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25 **UNITED STATES DISTRICT COURT**
26 **CENTRAL DISTRICT OF CALIFORNIA**
27 **(Western Division)**

28 BRIAN J. KRUEGER,) Civil Action 2:20-cv-07083-VAP-PJW
29)
30 Plaintiff,) **REPLY MEMORANDUM IN SUPPORT**
31) **OF MOTION FOR LEAVE TO SEEK**
32) **JURISDICTIONAL DISCOVERY**
33 v.)
34)
35 ADLIFE MARKETING AND) Courtroom: 8A – 8th Floor
36 COMMUNICATIONS CO.,) Hearing Time: 2:00 p.m.
37 INC.,) Hearing Date: Nov. 23, 2020
38 Defendant.)

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1 **I. INTRODUCTION**

2 Plaintiff Brian Krueger seeks leave to pursue targeted discovery (“Discov.
3 Mot.,” DN 20) aimed at contradicting self-serving affidavits filed with Defendant
4 Adlife’s motion to dismiss for lack of personal jurisdiction. Adlife’s affidavits present
5 selective factual assertions that omit key facts. The omitted facts, or implications from
6 the evidence to which Krueger can point without discovery, undercut Adlife’s
7 contentions that none of the actions of its California-based agent, Higbee & Associates,
8 relating to this case were taken by staff in California and that Adlife has no other
9 connections to the California forum. Adlife’s arguments opposing jurisdictional
10 discovery are unavailing.

11 **II. KRUEGER HAS MET THE LIBERAL STANDARD FOR**
12 **JURISDICTIONAL DISCOVERY.**

13 As Krueger’s discovery motion showed, district courts in the Ninth Circuit have
14 “consistently ordered discovery when plaintiffs established a ‘colorable basis’ for
15 personal jurisdiction,” which is “less than a prima facie showing,” and requires only
16 “‘some evidence’ tending to establish personal jurisdiction.” *HaloSongs, Inc. v.*
17 *Sheeran*, No. 16-CV-1062, 2017 WL 5198248, *4 (C.D. Cal. Jan. 13, 2017); *see also*
18 *Discov. Mot.* at 4-5. Krueger has established more than a colorable basis for personal
19 jurisdiction; limited discovery would confirm that this Court has specific jurisdiction
20 over Adlife.

21 **A. Adlife Does Not Dispute the Basic Premises of Krueger’s Personal**
22 **Jurisdiction Argument.**

23 Preliminarily, Adlife’s opposition to Krueger’s discovery motion (“Adlife
24 Opp.,” DN 22) does not dispute three key elements of Krueger’s arguments. First,
25 Adlife does not dispute the fundamental basis of Krueger’s personal jurisdiction claim,
26 and therefore the basis for jurisdictional discovery: that the Higbee firm is Adlife’s
27 agent and that an agent can engage in sufficient forum contacts to create specific
28 jurisdiction over a defendant. *Discov. Mot.* at 6-7, 8-10. Adlife acknowledges this as

1 Krueger’s jurisdictional theory. *See, e.g.*, Adlife Opp. at 9 (listing Krueger’s allegation
2 that the Higbee firm is Adlife’s agent as the very first of six “key facts”). But Adlife
3 cites no authority to dispute that an agent’s actions in a given forum can, in fact, render
4 that agent’s principal subject to jurisdiction in that forum. The law on that point is clear.
5 *See* Discov. Mot. at 8-10; *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (citing
6 *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 419 (9th Cir. 1977))
7 (“For purposes of personal jurisdiction, the actions of an agent are attributable to the
8 principal.”).¹ Adlife also does not cite any authority to contradict Krueger’s showing
9 that jurisdictional discovery is appropriate to reveal facts bearing on an agency
10 relationship to provide the basis for personal jurisdiction. *See* Discov. Mot. at 10.

11 Second, Adlife does not cite any case law or reasoning to dispute Krueger’s
12 showing that, in an intellectual property non-infringement declaratory judgment action
13 such as this, the defendant’s enforcement actions are the relevant conduct for
14 determining minimum forum contacts, not the underlying acts relating to possible
15 infringement. *See* Discov. Mot. at 14-16. Adlife does not even mention the case law
16 Krueger cited that establishes this principle; it simply reiterates facts relating to
17 possible underlying infringement, without addressing facts relating to enforcement
18 activities the Higbee firm conducted on its behalf. Adlife Opp. at 9-11.

