

[Born v. Celtic Mktg. LLC](#)

United States District Court for the Central District of California

May 20, 2020, Decided; May 20, 2020, Filed

8:19-cv-01950-JLS-ADS

Reporter

2020 U.S. Dist. LEXIS 89220 *; 2020 WL 3883273

Dennis Born v. Celtic Marketing LLC et al.

Prior History: [Born v. Celtic Mktg. LLC, 2020 U.S. Dist. LEXIS 61974 \(C.D. Cal., Apr. 8, 2020\)](#)

Counsel: [*1] ATTORNEYS PRESENT FOR PLAINTIFF: Not Present.

ATTORNEYS PRESENT FOR DEFENDANT: Not Present.

Judges: JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSEPHINE L. STATON

Opinion

CIVIL MINUTES — GENERAL

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Doc. 49)

Before the Court is a Motion to Dismiss filed by Defendants Northcoast Warranty Services, Inc. and Sunpath Limited Corp. (Mot., Doc. 49.) Plaintiff Dennis Born opposed and Defendants replied. (Opp., Doc. 60; Reply, Doc. 64.) Having reviewed all relevant papers and taken the matter under submission, for the following reasons, the Court GRANTS Defendants' Motion.

I. BACKGROUND

Plaintiff is a resident of Wisconsin. (First Amended Complaint ("FAC") ¶ 8, Doc. 40.) He brings this putative [TCPA](#) class action against Defendants Celtic Marketing, LLC d/b/a VAD, Sunpath Limited Corp., and Northcoast Warranty Services, Inc. According to the FAC, Defendants are each engaged in the business of selling

and administering vehicle protection contracts. (*Id.* ¶ 21.) Specifically, Sunpath issues and administers the "Vehicle Protection Contracts . . . provided by Northcoast as obligor." (Opp. at 1; see Mot. at 1.) Sunpath and Northcoast are Delaware corporations [*2] with their principal places of business in Massachusetts and Ohio respectively. (*Id.* ¶¶ 10, 11.) VAD is a Nevada limited liability corporation with its principal place of business in Irvine, California. (*Id.* ¶ 9.)

Born alleges that Northcoast and Sunpath contracted with VAD, creating a relationship whereby VAD served as the other Defendants' sales representative, authorized to solicit customers and sell vehicle protection plans administered by Sunpath and issued by Northcoast. (*Id.* ¶¶ 17, 18, 25, 27; Celtic FAC Answer ¶¶ 17, 18, 26, 27, Doc. 46.)¹ Northcoast Secretary Barry Moses explains that Northcoast authorizes independent, non-exclusive sellers of automobile service contracts to sell its protection plans. (Moses Decl. ¶ 8.) Northcoast provides those independent sellers with no compensation and "does not . . . control, direct, or manage the marketing practices of any" third-party seller. (*Id.* ¶¶ 7, 10.) Sunpath President Andrew Garcia has provided a declaration to a substantially similar effect, noting that corporations such as VAD are non-exclusive sellers of policies administered by Sunpath who receive no remuneration from Sunpath. (Garcia Decl. ¶¶ 10, 14, 15, Doc. 49-3.) Further, [*3] he clarifies that: (1) "SunPath has no role or involvement in the telemarketing companies' representatives' selection of [which protection plan, among available alternatives] to sell" to a prospective customer; (2) "SunPath has no oversight or control over what the telemarketing representatives say;" and, (3) "[t]he marketing operations of [companies like VAD], including how they

¹ In its Answer Celtic d/b/a VAD indicates that "it is authorized by SunPath to sell certain specified agreements under which SunPath and Northcoast have certain rights and duties" but admits only to entering into an agreement with Sunpath, while denying entering into any agreement with Northcoast. (See, e.g., Celtic FAC Answer ¶¶ 79, 92.)

obtain leads and what scripts they use, are created and maintained entirely by the telemarketing companies." (*Id.* ¶ 12.)²

