UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 11-08081 DMG (MANx)** Date February 11, 2013

Title ***Mary Cummins v. Amanda Lollar, et al.*** Page 1 of 8

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

VALENCIA VALLERY	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER RE ORDER TO SHOW CAUSE [DOC. # 128], DEFENDANT SHUPPS' MOTION TO DISMISS [DOC. # 108], AND PLAINTIFF'S MOTION TO VACATE ORDERS [DOC. # 132]

I.
INTRODUCTION

On September 27, 2012, Plaintiff filed a Second Amended Complaint ("SAC") [Doc. # 97], naming as new Defendants Rebecca Dmytryk aka WildRescue, Tiffany Krog, and Annette Stark, California citizens (together, "the California Defendants"), and Eric Shupps, a citizen of Texas. The SAC alleges the same state law causes of action alleged in the First Amended Complaint. On November 16, 2012, the Court granted summary judgment in favor of Defendants Amanda Lollar and Batworld Sanctuary on all claims asserted in the First Amended Complaint ("FAC"). [*See* Doc. # 103.] On January 14, 2013, the Court denied Plaintiff's motion to reconsider that order [Doc. # 127].

On November 21, 2012, Shupps filed a Motion to Strike or Dismiss the SAC [Doc. # 108]. On January 14, 2013, the Court issued an Order to Show Cause ("OSC") why this action should not be dismissed for lack of subject matter jurisdiction due to the addition of new non-diverse defendants [Doc. # 128]. On January 17, 2013, Plaintiff filed a Motion to Vacate the Court's orders granting summary judgment to Defendants Lollar and Batworld and denying reconsideration, set for hearing on February 15, 2013 [Doc. # 132]. The Court finds the Motions appropriate for decision without oral argument. *See* Fed R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

II.
SUBJECT MATTER JURISDICTION

The Court first considers whether the addition of non-diverse Defendants destroys this Court's subject matter jurisdiction over this case for all or some purposes. Diversity jurisdiction under 28 U.S.C. § 1332(a) "requires complete diversity between the parties—each defendant

must be a citizen of a different state from each plaintiff." *Diaz v. Davis*, 549 F.3d 1223, 1234 (9th Cir. 2008) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267, 2 L. Ed. 435 (1806)). The Court has an independent obligation to ascertain whether it possesses subject matter jurisdiction at any time in the action, even when no party challenges it. *Hertz Corp. v. Friend*, 559 U.S. 77, 130 S. Ct. 1181, 1193, 175 L. Ed. 2d 1029 (2010).

In general "diversity of citizenship is assessed at the time the action is filed." *Freeport-McMoRan, Inc. v. K N Energy, Inc.* 498 U.S. 426, 428, 111 S. Ct. 858, 112 L. Ed. 2d. 951)) (1991); *see also In re Digimarc Corp. Deriv. Litig.*, 549 F.3d 1223, 1236 (9th Cir. 2008). "[I]f jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events" such as a change in citizenship of an existing party or the intervention of a non-essential party. *Id.*; *see also Grupo Dataflux v. Atlas Global Gp., L.P.*, 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004) (change in citizenship of partnership late in litigation did not cure jurisdictional defect that existed at time of filing); *see also Wichita Railroad & Light Co. v. Pub. Util. Comm'n of Kansas*, 260 U.S. 48, 54, 43 S. Ct. 51, 53, 67 L. Ed. 124 (1922) (diversity jurisdiction not destroyed by intervention of non-essential party after time of filing). Courts apply the time-of-filing rule strictly in order to minimize litigation and avoid the necessity of new suit whenever a party's citizenship changes. *Grupo Dataflux*, 541 U.S. at 580-81.

Where an amended complaint joins new parties in a diversity action, the Court only has jurisdiction if diversity exists at the time of the amendment. *See China Basin Properties, Ltd. v. Allendale Mut. Ins. Co.*, 818 F. Supp. 1301, 1303 (N. D. Cal. 1992) (citing *Lewis v. Lewis*, 358 F.2d 495, 502 (9th Cir. 1966)).