19 Third, Adlife does not dispute that, as Krueger showed in his discovery motion,
20 purposeful availment can be an appropriate test to use for the first prong of the
21 minimum contacts analysis in this case. *See* Discov. Mot. (at 10-12). In fact, Adlife’s
22 opposition repeatedly cites cases that use a purposeful availment analysis. Adlife Opp.
23 at 5, 7, 8.

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28 ¹ Adlife does, however, appear to argue that law firms are different from other agents,
an argument this reply addresses at 5-6, *infra*.

1 **B. Discovery Is Warranted Because Plaintiff Has Established a Colorable**
2 **Basis for This Court’s Exercise of Specific Jurisdiction.**

3 Krueger’s motion established a “colorable basis” for jurisdiction sufficient to
4 obtain leave to take discovery in the Ninth Circuit. *HaloSongs*, 2017 WL 5198248, *4.
5 Adife’s opposition acknowledges that the required showing is “something less than a
6 prima facie showing that requires the plaintiff to come forward with ‘some evidence’
7 tending to establish personal jurisdiction over the defendant.” *Id.* (citations and some
8 internal quotations omitted); see *Adlife Opp.* at 6.

9 Krueger has satisfied this “liberal” threshold, *Life Bliss Found. v. Sun TV*
10 *Network*, No. 13-CV-00393, 2013 WL 12132068, at * 2 (C.D. Cal. Dec. 13, 2013),
11 sufficient to warrant an opportunity to develop a “more satisfactory showing of the
12 facts” bearing on jurisdiction. *Butcher’s Union Local No. 498 v. SDC Investment*, 788
13 F.2d 535, 540 (9th Cir. 1986). In short, Krueger has offered more than “some evidence”
14 to meet each prong of the test for specific jurisdiction: (1) he has provided evidence
15 that Adlife, acting through its California-based agent, the Higbee firm, purposefully
16 availed itself of the California forum; (2) he has provided evidence that his claims here
17 arise out of the Higbee firm’s actions in California on Adlife’s behalf; and (3) he has
18 provided evidence undercutting Adlife’s effort to meet its burden of “present[ing] a
19 compelling case” that the exercise of jurisdiction would be unreasonable because
20 it “does not comport with fair play and substantial justice.” *CollegeSource v.*
21 *AcademyOne, Inc.*, 653 F.3d 1066, 1079 (9th Cir. 2011).

22 Oddly, Adlife’s opposition seems to complain that Krueger’s Discovery Motion
23 has made **too strong** a showing of personal jurisdiction to warrant granting of
24 jurisdictional discovery. *Adlife Opp.* at 6 (“Kruger’s primary points seem to be focused
25 on arguing that that information already in his possession is sufficient to establish
26 personal jurisdiction[.]”). Krueger indeed believes the allegations and evidence in his
27 complaint and affidavits are enough to establish personal jurisdiction and avoid the
28 need for discovery, as his separate opposition to Adlife’s motion to dismiss shows. DN

1 21. But if the Court finds that evidence is not yet sufficient to show specific jurisdiction
2 on the merits, Krueger submits that the evidence is more than adequate to demonstrate
3 the colorable basis for jurisdiction needed to warrant jurisdictional discovery.

4 In arguing otherwise, Adlife’s opposition wrongly conflates the showings
5 required for the first and second prongs of the specific jurisdiction analysis. It argues
6 broadly that “Adlife’s general relationship with Higbee & Associates with regards to
7 unrelated infringement cases does not give rise to a colorable claim of personal
8 jurisdiction.” Adlife Opp. at 9. Regarding purposeful availment under the first prong,
9 Adlife argues that much of the discovery Krueger requests is irrelevant because it
10 would not show that **Krueger’s specific claims** arise out of Adlife’s contacts with
11 California. *Id.* But as Adlife recognized in its Motion to Dismiss (“MTD”), whether
12 the defendant’s contacts with the forum to give rise to the claims at issue is the test
13 under the **second** prong. MTD at 7, 10. The first prong requires that Adlife have
14 engaged in sufficient conduct in California through its agent, the Higbee firm, to
15 purposefully avail itself of the benefits of conducting activities in California. There
16 would be no reason for two separate prongs if both required exactly the same “claims
17 arising out of” connection. Krueger has demonstrated sufficient forum contacts to
18 satisfy both prongs for the purposes of granting jurisdictional discovery.

