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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Skydive Arizona, Inc.,	)	No. CV 05-2656-PHX-MHM
Plaintiff,	)	<b>ORDER</b>
vs.	)	
Cary Quattrochi; Ben Butler; 1-800-Sky-	)	
Ride; 1800SKYRIDE.COM; Atlanta)	)	
Skydiving Center; and CASC Inc.,	)	
Defendant.	)	

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Currently before the Court is Defendants Cary Quattrocchi ("Defendant Quattrocchi") and Defendant Benny Butler's ("Defendant Butler") (collectively the "Individual Defendants") Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, for Failure to State a Claim (Dkt.#7). Also, before the Court is Defendants USSO, LLC d/b/a 1800SkyRide and 1800SkyRide.com ("Defendant USSO"), Atlanta SC Inc., ("Defendant Atlanta") and CASC Inc.'s ("Defendant CASC") (collectively the "Corporate Defendants") Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion to Strike Allegations of Plaintiff's Complaint. (Dkt.#9). After reviewing the pleadings and hearing oral argument on July 17, 2006, the Court issues the following Order.

**I. Background**

1 On August 26, 2005 Plaintiff Skydive Arizona, Inc., ("Plaintiff") filed its Complaint  
2 against the above Defendants in this Court. Plaintiff has asserted the following claims  
3 against all Defendants: (1) False Designation or Origin and Unfair Competition Under  
4 Federal Lanham Act, § 43(a); (2) Trademark Infringement; and (3) False Designation of  
5 Origin and Unfair Competition Under Federal Lanham Act, § 43(d).

6 Plaintiff's claims derive out the alleged implementation of websites developed by  
7 Defendants and used in the state of Arizona. Plaintiff claims that Defendants maintain  
8 websites that misrepresent the Defendants as "Arizona Skydiving," "Skydiving Arizona," and  
9 as the "Skydiving Arizona Center" in the state of Arizona, when in fact Defendants operate  
10 no such skydiving facilities. (Complaint ("Compl." ¶ 16)). Plaintiff alleges that Defendants  
11 operate similar websites that misrepresent the Defendants as "Tucson Skydiving Center" and  
12 "Skydive Flagstaff" when in fact Defendants operate no such facilities. (Compl. ¶'s 14,15).  
13 Plaintiff alleges that Defendants misrepresent other aspects of these facilities as well, such  
14 as that the "Skydiving Arizona" facility is "the busiest skydive center serving Arizona," and  
15 the facilities "run multiple turbine aircraft." (Compl. ¶16). Plaintiff also alleges that  
16 Defendants have similar websites for the specific areas of Phoenix, Tempe, Scottsdale, Mesa,  
17 Gilbert, Yuma and Flagstaff. (Compl.¶17). Plaintiff claims that Defendants have sold  
18 "certificates" to residents of Arizona through these websites that are represented as being  
19 redeemable at Plaintiff's facility; when in fact Plaintiff does not accept any such  
20 "certificates." (Compl.¶19). Defendants are alleged to have made false and misleading  
21 statements to consumers in Arizona concerning Defendants' alleged affiliation, connection,  
22 or association with Plaintiff. (Id.). Defendants are further alleged to derive revenue from the  
23 sale of such "certificates" to Arizona residents. (Compl. ¶22).

24 The Individual Defendants move to dismiss Plaintiff's claims on the basis that this  
25 Court lacks personal jurisdiction over them and, in the alternative, Plaintiff's claims fail to  
26 state a claim. The Corporate Defendants move to dismiss and/or strike portions of Plaintiff's  
27 claim on the basis that the allegations fail to state a claim. Plaintiff opposes these motions.

## 28 **II. Standards**

1           **A.     Personal Jurisdiction**

2           To establish personal jurisdiction, plaintiff has the burden of showing that: (1) the  
3 forum state's long-arm statute confers jurisdiction over the nonresident defendant; and (2) the  
4 exercise of jurisdiction comports with principles of due process. Omeluk v. Langsten Slip  
5 & Batbyggeri A/S, 52 F.3d 267, 269 (9th Cir. 1995). Arizona's long-arm statute confers  
6 jurisdiction to the maximum extent allowed by the Due Process Clause of the United States  
7 Constitution. Ariz.R.Civ.P. 4.2(a); Doe v. American Nat'l Red Cross, 112 F.3d 1048, 1050  
8 (9th Cir. 1997). Therefore, the issue before the Court is whether the exercise of jurisdiction  
9 over Defendants accords with due process. See Omeluk, 52 F.3d at 269.