Nevertheless, as the FAC puts it, under its agreement with Sunpath and Northcoast, VAD carried out a telemarketing campaign, making thousands of unsolicited sales calls with the aid of an automatic telephone dialing system. (FAC ¶¶ 23-27.) Born received such a call on August 13, 2019 at 1:32 p.m., which according to his caller ID, was placed from the number 920-980-7352. (*Id.* ¶¶ 29-30.) In connection with his Opposition, Born provided VAD's response to a special interrogatory, in which VAD states that this call was placed to Born and then transferred to VAD "by an entity known to [VAD] as MMS."³ (VAD Special Interrogatory Response, Ravitch Decl. Ex. 1, Doc. 60-2.) When Born answered [*4] the call, a live agent informed him that they were selling vehicle protection plans, but did not identify the entity on behalf of which the agent was calling. (FAC ¶¶ 32, 34.) Born purchased a plan "for the sole purpose of identifying who was calling and/or the company who was responsible for calling." (*Id.* ¶ 35.) After making his purchase, Born received documentation from VAD indicating that Sunpath and Northcoast were responsible for the vehicle protection plan. (*Id.* ¶¶ 36-47.)

Born filed this action on October 12, 2019. (Complaint, Doc. 1.) He asserts a lone claim for violation of [47 U.S.C. § 227](#), the [Telephone Consumer Protection Act \("TCPA"\)](#). (FAC ¶¶ 131-137.) Born seeks to represent a class defined as:

All persons in the United States who: (1) between October 12, 2015 and the date of class notice; (2) received at least one telephone call; (3) on his or her telephone; (4) that was initiated by an automatic telephone dialing system; (5) for the purpose of promoting Defendants' services; (6) where Defendants did not first obtain the person's express written consent.

² Born argues that much of the Moses and Garcia Declarations is a collection of impermissible legal conclusions. (Opp. at 4-5.) The portions of the Declarations cited by the Court are statements of fact based on Messrs. Moses and Garcia's personal knowledge. Insofar as Born objects to the Court's reliance on these Declarations, his objection is OVERRULED.

³ VAD "contracted orally with MMS[] and communicated with MMS via the following telephone number: +63-9325552729." (VAD Special Interrogatory Response.) "[VAD] has no mailing or email address for MMS." (*Id.*)

(*Id.* ¶ 53.)

Sunpath and Northcoast presently seek dismissal from this action on the basis that this Court lacks personal jurisdiction [*5] over them.

II. LEGAL STANDARD

[Rule 12\(b\)\(2\)](#) allows a party to assert lack of personal jurisdiction as a defense by motion. [Fed. R. Civ. P. \(12\)\(b\)\(2\)](#). "Although the defendant is the moving party on a motion to dismiss [for lack of personal jurisdiction], the plaintiff bears the burden of establishing that jurisdiction exists." [Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1019 \(9th Cir. 2002\)](#). "[I]n the absence of an evidentiary hearing, the plaintiff need only make 'a prima facie showing of jurisdictional facts to withstand the motion to dismiss.'" [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 \(9th Cir. 2006\)](#)).⁴ Generally, the court may consider the pleadings as well as any declarations submitted by the parties when deciding a motion to dismiss for lack of personal jurisdiction. See [Data Disc. Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280, 1285 \(9th Cir. 1977\)](#). The "uncontroverted allegations in [the plaintiff's] complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in [the plaintiff's] favor." [Rio Props., 284 F.3d at 1019](#). In other words, "for the purpose of this [prima facie] demonstration, the court resolves all disputed facts in favor of the plaintiff." [Pebble Beach, 453 F.3d at 1154](#).

"In evaluating the appropriateness of personal jurisdiction over a nonresident defendant, [courts] ordinarily examine whether such jurisdiction satisfies the 'requirements of the applicable state long-arm [*6] statute' and 'comport[s] with federal due process.'" [Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 919 \(9th Cir. 2011\)](#) (alteration in original) (quoting [Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1404-05 \(9th Cir. 1994\)](#)). "Because California permits the exercise of

⁴ The district court has discretion to hold an evidentiary hearing on a [12\(b\)\(2\)](#) motion to resolve "issues of credibility or disputed questions of fact" raised in the pleadings and other submitted materials. [Data Disc. Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 \(9th Cir. 1977\)](#). Neither party has requested an evidentiary hearing, and based on the papers before it, the Court concurs that none is necessary.

personal jurisdiction to the full extent permitted by due process, [courts] need only determine whether jurisdiction over [a defendant] comports with due process." *Id.* (internal citation and quotation marks omitted); see [Cal. Civ. Proc. Code § 410.10](#) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."). "For due process to be satisfied, a defendant, if not present in the forum, must have 'minimum contacts' with the forum state such that the assertion of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" [Pebble Beach, 453 F.3d at 1155](#) (quoting [Int'l Shoe Co. v. State of Wash., Office of Unemp't Comp. & Placement, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 \(1945\)](#)).