19 *1. Krueger has provided sufficient evidence of Adlife’s purposeful*
20 *availment of the California forum through the actions of the Higbee*
21 *firm to warrant discovery.*

22 To satisfy the first prong of the minimum contacts analysis, Krueger proffers
23 ample evidence—via his complaint, his discovery motion, and exhibits and
24 affidavits—that Adlife engaged in numerous activities through its agent, the Higbee
25 firm, located in Santa Ana, California. *See* Discov. Mot. at 8-10. On its web site, the
26 Higbee firm advertises the multitude of services it performs for Adlife, describes how
27 one can license Adlife’s images, and provides a direct link to do so. *Id.* On behalf of
28 Adlife, the Higbee firm regularly searches the Internet for Adlife’s photographs, then

1 reports its findings to Adlife and receives instructions in California from Adlife to send
2 inquiries, demand letters, and threats seeking to collect money from alleged infringers.
3 *Id.* The Higbee firm, the vast majority of whose staff is located in California, has sent
4 multiple demand letters on Adlife's behalf, including to Krueger related to this case,
5 seeking payment for unauthorized uses of Adlife's photographs. *Id.* And it has filed at
6 least three copyright infringement lawsuits for Adlife in the Central District of
7 California. *Id.* These actions demonstrate a colorable basis to conclude that Adlife
8 purposefully availed itself of the privilege of conducting activities in California.

9 Adlife does not deny that the actions of an agent can constitute sufficient
10 minimum contacts to establish specific jurisdiction over the principal, and it does not
11 respond to the many cases cited in Krueger's discovery motion demonstrating this
12 principle. *See* Discov. Mot., at 8-10; *see also* Krueger's Opposition to Adlife's MTD
13 (DN 21) at 10-12. Instead, Adlife contends, echoing an argument it made in its motion
14 to dismiss, that a client should not be subject to personal jurisdiction simply because it
15 has an attorney-client relationship with a multi-state law firm that litigates on its behalf.
16 But it cites no new cases for that proposition. Nor does Adlife address Krueger's
17 argument in his discovery motion that the cases Adlife cited in its motion to dismiss (at
18 12-13) on the law-firm issue have no bearing here. Rather, the cases Adlife cited only
19 show that a law firm cannot necessarily be sued in the client's home forum when the
20 client complains about inadequate representation.² Discov. Mot. at 9 n.2.

21 Moreover, Krueger's allegations and evidence reveal that Adlife does not have
22 a mere attorney-client relationship with the Higbee firm or employ it only for litigation
23 services. Instead, the Higbee firm appears to operate as a full partner in Adlife's
24 **business** of advertising and selling licenses, advertising and linking to Adlife's

25
26 ² Because provision of legal services can constitute purposeful availment in the forum
27 state, *Lake v. Lake*, 817 F.2d 1416, 1422 (9th Cir. 1987), it is *a fortiori* that deliberate
28 employment of a lawyer in the forum to obtain legal services would also constitute
purposeful availment of that forum.

1 licensing system, conducting frequent Internet reverse image searches and identifying
2 those who have used Adlife’s work without licenses, and then seeking payment for
3 retroactive licenses through requests, demands, and litigation threats. The Higbee
4 firm’s copyright services web site even touts that “Best of all, by using us for reverse
5 image search, you will be eliminating the middleman and nearly doubling your profit.”
6 Levy First Aff., Ex. C, at 24-25 (DN 20-1). Thus, to the extent that Adlife is implicitly
7 advancing a policy argument that providing litigation services should be treated
8 differently from other services that an agent provides, that argument does not apply to
9 the facts of this case and, in any event, Adlife provides no case law or other legal
10 support for it. Discovery thus should be allowed to confirm the scope and extent of the
11 services for Adlife that were provided by the Higbee firm, including which of those
12 services involved staff or conduct in California.

