No. 18-15051

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMA MULTIMEDIA, LLC,
a Nevada Limited Liability Company,

Plaintiff-Appellant,

v.

MARCIN WANAT,
a Foreign Citizen,

Defendant-Appellee,

On Appeal from the United States District Court
for the District of Arizona
No. 2:15-CV-01674-ROS
The Honorable Roslyn O. Silver

APPELLEE'S RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

In yet another attempt that by now resembles a Sisyphean task, AMA asks this Court to use its valuable time to reconsider an already well-reasoned decision from the panel—a decision that was made after extensive briefing, oral arguments, two-years' long jurisdictional discovery, an appointment of a special master, and extensive and exhaustive briefings in the District Court. *Pet.* However, the majority opinion has already taken a careful examination of the law and correctly determined that Wanat, a Polish citizen, has not taken actions that could constitute express aiming at the United States. *Maj. Op.* at 21.

Wanat is a manager of ePorner, but ePorner's contacts with the U.S. are both minimal and not of a nature that could show express aiming. ePorner has a minority of its user base in the U.S., less than 20 percent, and in the past used a DNS service that happens to have its headquarters in the U.S. (*See* ER 744-45). These minor connections are insufficient to show an express aiming at the U.S. *See Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230-31 (9th Cir. 2011).[1] The majority opinion reached the correct decision on that, and it would be a poor use of this

[1] *See also Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418-20 (9th Cir. 1997) (declining to exercise jurisdiction under similar circumstances).

Court's time to reconsider. *Maj. Op.* at 20-21.[2] This Court should, therefore, decline to reconsider and let the well-reasoned opinion stand.

I. THE RECORD SHOWS THAT WANAT DID NOT TAKE ANY ACTIONS TO CONSTITUTE EXPRESS AIMING.

This matter centers on the question of when a foreign party can be forced to litigate in an American court. Under the federal long-arm statute, there are three requirements: "First, the claim against the defendant must arise under federal law. Second, the defendant must not be subject to the personal jurisdiction of any state court of general jurisdiction. Third, the federal court's exercise of personal jurisdiction must comport with due process." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1159 (9th Cir. 2006); *see also* FRCP 4(k)(2).[3] The plaintiff has the burden of establishing that the court has personal jurisdiction over the defendant. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).[4] The panel correctly noted that here the first two requirements were undisputed. *Maj. Op.* at 11. The panel found that the third prong could not be satisfied because, among

[2]*See also* FRAP 35(a) (noting that en banc reconsideration is disfavored).

[3]Personal jurisdiction under FRCP 4(k)(2) is a rare occurrence. *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 461 (9th Cir. 2007).

[4]*See also Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.,* 551F.2d 784, 787 (9th Cir. 1977) (noting that the plaintiff is "obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.").

other things, Wanat did not purposefully direct, or expressly aim, his activities at the U.S. *Id.* at 21.

When considering whether there was express aiming, a court will consider whether the defendant "anticipated, desired, and achieved" a substantial market in the forum and whether the defendant "continuously and deliberately" exploited that market. *Mavrix Photo*, 647 F.3d at 1230-31. The majority opinion correctly found that neither of those elements were present here. *Maj. Op.* at 16.

A. Wanat did not take any actions to target the U.S. or show that it anticipated, desired, and achieved a substantial U.S. market.

AMA argues, based on a misunderstanding of *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80, 104 S. Ct. 1473, 1481 (1984) and on a misunderstanding of the difference between a sale of a magazine and a website hit, that Wanat had expressly aimed at the U.S. *Pet.* at p. 6. AMA argues that the majority opinion creates a forum specific focus that is incompatible with *Keeton. Id.* But *Keeton* did require the plaintiff to show that there was a continuous and systematic business activity on the part of the defendant in the forum such that the defendant could be said to be expressly aiming at the forum. *Keeton*, 465 U.S. at 779-80, 104 S. Ct. at 1481. In *Keeton*, the defendant Hustler was actively and continuously aiming at the forum by physically shipping between 10,000 and 15,000 physical magazines to the forum every month. *Id.* at 772. Based on selling thousands of units every month in the target forum, the U.S. Supreme Court found that there were sufficient continuous

and systematic business operations to justify jurisdiction. *Id.* at 779-80. AMA's argument that some form of focus on the target forum that could constitute express aiming is not required misreads *Keeton*, and the majority's well-reasoned opinion was correct in its interpretation. *Maj. Op.* at p. 20-21, n.8.

Moreover, AMA's argument fails in its factual analysis. *Pet.* at p. 6-7. AMA claims that ePorner's traffic in the U.S. is "300 times the size of Hustler's circulation in *Keeton.*" *Id.* This claim fails even basic scrutiny. It tries to make a website hit and the purchase of a magazine directly equivalent. However, a magazine is a durable object that must be purchased at a price and may then be viewed any number of times. A website hit is a transitory thing, and a single user may generate numerous hits over the course of a month or even a day at no cost to the user. While the two may be analogized in a loose way, they are not interchangeable, and trying to treat a website hit as exactly the same as the purchase of a durable magazine is flawed and misleading. Furthermore, this comparison neglects the differences in the size of the markets under discussion. *Keeton* was considering the distribution of magazines by a U.S. company within a single state, New Hampshire. *Keeton*, 465 U.S. at 779. AMA disingenuously tries to conflate that with ePorner's traffic, as a foreign entity who primarily serves foreign users, from the entire U.S.[5]

[5]The fact that ePorner is a truly foreign entity operating out of Poland is significant since jurisdiction must be exercised with caution in an international field. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1489 (9th Cir. 1993).