"Applying the 'minimum contacts' analysis, a court may obtain either general or specific jurisdiction over a defendant." [Doe v. Unocal Corp., 248 F.3d 915, 923 \(9th Cir. 2001\)](#). "If the defendant's activities in the forum are substantial, continuous and systematic, general jurisdiction is available; in other words, the foreign defendant is subject to suit even on matters unrelated to his or her contacts to the forum." *Id.* On the other hand, "[a] court may exercise specific jurisdiction over a foreign [*7] defendant if his or her less substantial contacts with the forum give rise to the cause of action before the court." *Id.* The Ninth Circuit applies a three-part test to determine whether a district court can exercise specific personal jurisdiction over a nonresident defendant:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws (the "purposeful availment" requirement);
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

[Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 \(9th Cir. 2004\)](#) (quoting [Lake v. Lake, 817 F.2d 1416, 1421 \(9th Cir. 1987\)](#)).

"The plaintiff bears the burden of satisfying the first two prongs of the test." *Id.* "If the plaintiff succeeds in satisfying both of the first two prongs, the burden then

shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Id.* (quoting [Burger King, 471 U.S. at 477](#)). Where a Court is exercising specific jurisdiction [*8] over a defendant, "the fair warning that due process requires arises not at the time of the suit, but when the events that gave rise to the suit occurred." [Steel v. United States, 813 F.2d 1545, 1549 \(9th Cir. 1987\)](#).

III. DISCUSSION

In the motion at bar, Sunpath and Northcoast assert that they (1) lack the continuous and systematic contacts with California required for this Court to exercise general jurisdiction and (2) have not purposefully directed any actions towards the California forum in a manner that would render specific jurisdiction appropriate. (Mot. at 6-19.) Born does not dispute that this Court lacks general jurisdiction over Sunpath and Northcoast and argues only that an exercise of specific jurisdiction is warranted. (See Opp. at 5-16.)

A. Jurisdictional Analysis

"The purposeful availment requirement ensures that a nonresident defendant will not be haled into court based upon 'random, fortuitous or attenuated' contacts with the forum state." [Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 \(9th Cir. 1998\)](#) (quoting [Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 \(1985\)](#)). The phrase "purposeful availment" includes both purposeful availment and purposeful direction, which are distinct concepts. [Schwarzenegger, 374 F.3d at 802](#). While a purposeful availment analysis is used in suits sounding in contract, a purposeful direction analysis is used in suits sounding in tort. *Id.* Claims for violation [*9] of the [TCPA](#) sound squarely in tort and require application of the purposeful direction analysis. [Moser v. Health Ins. Innovations, Inc., No. 3:17-CV-1127-WQH-KSC, 2018 U.S. Dist. LEXIS 3237, 2018 WL 325112, at *3 \(S.D. Cal. Jan. 5, 2018\)](#) (collecting cases); [Abedi v. New Age Med. Clinic PA, No. 1:17-CV-1618 AWI SKO, 2018 U.S. Dist. LEXIS 105932, 2018 WL 3155618, at *2 n.2 \(E.D. Cal. June 25, 2018\)](#).

Accordingly, in this case, the Court's personal jurisdiction inquiry is appropriately limited to an examination of whether Defendants may be said to have purposefully directed their activities at California. [Morrill v. Scott Fin. Corp., 873 F.3d 1136, 1149 \(9th Cir. 2017\)](#)