13 Notably, Adlife does not deny that Adlife “has retained Higbee & Associates to
14 represent it in unrelated cases, or even that it does so on a frequent basis.” Adlife Opp.
15 at 8. Instead, it simply tries to characterize these as “generalized facts” about the
16 relationship and then claim they are not sufficient to establish personal jurisdiction in
17 this particular case. But these facts **are** sufficient to show a colorable basis that Adlife
18 engaged in affirmative conduct that purposefully availed itself of the benefits of
19 conducting activities in California, a substantial, established, and ongoing connection
20 to the forum that is a far cry from the “random, fortuitous, or attenuated” contacts this
21 Court has previously found not to be sufficient. *See Drayton v. Eastlink Prods.*, No. 17-
22 CV-06048, 2018 WL 5266870, at *6 (C.D. Cal. Mar. 20, 2018).

23 *2. Plaintiff has provided sufficient evidence that Adlife’s claims arise out*
24 *of Adlife’s California conduct to warrant discovery.*

25 Krueger’s claims in this case arise directly out of and relate to Adlife’s activities
26 in California through its agent, the Higbee firm. First, as Krueger demonstrated in his
27 Discovery Motion (citing cases and arguments to which Adlife’s Opposition does not
28 respond), in a declaratory non-infringement action such as this, enforcement actions on

1 which the action is predicated are the relevant forum contacts that give rise to the
2 declaratory judgment claims. *See* Discov. Mot. at 14-16. Krueger has provided ample
3 facts regarding enforcement actions Adlife took against him via its California-based
4 agent, including actions taken in California, that gave rise to Krueger’s declaratory
5 judgment claims here. These enforcement actions against Krueger thus provide a
6 colorable basis for jurisdiction to warrant discovery.

7 The Ninth Circuit has articulated various tests for satisfying the second prong,
8 including but not limited to the “but for” test that Adlife’s Opposition insists must be
9 used. *See, e.g., Ziegler v. Indian River County*, 64 F.3d 470, 474 (9th Cir. 1995). The
10 touchstone of each of those tests is that the plaintiff’s claims must arise out of or relate
11 to the defendant’s purposeful availment of the forum. But even applying the “but for”
12 test in this case, Krueger has shown a colorable basis to conclude that his claims arise
13 out of the activities of Adlife’s California agent: **But for** the reverse image searches
14 the Higbee firm conducted (which it is reasonable to infer occurred in California, an
15 inference Adlife’s affidavits do not contest), Adlife would not have identified the
16 photograph on Krueger’s web site, and Adlife would never have focused on Krueger
17 and unleashed on him the license enforcement and legal threat activities of the Higbee
18 firm that form the basis for his claims here. **But for** Adlife’s direction to the Higbee
19 firm in California to pursue a licensing inquiry to Krueger, Albrizio Aff. ¶ 10, DN 22-
20 2, the subsequent demands for money and the legal threats that give rise to Krueger’s
21 claims would never have occurred. **But for** the resulting communication to Krueger by
22 at least one Higbee firm employee who is physically located in California, those later
23 demands and threats would not have been sent. Compl. ¶ 22, Ex. A; Levy Aff. ¶ 9. And
24 **but for** directions from the Higbee firm, which it is reasonable to infer came from its
25 California office, the enforcement actions of its allegedly Nevada-based staff that also
26 give rise to Krueger’s claims would not have been undertaken.

27 These facts show a sufficient colorable basis that these California-based
28 activities of Adlife’s agent directly gave rise to the declaratory judgment claims in this

1 case to warrant discovery. And some of that discovery will seek facts that both contest
2 Adlife’s affidavits on these issues and confirm the full extent of Adlife’s forum
3 activities that give rise to Krueger’s claims.