The Ninth Circuit's interpretation of *Keeton*, which was provided in *Mavrix Photo*, is instructive of what would be required for a website to meet the requirements to be subject to personal jurisdiction as the majority opinion discussed. *See, e.g.*, *Maj. Op.* at 13; *Mavrix Photo*, 647 F.3d at 1230-31. AMA argues that the majority opinion would require that there be a unique appeal in the forum of the website to ever show jurisdiction. *Pet.* at 7. That misconstrues the majority opinion, which instead found that the lack of a forum specific focus was one of several ways that this case was factually distinguishable from the well-reasoned *Mavrix Photo*. Maj. Op. at 16-20. In *Mavrix Photo*, the evidence showed that California was an integral component of the website's business model when considering numerous factors, including the fact that the subject matter was peculiarly focused on California-centered topics. *Mavrix Photo*, 647 F.3d at 1230.

Here, as the majority opinion correctly determined, several of the factors present in *Mavrix Photo* were absent, including the fact that there is nothing on the website indicating a focus on forum specific focus. *Maj. Op.* at 16-17. But the majority opinion also noted that unlike in *Mavrix Photo*, much of the content on ePorner is provided by users. *Id.* at 17. Furthermore, ePorner received only a minority of its traffic, less than 20 percent, from the U.S., and any targeting of the advertisements that may be present was done through third-party geolocated advertising. *Id.* at 18. This was a significant distinction from *Mavrix Photo* where

there were ads specifically targeting California. *Id.*; *see also Mavrix Photo*, 647 F.3d at 1230.

In a vain attempt to show that ePorner had other direct contacts with the U.S., AMA attempts to make much of the fact the ePorner had a contract with a U.S.-based DNS company. *Pet.* at 8. However, A domain name server (DNS) is merely a system that translates domain names to IP addresses or vice versa, in a method similar to a phone book. (ER 1090-91). This is a minor item, and ePorner would have remained operational without it. (ER 1119-21). The petition claims, without citation to the record, that ePorner "had more locations and technical infrastructure in the U.S. than anywhere else," but this is plainly false when the servers and web hosting were located in the Netherlands. *Pet.* at 8.

The majority opinion correctly determined that AMA could not meet its burden to show that ePorner had anticipated, desired, and achieved a significant market share in the U.S. The majority opinion correctly states the standards by which such determinations should be made. Therefore, the majority opinion should be upheld.

B. There is no evidence that Wanat continuously or deliberately exploited the U.S. market.

As the majority opinion notes, the requirement to continuously and deliberately exploit a forum's market is normally met by a website when its economic value rests in significant measure on its appeal to forum residents. *Maj.*

Op. at 15-16; *Mavrix Photo*, 647 F.3d at 1230. AMA argues that this requirement is met because ePorner used a third-party service that geotargeted ads. *Pet.* at 10.[6] However, the majority opinion correctly determined that this does not constitute deliberately exploiting the market or establish that ePorner was expressly aimed at the U.S. *Maj. Op.* at 18.

AMA claims that this holding is in conflict with *Mavrix Photo*. *Pet.* at 11. However, the two are perfectly consistent because they are based on different sets of facts that are readily distinguishable. In *Mavrix Photo*, the website in question hosted content with a peculiar appeal to the target forum and hosted ads specifically targeted to the forum. *Mavrix Photo*, 647 F.3d at 1230. Those factors are not present here. Because ePorner, through a third-party service, used ads that were geolocated for any and all users, the action did not expressly target or show deliberate exploitation of the U.S. market. *See Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115, 1122 (2014).[7]

The petition attempts to claim that reliance on *Walden* is misplaced because Wanat elected to sell the ad space. *Pet.* at 12.[8] However, Wanat sold the ad space to

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[6]The Copyright Alliance in its *amici* brief made a similar argument. Doc. 61-2, p. 17.

[7]"We have consistently rejected attempts to satisfy the defendant-focused "minimum contacts" inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State."

[8]The Motion Picture Association, Inc., in its *amici* brief makes virtually the same argument. Doc. 62-2, p. 16-19.

a third party who decided what to place there and how to select it, and *Walden* makes clear that this is precisely the type of third-party actions that cannot create personal jurisdiction. *Id.* at 284-85. AMA tries to claim this creates a loophole that would provide an easy method for someone to improperly avoid jurisdiction, but this is simply false. If the hypothetical website were specifically targeting the U.S., then it would be easy to show jurisdiction, but that is not the case here. On the contrary, as a matter of policy, a truly foreign company cannot be haled into a U.S. court based solely on the actions of a third party, especially when the third party itself is taking actions to serve the entire world and not specifically targeting the U.S. *Id.*; *see also Core-Vent Corp.*, 11 F.3d at 1490.[9] To do otherwise would allow the U.S. to exercise jurisdiction over virtually any website that used third-party advertising services.