A. Jurisdiction to Rule on the Motions for Summary Judgment and Reconsideration

From its inception, the present action has been based on diversity of citizenship. (*See* Compl. ¶ 2.) The claims alleged in the FAC have since been resolved by the Court's orders granting summary judgment and denying reconsideration [Doc. ## 103, 127]. In her Motion to Vacate, Plaintiff argues that the Court lacked jurisdiction to issue these orders because the SAC, filed on September 27, 2012, divested the Court of jurisdiction. Plaintiff is incorrect.

In *Lewis v. Lewis*, the plaintiff, a New York citizen, sued his wife and several business associates, all of whom were California citizens, based on diversity of citizenship. 358 F.2d at 497. At some point, the plaintiff moved to California, destroying diversity, but the Court found that his change of citizenship "did not oust the district court of diversity jurisdiction insofar as the claims asserted against the [original] defendants" were concerned. *Id.* at 502 (citing *Morgan's Heirs v. Morgan*, 15 U.S. (2 Wheat.) 290, 4 L. Ed. 242 (1817)). When the plaintiff

later added California corporations as defendants, however, the court held that "since no action was stated against the newly-joined corporate defendants until plaintiff changed his state citizenship, no diversity jurisdiction . . . ever existed as to those defendants." *Id.* Because the corporate defendants were indispensable parties under Fed. R. Civ. P. 19(a), the district court properly dismissed the amended complaint.

The time-of-filing principles applied in *Lewis* are instructive here. Complete diversity existed at the time of filing, and it existed when Defendants Lollar and Bat World Sanctuary filed their motion for summary judgment. The order granting summary judgment only resolves claims between the completely diverse parties named in the FAC. *See Lewis*, 358 F.2d at 502. Relinquishing jurisdiction as to those claims at this stage would render a waste the 15 months of litigation that has taken place to date and run counter to the longstanding policy of efficiency that underlies the time-of-filing rule. *See Grupo Dataflux*, 541 U.S. at 570, 581 ("This time-of-filing rule is hornbook law (quite literally)."). Accordingly, the Court finds that it maintained jurisdiction over Plaintiff's claims against Defendants Lollar and Bat World Sanctuary through the date of their resolution, notwithstanding the filing of the SAC and the addition of non-diverse defendants. *See In re Digimarc*, 549 F.3d at 1236.

In light of the foregoing, Plaintiff's Motion to Vacate the Court's orders is **DENIED**.

B. Jurisdiction Over Plaintiff's Claims Against the California Defendants

The Court next examines whether Plaintiff may maintain her claims against California Defendants Dmytryk, Krog, and Stark, all of whom are California citizens. Like the corporate defendants in *Lewis*, diversity has never existed with respect to these defendants. *See Lewis*, 358 F.2d at 502. Accordingly, the Court must determine whether the California Defendants are "indispensable parties" under Fed. R. Civ. P 19 or whether their joinder is merely permissible under Rule 20. If the California Defendants are indispensable, then their presence destroys diversity and the entire action must be dismissed; if they are merely permissible, then the Court may deny joinder and dismiss only the non-diverse Defendants. *See E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 780 (discussing "indispensable" parties under Rule 19(b) and noting that dismissal of an action is appropriate if indispensable parties cannot feasibly be joined). A party is indispensable under Rule 19(b) when "in equity and good conscience, the action should not be allowed to proceed without the presence of the party." *Nam Soon Jeon v. Island Colony Partners*, __ F. Supp. 2d __, 2012 WL 3780094 at *6 (D. Haw. Aug. 31, 2012) (citing *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002)).

