiction. Plaintiff additionally requests leave to conduct jurisdictional discovery should the court grant the motion to quash.

In *Shisler v. Sanfer Sports Cars, Inc.* (2006) 146 Cal.App.4th 1254, a California plaintiff sued a Florida defendant over the sale of a vehicle. (*Id.* at p. 1257.) The Court found that a Defendant's website that merely advertised vehicle and presumably provided an online application, was not subject to specific jurisdiction in California, in part, because there was no evidence the website targeted California residents.

Indeed, "[t]he purposeful availment inquiry...focuses on the defendant's intentionality. [Citation.] This prong is *only satisfied when the defendant purposefully and voluntarily directs his activities toward the forum* so that he should expect, by virtue of the benefit he receives, to be subject to the Court's jurisdiction based on his contacts with the forum. [Citation.] Thus, the "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts [citations], or of the "unilateral activity of another party or a third person." [Citation.] [Citation.]" (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269.)

The court of appeal in *Thurnston v. Fairfield Collectibles of Georgia, LLC* (2020) 53 Cal.App.5th 1231, discussed internet websites and purposeful availment:

"To determine whether a Web site is sufficient to establish purposeful availment, we first look to [a] sliding scale analysis [Citation.] 'At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. [Citation.] At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. [Citation.] The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.' [Citation.]" (*Snowney v. Harrah's Entertainment, Inc.*, supra, 35 Cal.4th at p. 1063...)

"Some courts have held that sufficient minimum contacts are established, and the defendant is "doing business" over the Internet, where the defendant's website is capable of accepting and does accept purchase orders from residents of the forum state.' [Citation.] Other courts have suggested that "something more" is necessary, such as "deliberate action" within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state.' [Citations.] Other courts 'have criticized ... emphasis on website interactivity' [citation] and focus instead on 'traditional due process principles' [citation], asking whether the site expressly targets 'residents of the forum state' [citation]. According to these courts, 'Website interactivity is important only insofar as it reflects commercial activity, and then only insofar as that commercial activity demonstrates purposeful targeting of residents of the forum state or purposeful availment of the benefits or privileges of the forum state.' [Citations.]" (**371 *Snowney v. Harrah's Entertainment, Inc.*, supra, 35 Cal.4th at p. 1064, 29 Cal.Rptr.3d 33, 112 P.3d 28.)

(*Thurnston v. Fairfield Collectibles of Georgia, LLC*, supra, 53 Cal.App.5th at p. 1237-38.)

The court of appeal then went on to summarize California case law, stating that "making a *substantial number of sales* of goods or services to California residents via one's own website constitutes purposeful availment." (*Id.* at p. 40.) (Emphasis added.) Sales must be substantial; they are not enough if they are "random, isolated, or fortuitous." (*Id.*)

Here, Plaintiff has not met her burden showing that Defendant purposefully availed itself of California as a forum by merely operating its website. Plaintiff presents *no* evidence demonstrating that Defendant targeted or made a substantial number of its sales to California residents. Indeed, Plaintiff claims *she* interacted with Defendant's website – not any intentional interaction by Defendant. (See generally, Complaint.) The only claim is that Defendant's website violations a California law. (*Ibid.*) This, however, is insufficient to exercise personal jurisdiction. Likewise, Plaintiff has failed to present any evidence, credible or otherwise, that jurisdictional facts sought through discovery are likely to substantiate Plaintiff's claim that Defendant purposefully availed themselves to California jurisdiction.[1]

Accordingly, Defendant's Motion to Quash Service of Summons is GRANTED.

CONCLUSION:

For the foregoing reasons, the Court decides the pending motion as follows:

* Motion to Dismiss is DENIED;

Motion to Quash is GRANTED.

Moving party is to give notice.

IT IS SO ORDERED.

Dated: July 2, 2024



UPINDER S. KALRA

Upinder S. Kalra

Judge of the Superior Court

[1] Even if the court is mistaken, it would still be unwise to exercise personal jurisdiction because it violates the notion of fair play and substantial justice. Indeed, Plaintiff seeks to enforce a California privacy law on a New Jersey corporation's website because she was able to access it from California. There is no evidence that Defendant—who sells wallpaper—anticipated being haled into court here because of Plaintiff's internet browsing.

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