4 **C. Discovery Is Also Warranted to Rebut Adlife’s Assertions on the**
5 **Third Prong – Whether Jurisdiction Would Comport With Fair Play**
6 **and Substantial Justice.**

7 Adlife bears the ultimate burden to “present a compelling case” that the exercise
8 of jurisdiction would be unreasonable under the third prong. *See CollegeSource*, 653
9 F.3d at 1079. Adlife’s motion to dismiss relied on an affidavit from Joel Albrizio
10 purporting to show that Adlife has **no** contact with California—apart from its
11 employment of Higbee & Associates—and that exercising personal jurisdiction in this
12 case would be inconsistent with fair play and substantial justice. MTD at 6, 11-12.
13 Krueger’s motion for discovery contested that affidavit, and explained why, based on
14 the allegations and evidence Krueger has provided thus far, it is unlikely Adlife can
15 meet this high burden. The motion for discovery then set forth specific subjects on
16 which Krueger sought discovery that are directly relevant to countering Adlife’s third
17 prong arguments. Discov. Mot. 16-20. Remarkably, in opposing discovery, Adlife’s
18 brief never even mentions the third prong, the phrases “fair play” or “substantial
19 justice,” or any of the seven factors that bear on the third prong analysis that Adlife
20 itself chose to put into play in moving to dismiss (*see* MTD at 11). Instead, Adlife’s
21 only objections to areas of discovery sought to address this third prong are that these
22 facts are irrelevant to the **first or second prongs** of the analysis. Adlife Opp. at 12-16.
23 Exhibit H to the attached Third Levy Affidavit distinguishes those issues.

24 Under Ninth Circuit law, including cases Adlife cited in its motion to dismiss,
25 the third prong analysis considers not only the specific contacts with the forum that
26 provide a basis for specific jurisdiction, but also the nature and extent of any larger set
27 of forum contacts and the extent to which the defendant has deliberately appealed to
28

1 the market in the forum state or obtained revenue from that market.³ Hence, Krueger
2 should be allowed to discover the full extent of Adlife’s dealings with the California-
3 based Higbee firm, as well as the extent to which Adlife sells in the California market,
4 or secures its copyrighted works from California photographers. Much of this
5 information would be directly responsive to the facts put into play by the Albrizio
6 affidavit, but some discovery is needed to assess the veracity of that affidavit. For
7 example, given that Adlife has a regional vice-president for sales in LaVerne, DN 20
8 at 17, Albrizio’s claims that it pays no California taxes and has no California office are
9 questionable. Discovery is appropriate to give Krueger the opportunity to contradict
10 those claims.

11 Moreover, although “advances in transportation and telecommunications and the
12 increasing interstate practice of law [make] any burden of litigation in a [distant] forum
13 substantially less than in days past,” *Menken v. Emm*, 503 F.3d 1050, 1060 (9th Cir.
14 2007), Adlife argues that because its witnesses are in Rhode Island rather than
15 California, it would be unfair to make it litigate here. MTD at 11. Discovery will reveal
16 how many cases Adlife has brought or threatened to bring in California and the extent
17 to which the distance from Rhode Island has interfered with its ability to litigate fully.⁴

18 Thus, Krueger has made a sufficient showing to warrant the Court exercising its
19 discretion to permit the requested discovery to provide the “more satisfactory showing
20 of the facts” because “pertinent facts bearing on the question of jurisdiction are
21 controverted.” *See Butcher’s Union*, 788 F.2d at 540 (quoting *Data Disc, Inc. v.*
22 *Systems Tech. Assocs., Inc.* 557 F.2d 1280, 1285 n.1 (9th Cir. 1977)).

25 ³ *See, e.g., CollegeSource*, 653 F.3d at 1080; *Mavrix Photo v. Brand Techs.*, 647 F.3d
26 1218, 1230 (9th Cir. 2011); *Panavision Int’l v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir.
27 1998); *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1488 (9th Cir. 1993).

28 ⁴ In the past four years, Adlife has filed 65 federal lawsuits outside Rhode Island.
Third Levy Aff. ¶ 12, Ex. G.