The gravamen of Plaintiff's SAC sounds in tort. Plaintiff seeks monetary damages for defamation, defamation *per se*, and various other intentional torts. (SAC at 8-10.) It is well established that joint tort-tortfeasors are not indispensable parties and need not be named as defendants in a single suit. *Jeon* at *6 (citing *Temple v. Synthes Corp.*, 498 U.S. 5, 7, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990)). Thus, even if all Defendants committed the alleged tortious actions in concert, the presence of the California Defendants is not necessary for the complete resolution of claims against the other Defendants. *See Dawavendewa*, 276 F.3d at 1155. Accordingly, the Court finds that the California Defendants are not indispensable parties under Rule 19(a). *See Temple*, 498 U.S. at 7 (noting that the Advisory Committee Notes to Rule 19(a) explicitly state that "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability").

Because they are not indispensable parties and their presence in this action would destroy diversity of citizenship, Defendants Dmytryk, Krog, and Stark are hereby **DISMISSED** from the action.

III.
SHUPPS' MOTION TO DISMISS

Having dismissed Defendants Dmytryk, Krog, and Stark from the action, the Court turns next to Shupps' Motion to Strike or Dismiss Plaintiff's SAC.

A. Legal Standard for Dismissal Under Fed. R. Civ. P. 12(b)(2)

Consistent with due process, a court may exercise personal jurisdiction over a defendant "only if he or she has 'certain minimum contacts' with the relevant forum 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006) (*en banc*) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)) (internal quotation marks omitted). The plaintiff bears the burden of making a *prima facie* showing that jurisdiction is appropriate to survive a motion to dismiss. *Love v. Assoc. Newspapers, Ltd.*, 611 F.3d 601, 608 (9th Cir. 2010); *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010) (quoting *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006)). A "*prima facie* showing" means that the plaintiff has "produced admissible evidence which, if believed, would be sufficient to establish the existence of personal jurisdiction." *Colt Studio, Inc. v. Badpuppy Enterprise*, 75 F. Supp. 2d 1104, 1107 (C.D. Cal. 1999); *see also Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1097 (N.D. Cal. 1999). The plaintiff cannot "simply rest on the bare allegations of its complaint," *Schwarzenegger v. Fred Martin*

Motor Co., 374 F.3d 797, 800 (9th Cir. 2004) (quoting *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir.1977)) (internal quotation marks omitted), but "uncontroverted allegations in the complaint must be taken as true" unless contradicted. *Id.* (citing *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996)). Factual disputes in the evidence must be resolved in the plaintiff's favor. *See Pebble Beach*, 453 F.3d at 1154 (citing *Doe v. Unocal*, 248 F.3d 915, 922 (9th Cir. 2001)).

Because no federal statute governs personal jurisdiction in this case, the Court applies California law. *See* Fed. R. Civ. P. 4(k)(1); *Mavrix Photo, Inc. v. Brand Techn., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011) (citing *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998)). Inasmuch as California's long-arm jurisdictional statute, Cal. Civ. Proc. Code § 410.10, is coextensive with federal due process requirements, the jurisdictional analysis under either federal or state law is the same. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011) (quoting *Schwarzenegger*, 374 F.3d at 800-01).

B. Personal Jurisdiction Over Defendant Shupps

A forum state may exercise either general or specific jurisdiction over a non-resident defendant. *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008). General jurisdiction is appropriate when "a defendant's contacts with a forum are so substantial, continuous, and systematic that the defendant can be deemed to be 'present' in that forum for all purposes." *Menken v. Emm*, 503 F.3d 1050, 1056-57 (9th Cir. 2007). Shupps is a resident and citizen of Texas. (Declaration of Eric Shupps, ¶1 [Doc. # 108].) He occasionally visits California to attend and speak at professional conferences in matters unrelated to the facts of this case. (*Id.* at ¶ 5.) Although Shupps previously resided in California between 1991 and 1995, he has not resided here since then. (*See* Supplemental Declaration of Eric Shupps, ¶ 2 [Doc. # 123-1].) These facts do not establish a basis for general jurisdiction over Shupps. *See Menken*, 503 F.3d at 1056-67.