The majority opinion is correct as a matter of both law and policy. Wanat has not taken any actions that show he continuously and deliberately exploited the U.S. market. On the contrary, he is a citizen of Poland, and ePorner's main assets were located in the Netherlands. The majority opinion should be upheld.

[9]"[A] plaintiff seeking to hale a foreign citizen before a court in the United States must meet a higher jurisdictional threshold than is required when the defendant is a United States citizen." *Core-Vent Corp.*, 11 F.3d at 1490.

II. EVEN IF HYPOTHETICALLY THERE HAD BEEN EXPRESS AIMING, IT WOULD VIOLATE DUE PROCESS TO FORCE WANAT TO ANSWER THE CLAIMS IN ARIZONA.

Even if hypothetically the reasoning of the panel regarding whether there had been express aiming were flawed, the results of the majority opinion should be upheld. It would be unreasonable to require Wanat to defend an action in the U.S. *Maj. Op.* at 21, n.9; *Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1331 (9th Cir. 1985).[10] Wanat is a citizen of Poland who does not have a visa to get into the U.S. (ER 746). Wanat has virtually no contacts with the U.S.[11] Further, it would be a tremendous expense on an individual who lives in Poland to defend a lawsuit in the U.S. Therefore, even if adjustments need to be made to the reasoning, the result of the majority opinion should be upheld.

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[10] *See also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.") (*internal citations and quotation marks omitted*).

[11] To the extent that AMA may try to argue that his connection with Godaddy is a contact in the U.S., it is noteworthy that Godaddy is a major international corporation, and Wanat dealt with its Polish version at https://pl.godaddy.com. (ER 744).

III. THE PARADE OF HORRIBLES THE APPELLANT ATTEMPTS TO CONJURE FORTH ARE NONEXISTENT, AND POLICY SUPPORTS UPHOLDING THE MAJORITY OPINION.

In an attempt to show that this case is of great importance and deserving of rehearing, AMA claims it provides a blueprint for stealing American intellectual property and avoiding jurisdiction by simply outsourcing the advertising. *Pet.* at 14. This claim is false and based on a deliberate misreading of the majority opinion. When a company takes steps to deliberately target the U.S. as a market, or if the company is itself using significant amounts of intellectual property from the U.S. and due process otherwise allows, the majority opinion would allow that corporation to be brought under U.S. jurisdiction. *See Maj. Op.* at 14-21. However, that is not the case here. *Id.* at 20-21.

On the contrary, adopting the standards that AMA urges would allow U.S. courts to exercise jurisdiction over virtually any website that includes advertising and that is contrary to both precedent and policy. *Core-Vent Corp.*, 11 F.3d at 1490;[12] *Walden*, 571 U.S. at 284-85.

Finally, AMA claims that this decision creates a circuit split with the Fourth Circuit's decision. *Pet.* at 15. However, this decision is fully consistent with the

[12] *See also Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 114, (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.")

Fourth Circuit's decision. *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344 (4th Cir. 2020). In the Fourth Circuit case, the defendants took several steps clearly targeting the U.S., including contracting with a U.S.-based advertising broker and using U.S.-based servers that were physically located in Virginia. *Id.* at 349. These additional factors are not present here, and the majority opinion almost certainly would have come out different had those factors been present. *Maj. Op.* at p. 20, n.4.

AMA claims without citation that these factors are irrelevant. *Pet.* at 17. These claims are nonsensical. The use of a U.S.-based advertising broker in *UMG Recordings* was directly cited by the Fourth Circuit as a relevant factor, and that was a logical decision. *UMG Recordings*, 963 F.3d at 349. The use of a U.S.-based advertising broker directly creates an additional significant contractual relationship and indirectly implies an attempt to target U.S. users. The Fourth Circuit referenced the use of U.S.-based servers alongside the use of a U.S.-based domain registration. *Id.* at 349. This is logical and reasonable when considering numerous factors, but of the two, the location of the servers is more significant. DNS plays a minor role and is akin to a phone book, while the main servers distribute content and support the entire website. (ER 1090-91).

There is, therefore, no circuit split, and it would be a poor use of this Court's time to reconsider a well-reasoned opinion from the panel. Thus, the request for rehearing should be denied in its entirety.[13]

CONCLUSION

The majority opinion is correct both as a matter of law and policy. It would not be a good use of this Court's limited judicial resources to reconsider the decision. Accordingly, Wanat respectfully requests that this Court decline to grant rehearing *en banc* and permit the District Court's opinion to stand.

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[13] *See also* FRAP 35(a) (noting that en banc hearing is not favored).

CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the type-volume limitation of this Court's September 2, 2020 Order (ECF No. 60) because this brief contains 3420 words and does not exceed 15 pages.

Date: September 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 23, 2020

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