1 **III. PLAINTIFF’S DISCOVERY IS NARROWLY TAILORED AND**
2 **DIRECTLY RELATED TO THE LEGAL ISSUES IN THIS CASE.**

3 The requested discovery is not speculative and not a “fishing expedition.” Adlife
4 Opp. at 15. Rather, it is targeted and narrowly tailored to focus on the three elements
5 of personal jurisdiction analysis. Krueger’s identification of the particular types of
6 information sought and the direct relevance of that information to the specific
7 jurisdiction questions is precisely the sort of “demonstrat[ion] [of] how further
8 discovery would allow it to contradict the [defendant’s] affidavits” that the Ninth
9 Circuit has described as a proper basis for jurisdiction. *Terracom v. Valley Nat. Bank*,
10 49 F.3d 555, 562 (9th. Cir. 1995).

11 Adlife’s attempts to portray the requested discovery as broad and speculative,
12 Adlife Opp. at 15-16, are unavailing. Krueger’s discovery motion explained the limited
13 amount and types of discovery that are necessary, and it described that discovery in
14 specific and concrete terms. To remove any doubt about the narrowness, specificity,
15 and relevance of the requested discovery, a chart included as Exhibit H to the attached
16 Third Levy Affidavit lists each concrete category of discovery sought and the specific
17 element of the personal jurisdiction analysis to which it pertains. Krueger of course
18 does not request and will not seek any information that is covered by the attorney-client
19 privilege. The requested discovery regarding connections and communications
20 between Adlife and the Higbee firm does not seek any privileged contents of such
21 communications, but only their existence, number, and the location of the individual
22 staff from or to whom they were sent and received.

23 **IV. ADLIFE’S ATTACKS ON PLAINTIFF’S COUNSEL ARE MISPLACED**
24 **AND DO NOT PROVIDE A BASIS TO DENY DISCOVERY FOR**
25 **WHICH PLAINTIFF HAS DEMONSTRATED A SUFFICIENT BASIS.**

26 Finally, Adlife takes issue with the fact that the public interest law firm and law
27 school clinics that are representing Krueger on a pro bono basis also have handled four
28 other declaratory judgment actions brought over demand letters in cases similar to this

1 one: where the targets operated platforms on which third-party users had posted
2 content. Adlife Opp. at 16-17. In each of these prior declaratory judgment cases, the
3 defendant photographer wholly relinquished his underlying copyright claims over the
4 photographs at issue in response to the declaratory judgment proceeding—sometimes
5 only after an unsuccessful motion to dismiss.

6 Declaratory judgment cases of this sort can, for all practical purposes, only be
7 done pro bono, because the amounts demanded from the plaintiff forum hosts by the
8 photographers in their legal threats are low enough that it would make no financial
9 sense to pay a non-pro bono lawyer by the hour to defend against these claims. Levy
10 Third Aff. ¶ 6. But these declaratory judgment cases serve important public interests.
11 They protect the represented parties from having to pay significant sums of money
12 based on legally meritless claims. They will, hopefully, encourage photographers and
13 other copyright owners like Adlife to stop bullying nonprofits with threats to seek
14 damages based on legally untenable claims, and instead to concentrate their future
15 enforcement on meritorious claims against businesses that infringe their copyrights. *Id.*

16 This case is anything but “litigation []motivated by personal disputes between
17 individual attorneys,” *Ward v. Consequence Holdings*, No. 18-CV-1734, 2020 WL
18 2219070, at *4 n.3 (S.D. Ill. May 7, 2020). Adlife Opp. at 17. In *Ward*, on which Adlife
19 relies, a lawyer in private practice was advertising for paying business by touting his
20 work in cases against a different copyright troll, and then seeking sanctions for work
21 on behalf of an Internet user who was admittedly guilty of copyright infringement.⁵
22 Here, the representation is pro bono, Levy Third Aff. ¶ 10, and is based on the proper
23 litigation objective of protecting Brian Krueger from legal threats and demands for the
24

25
26 ⁵ Adlife’s concern that discovery of confidential information about Adlife’s
27 relationship with the Higbee firm or its engagement in the California market is sought
28 for use in other cases can be addressed through a protective order limiting use to this
litigation.

1 payment of money to avoid a meritless lawsuit that would be based on theories of
2 copyright law that have been rejected in the Ninth Circuit. *See Levy Third Aff.* ¶ 10.

3 **V. CONCLUSION**

4 The motion for leave to take jurisdictional discovery should be granted.

5
6 DATED: November 9, 2020

Respectfully submitted,

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