10           Where an evidentiary hearing is not held, dismissal for lack of personal jurisdiction  
11 is appropriate only if the plaintiff has not made a prima facie showing of personal  
12 jurisdiction. Fields v. Sedgwick Associated Risks, Ltd., 796 F.2d 299, 300 (9<sup>th</sup> Cir. 1986).  
13 "[U]ncontroverted allegations in [plaintiff's] complaint must be taken as true, and 'conflicts  
14 between the facts contained in the parties' affidavits must be resolved in [plaintiff's] favor for  
15 purposes of deciding whether a prima facie case for personal jurisdiction exists.'" American  
16 Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9<sup>th</sup> Cir.  
17 1996) (citing WNS, Inc. v. Farrow, 884 F.2d 200, 2003 (5<sup>th</sup> Cir. 1989). However, a court  
18 may not assume the truth of allegations in a pleading that are contradicted by affidavit. Data  
19 Disc, Inc., v. Systems Tech. Assoc., 557 F.2d 1280, 1284 (9<sup>th</sup> Cir. 1977). If the plaintiff is  
20 able to meet its prima facie burden, the movant can nevertheless continue to challenge  
21 personal jurisdiction either at a pretrial evidentiary hearing or at trial itself. Metropolitan  
22 Life Ins. Co. v. Neaves, 912 F.2d 1062, 1064, n.1 (9<sup>th</sup> Cir. 1990).

23           Due Process requires that the nonresident defendant have "certain minimum contacts  
24 with [the forum] such that the maintenance of the suit does not offend 'traditional notions of  
25 fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316  
26 (1945) (internal citation omitted). There are two types of personal jurisdiction, general and  
27 specific. General jurisdiction exists where a non-resident defendant engages in substantial,  
28 continuous or systematic activities within the forum. Perkins v. Benquet Consol. Mining,

1 Co., 342 U.S. 437, 445, 72 S.Ct. 413 (1952). When a defendant's contacts with the forum  
2 do not rise to the level required for general jurisdiction, a court may exercise specific  
3 jurisdiction over a claim when it arises from the defendant's activities within that forum.  
4 Shute v. Carnival Cruise Lines, 897 F.2d 377, 381 (9<sup>th</sup> Cir. 1990) rev'd on other grounds, 499  
5 U.S. 585, 111 S.Ct. 1522 (1991).

#### 6 **B. Failure to State a Claim**

7 "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely  
8 granted." Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997).  
9 Accordingly, the court will not dismiss a complaint unless it appears beyond a doubt that the  
10 plaintiff can prove no set of facts to support the claim that would entitle the plaintiff to relief.  
11 Morley v. Walker, 175 F.3d 756, 759 (9<sup>th</sup> Cir. 1999). In determining whether a complaint  
12 states a claim, all allegations of material fact are taken as true and construed in the light most  
13 favorable to the nonmoving party. Wyler Summit Partnership v. Turner Broad. Sys., Inc., 135  
14 F.3d 658, 661 (9<sup>th</sup> Cir.1998). As such, an inquiry into the adequacy of the evidence is  
15 improper when deciding whether to dismiss for failure to state a claim. Enesco Corp. v.  
16 Price/Costco Inc., 146 F.3d 1083, 1085 (9<sup>th</sup> Cir. 1998). However, "the court [is not]  
17 required to accept as true allegations that are merely conclusory, unwarranted deductions of  
18 fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9<sup>th</sup>  
19 Cir.2001).

20 Moreover, Rule 12(b)(6) Fed.R.Civ.P. provides that a motion to dismiss must be  
21 treated as a motion for summary judgment when "matters outside the pleadings are presented  
22 to and not excluded by the court." However, if the court does not rely on the extraneous  
23 matters, the motion to dismiss will not be converted into a motion for summary judgment.  
24 See North Star Intern. v. Arizona Corp. Commission, 720 F.2d 578, 581-82 (9<sup>th</sup> Cir. 1983).

#### 25 **C. Rule 12(f)**

26 Rule 12(f) provides that a court "may order stricken from any pleading ... any  
27 redundant, immaterial, impertinent, or scandalous matter." "[T]he function of a 12(f) motion  
28 to strike is to avoid the expenditure of time and money that must arise from litigating

1 spurious issues by dispensing with those issues prior to trial..." Sidney-Vinsein v. A.H.  
2 Robins Co., 697 F.2d 880, 885 (9<sup>th</sup> Cir. 1983). "Immaterial matter is that which has no  
3 essential or important relationship to the claim for relief or the defenses being pleaded."  
4 Fantasy, Inc., v. Fogerty, 984 F.2d 1524, 1527 (9<sup>th</sup> Cir. 1993), reversed on other grounds, 510  
5 U.S. 517 (1994) (quoting 5 Charles A. Wright & Miller, Federal Practice and Procedure §  
6 1382 at 706-07 (1990)). "'Impertinent' matter consists of statements that do not pertain, and  
7 are not necessary to the issues in question." Id.