Courts use a three-part test to determine whether they may appropriately exercise specific jurisdiction over a nonresident defendant: (1) the defendant must (a) "purposefully direct his activities or consummate some transaction with the forum or resident thereof"; or (b) "perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws"; (2) the claim must arise out of or relate to the defendant's forum-related activities; and (3) "the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable." *CollegeSource*, 653 F.3d at 1076 (quoting *Schwarzenegger*, 374 F.3d at 802). Courts apply the "purposeful direction" analysis to suits sounding in tort. *Schwarzenegger v. Fed Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (citing *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir.

2004)). The plaintiff bears the burden of establishing the first two prongs. If the plaintiff meets this burden, the defendant must "set forth a 'compelling case' that the exercise of jurisdiction would not be reasonable." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

Under the purposeful direction or "effects" test, a defendant has the requisite minimum contacts when "(1) the defendant committed an intentional act; (2) the act was expressly aimed at the forum state; and (3) the act caused harm that the defendant knew was likely to be suffered in the forum state." *Love*, 611 F.3d at 609 (citing *Yahoo!*, 433 F.3d. at 1206). Several courts have held that "intentionally placing defamatory information on the internet is not, by itself, sufficient to subject the author . . . to personal jurisdiction in the state where the defamed party resides" without a showing as to the latter two requirements. *Xcentric Ventures, LLC v. Bird*, 683 F. Supp. 2d 1068, 1072 (D. Ariz. 2010) (citing *Fahmy v. Hogge*, No. CV 08-01152, 2008 WL 4614322 at * 4 (C.D. Cal. Oct. 14, 2008)).

At the outset, the SAC does not describe Shupps' activities beyond his residency in Tarrant County, Texas. (SAC ¶ 9.) It describes no tortious activities that are attributable to Shupps. In her Opposition to the Motion, Plaintiff includes several attachments purporting to show that Shupps has made defamatory statements about Plaintiff through various accounts on Twitter.com and on the blog "truthaboutmary.wordpress.com." (*See* Opp'n, Exs. 6-9.) The statements are, for the most part, undated, and there is little, if any, identifying information to demonstrate that Shupps posted them. Moreover, Plaintiff provides no evidence, such as a declaration, to authenticate or lay a foundation for how she discovered the statements or why she attributes those statements to Shupps. In short, Plaintiff has produced no allegations or admissible evidence to make a *prima facie* showing of personal jurisdiction over Shupps. *See Colt Studio*, 75 F. Supp. 2d at 1107. Assuming however, for the sake of argument, that the allegations in Plaintiff's opposition brief are true, the allegations suggest that Shupps committed an intentional act by posting allegedly defamatory statements on the Internet, satisfying the first element of the purposeful direction test. *See Xcentric Ventures*, 683 F. Supp. 2d at 1072.

As to the second prong, it is unclear in the Ninth Circuit whether the intentional posting of defamatory statements about a known forum resident on the Internet is "expressly aimed" at the forum. *Xcentric Ventures*, 683 F. Supp. 2d at 1073. The Ninth has emphasized that "something more than mere foreseeability [that harm will result in the forum is required] in order to justify the assertion of personal jurisdiction." *Schwarzenegger*, 374 F.3d at 805. Because a defendant's knowledge of the plaintiff's state of residency goes to the foreseeability of harm in the forum state, the express aiming requirement appears to demand some additional connection between the intentional act and the forum. *Xcentric Ventures*, 683 F. Supp. 2d at 1073. Several

courts that have directly considered whether personal jurisdiction extends to Internet-based defamation by out-of-state tortfeasors have concluded that mere knowledge of the plaintiff's residence is insufficient to establish personal jurisdiction. *See id.* at 1075; *Lange v. Thompson*, No. CV 08-00271, 2008 WL 3200249 at *3 (W.D. Wash. Aug. 6, 2008) (Internet-based defamation where defendant knew plaintiff resided in the forum state did not establish that conduct was expressly aimed at forum state); *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1138 (D. Nev. 2002) (Internet-based defamation of plaintiff, where plaintiff's shareholders were located in the forum state and had access to the defamatory statements, did not establish personal jurisdiction).