("[P]urposeful availment test does not apply" where "the claims at issue are premised on alleged tortious conduct by [d]efendants."). The Ninth Circuit "evaluate[s] purposeful direction under the three-part 'effects' test traceable to the Supreme Court's decision in [Calder v. Jones](#), 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)." [Schwarzenegger](#), 374 F.3d at 803. Under this test, "the defendant allegedly [must] have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* (quoting [Dole Food Co. v. Watts](#), 303 F.3d 1104, 1111 (9th Cir. 2002) (citations omitted)). In [Walden v. Fiore](#), the Supreme Court emphasized that under the [Calder](#) effects test, "[t]he proper question is not where the plaintiff experienced a particular injury or effect but [*10] whether the defendant's conduct connects him to the forum in a meaningful way." [Walden](#), 571 U.S. at 290. In other words, in tort actions, while conducting the minimum contacts inquiry, the Court is to focus on "the relationship among the defendant, the forum, and the litigation." *Id.* at 291. "And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Id.*

Here, Born does not dispute that the lone alleged telemarketing call described in the FAC was made to him in Wisconsin, via his cellular phone number, which bears a Wisconsin area code. (See Mot. at 1-3, 8-10; Opp.) It should go without saying that an allegedly tortious call to Wisconsin does not amount to an intentional act expressly aimed at California. And an out-of-state defendant's mere agreement with a third-party located within the forum, pursuant to which that third-party independently operates an advertising or solicitation campaign, does not satisfy the first prong of the three-part jurisdictional analysis set forth in [Schwarzenegger](#), and is thus an insufficient basis for an exercise of specific jurisdiction over the foreign defendant. See [Durward v. One Techs. LLC, No. CV 19-6371-GW-AGRX, 2019 U.S. Dist. LEXIS 174012, 2019 WL 4930229 \(C.D. Cal. Oct. 3, 2019\)](#) (finding lack of jurisdiction [*11] over an out-of-state defendant in connection with unsolicited emails sent to the plaintiff by in-state, third-party advertising affiliates where the affiliates "controlled all aspects of transmitting the emails and [made] fundamental decisions concerning the emails themselves, including choosing each email's recipient"); [Zoobuh, Inc. v. Williams, No. 2:13-CV-791-TS, 2014 U.S. Dist. LEXIS 175737, 2014 WL 7261786 \(D. Utah Dec. 18, 2014\)](#) (finding no purposeful direction

in very similar circumstances)⁵ ; see also [Ziegler v. Indian River Cty.](#), 64 F.3d 470, 473 (9th Cir. 1995). In light of (1) the nature of the conduct pleaded in this matter—an unsolicited call made to Wisconsin by or at the direction of VAD, a California corporation, and (2) the declarations of Northcoast and Sunpath executives decisively disavowing any involvement in the marketing practices of VAD, Born has failed to make a prima facie showing that either Northcoast or Sunpath has purposefully directed its activities towards the California forum.

Perhaps recognizing that he fails to show purposeful direction by the moving defendants, Born submits two far more creative theories of personal jurisdiction that ignore purposeful direction and instead are founded on (1) purposeful availment and (2) agency. Specifically, Born argues that Sunpath [*12] and Northcoast availed themselves of the benefits, privileges, and protections of doing business in California by entering into an agreement with VAD, and alternatively that VAD is the agent of Sunpath and Northcoast, such that VAD's California contacts should be imputed to Sunpath and Northcoast as principals. (Opp. at 7-16.) Therefore, Born asserts, under either theory this Court may exercise jurisdiction over Sunpath and Northcoast. The Court has considered all of Born's arguments suggesting that the jurisdictional inquiry in this matter should extend beyond the obviously applicable purposeful direction analysis — none is persuasive.

First, binding Ninth Circuit precedent treats the purposeful direction and availment inquiries as distinct and appropriately applied under different circumstances. See, e.g., [In re Boon Glob. Ltd.](#), 923 F.3d 643, 651 (9th Cir. 2019); [Pakootas v. Teck Cominco Metals, Ltd.](#), 905 F.3d 565, 577 (9th Cir. 2018), cert. denied sub nom. [Teck Metals Ltd. v. Confederated Tribes of the Colville Reservation](#), 139 S. Ct. 2693, 204 L. Ed. 2d 1091 (2019); [HK China Grp., Inc. v. Beijing United Auto. & Motorcycle Mfg. Corp.](#), 417 F. App'x 664 (9th Cir. 2011) (emphasizing the importance of applying the more applicable of the two analyses); [Morrill v. Scott Fin. Corp.](#), 873 F.3d 1136, 1149 (9th Cir. 2017) (same). This case sounds in tort and Born presents no convincing

⁵ Importantly, in both [Durward](#) and [Zoobuh](#), the plaintiffs were forum domiciliaries, meaning the connection between the defendants' alleged conduct, the harm suffered, and the forum was much stronger than that here. See [Durward, 2019 U.S. Dist. LEXIS 174012, 2019 WL 4930229 at *1](#); [Zoobuh, 2014 U.S. Dist. LEXIS 175737, 2014 WL 7261786, at *1](#).

reason to depart from the well-established rule that purposeful direction is the relevant analysis.