The Ninth Circuit offered its most recent interpretation of the "express aiming" requirement in *Fiore v. Walden*, 688 F.3d 558 (9th Cir. 2011). In *Fiore*, the plaintiffs were Nevada residents traveling home from Puerto Rico through Atlanta, Georgia. *Id.* at 570. During a layover in Atlanta, Georgia, they were detained and searched by Drug Enforcement Administration Agents, and they later brought a *Bivens* action in Nevada against the agents for violation of their Fourth Amendment rights. *Id.* at 572. Applying the "purposeful direction" test, the Ninth Circuit concluded that the agents' actions were "expressly aimed" at Nevada because the agents' conduct was performed "with the purpose of having its consequences felt by someone" in Nevada. *Id.* at 579 (quoting *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1259 (9th Cir. 2008) (internal quotation marks omitted). The court noted that the "express aiming" requirement is typically satisfied where "actions taken outside the forum state [have] the purpose of affecting a particular forum resident or a person with strong forum connections", but not where "it is merely foreseeable that there will be an impact on individuals in the forum." *Id.* at 577 (citing *Pebble Beach*, 453 F.3d at 1156; *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000); *Schwarzenegger*, 374 F.3d at 805)). Thus, although the agents' knowledge of the plaintiffs' residency was relevant to whether the conduct was expressly aimed at Nevada, it was not dispositive. *Id.* at 578-79. Rather, the "critical factor" was whether the agents, knowing of the plaintiffs' connections to Nevada, "intended that the consequences of [their] actions would be felt by [the plaintiffs] in that state." *Id.* at 580.

Even if Shupps committed "intentional acts" to satisfy the first requirement for purposeful direction, neither the allegations in the SAC nor the evidence presented suggests that his acts were "expressly aimed" at California. Shupps does not dispute having knowledge that Plaintiff is a California resident. His knowledge of Plaintiff arises out of his expert testimony in the Texas case against her. (Shupps Decl. ¶ 6.) In fact, many of the allegedly defamatory statements were posted in connection with or in response to the Texas suit. (Opp'n, Exs. 8-9.) Thus, while Shupps may have made statements on the Internet with knowledge that they were likely to have some effect in Plaintiff's community in California, this goes to the foreseeability

of harm in the forum, not whether the conduct was "expressly aimed" at the forum. *See Xcentric Ventures*, 683 F. Supp. 2d at 1073 ("[I]t is quite foreseeable that the brunt of the reputational harm that results from internet-based defamation is most likely to be felt in the forum where the defamed individual lives, works, and maintains social relationships.").

Nothing in the record suggests that Shupps directed his statements to California residents specifically, intended for his statements to cause harm in California, or sought to induce some action, by Plaintiff or others, in California. *See Fiore*, 688 F.3d at 580. At most, it appears that Shupps' allegedly defamatory statements were directed at the Internet community generally without regard for whether any result, intended or otherwise, would result in California. *See Xcentric Ventures*, 683 F. Supp. 2d at 1075. Plaintiff thus fails to make a *prima facie* showing that Shupps purposefully directed his activities toward California such that the Court may exercise personal jurisdiction over him.

IV.
CONCLUSION

In light of the foregoing, Defendants Dmytryk, Krog, and Stark are **DISMISSED** from the action and Shupps' Motion to Dismiss is **GRANTED** with leave to amend. A Third Amended Complaint may be filed within 15 days from the date of this Order. Defendant Shupps' response shall be due within 15 days of service of any amended complaint. The hearing on February 15, 2013 is **VACATED**.

IT IS SO ORDERED.