Second, while Born presents three alternative agency theories under which he argues that VAD's California contacts should [*13] be attributed to Sunpath and Northcoast⁶, none addresses the key element lacking here, namely, the principal's right of control. See [Williams v. Yamaha Motor Co., 851 F.3d 1015, 1024-25 \(9th Cir. 2017\)](#) (even assuming the relevance of agency to a specific jurisdiction analysis, "under any standard for finding an agency relationship, the [principal] must have the right to substantially control its [agent's] activities." (emphasis added)). Cf. [Delacruz v. Serv. Corp. Int'l, No. 1:18-cv-00154-LJO-EPG, 2018 U.S. Dist. LEXIS 84172, 2018 WL 2287962, at *7 \(E.D. Cal. May 18, 2018\)](#) (failure to show substantial control doomed agency theory for imputing forum contacts of agent to principal); [AirWair Int'l Ltd. v. Pull & Bear Espana SA, No. 19-CV-07641-SI, 020 U.S. Dist. LEXIS 78158, 2020 WL 2113833, at *4 \(N.D. Cal. May 4, 2020\)](#) (same); [Page v. Minnesota Life Ins. Co., No. SACV 18-01208 AG \(KESx\), 2019 U.S. Dist. LEXIS 43993, 2019 WL 3059561, at *5 \(C.D. Cal. Mar. 11, 2019\)](#) (same). Because Born has failed to show that Sunpath and Northcoast exercise any control over VAD's activities, his agency theory does not confer specific jurisdiction.

B. Request to Conduct Jurisdictional Discovery

Born requests that if the Court is inclined to grant the instant Motion, he first be afforded an opportunity to conduct jurisdictional discovery on the subject of Defendants' contacts with California. (Opp. at 19-20.)

"A district court is vested with broad discretion to permit or deny [jurisdictional] discovery." [Laub v. U.S. Dep't of Interior, 342 F.3d 1080, 1093 \(9th Cir. 2003\)](#). Jurisdictional discovery need not be allowed [*14] if the request amounts merely to a "fishing expedition," [Johnson v. Mitchell, No. CIV S-10-1968 GEB GGH PS, 2012 U.S. Dist. LEXIS 65934, 2012 WL 1657643, *7 \(E.D. Cal. May 10, 2012\)](#), or is "based on little more than a hunch that it might yield jurisdictionally relevant facts." [Boschetto v. Hansing, 539 F.3d 1011, 1020 \(9th Cir. 2008\)](#). Rather, the party seeking jurisdictional discovery must make at least a "colorable" showing that jurisdiction exists. [Mitan v. Feeney, 497 F. Supp. 2d 1113, 1119 \(C.D. Cal. 2007\)](#). Born has not made such a

colorable showing. Rather, based on the facts already presented, it is clear that this Court lacks personal jurisdiction over Northcoast and Sunpath, regardless of the answers to the further jurisdictional questions Born proposes (see Opp. at 19-20.) Therefore, his request is DENIED

IV. CONCLUSION⁷

For the foregoing reasons, Born has failed to make out a prima facie showing of jurisdictional facts to withstand Defendants' Motion. Accordingly, the Motion is GRANTED. Northcoast and Sunpath are DISMISSED from this action.

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⁶Born argues agency via (1) actual authority; (2) apparent authority; and (3) ratification. (Opp. at 10-16.)

⁷ Because the Court holds that Born has not satisfied the first prong of the applicable specific jurisdiction analysis, it does not reach the parties' arguments on the remaining two prongs, whether the claim arises out of or relates to the Defendants' forum-related activities and whether the exercise of jurisdiction would comport with the notions of fair play and substantial justice, or in other words, be reasonable. (See Opp. at 16-18; Reply at 15-21.)