### 8 **III. Discussion**

#### 9 **A. Individual Defendants' Motion to Dismiss for Lack of Personal** 10 **Jurisdiction**

##### 11 **1. Plaintiff's Objection to Individual Defendants' Affidavits in** 12 **Support of Motion to Dismiss**

13 In support of the Individual Defendants' Motion to dismiss they each submit affidavits  
14 explaining their lack of personal contacts with the state of Arizona. For instance, both the  
15 Individual Defendants explain that while they are owners of the named Corporate  
16 Defendants, they themselves have no personal relationship with Arizona. Moreover, the  
17 Individuals Defendants state that they do not own property in Arizona, have never personally  
18 transacted business in Arizona, have never tried to personally transact business in Arizona,  
19 have no bank accounts in Arizona, do not have an office in Arizona, and have never traveled  
20 to Arizona. (Motion to Dismiss, Dkt.#7, Exhibits A and B).

21 In opposition to these affidavits, Plaintiff objects to their admissibility because the  
22 affidavits were unsigned when originally submitted with the Individual Defendants' Motion  
23 to dismiss on November 14, 2005. (Dkt.#7). Specifically, Plaintiff notes that neither affidavit  
24 was signed by either Defendant, nor was either affidavit notarized. Plaintiff notes that  
25 CM/ECF policy in this District requires that for documents that are to be signed by a non-  
26 registered signatory, the original document is to be scanned and electronically filed. See  
27 Case Management/Electronic Filing Administrative Policies and Procedures Manual, Section  
28 II(C)(2).

1           The Individual Defendants; on the other hand, contest any such notion of  
2 inadmissibility. The Individual Defendants contend that the fact that the original affidavits  
3 with Defendants' notarized signatures were not timely filed was because of timing and  
4 clerical issues. The Individual Defendants state that on the day the affidavits were to be filed  
5 they were traveling, thus they authorized counsel to electronically submit the affidavits with  
6 the understanding that the notarized signed affidavits would be filed with the Court as soon  
7 as possible. Because of a clerical error; however, these affidavits were not filed until  
8 December 16, 2005, but were signed and notarized on November 16, 2005. (Dkt.#14); (See  
9 also Dkt.#15, Defendant's Response to Plaintiff's Objection to Unsigned Affidavits,  
10 Declaration of Kimberly Warshawsky).

11           The Court has discretion in considering the admissibility of these affidavits filed in  
12 support of Defendant's Motion to dismiss. See Wood v. Santa Barbara Chamber of  
13 Commerce, Inc., 705 F.2d 1515, 1519 (9<sup>th</sup> Cir. 1983) (finding that district court did not abuse  
14 its discretion in excluding affidavit offered in opposition to motion for summary judgment  
15 where it was submitted on the day of the hearing and upon no showing of excusable neglect).  
16 In this case, the Court will consider the affidavits submitted by the Individual Defendants.  
17 The unsigned electronic versions of the affidavits were timely filed on November 14, 2005  
18 with the instant Motion to dismiss, thus Plaintiff was certainly on notice of the existence of  
19 these affidavits. As such, there is no undue surprise or unfair prejudice resulting to Plaintiff.  
20 Moreover, the original signed affidavits were signed on November 16, 2005 and filed with  
21 the Court approximately one month later. The delay in filing the original signed affidavits  
22 appears attributable to a clerical error. In such circumstances, the Court finds that  
23 consideration of the affidavits is fair and just.

24           Conversely, at the oral argument hearing, the Court denied Plaintiff's Motion to file  
25 Exhibits (Dkt.#20) and struck Plaintiff's "Notice of Filing Declarations and Other  
26 Evidence..." (Dkt.#21). The Court, in the exercise of its discretion, held that Plaintiff's  
27 exhibits, which were hand-delivered to the Court the day of the hearing, were not appropriate  
28 for consideration considering their untimely presentation and Plaintiff's failure to

1 demonstrate "excusable neglect." See Id. Specifically, although the pending motions had  
2 been fully briefed for over seven months prior to the hearing, Plaintiff waited until the day  
3 of the hearing to attempt to introduce these exhibits, in the form of declarations from various  
4 witnesses, in opposition to the Individual Defendants' Motion to Dismiss for lack of Personal  
5 Jurisdiction.

## 6 **2. Analysis**

7 Plaintiff, while not conceding general jurisdiction over the individual Defendants,  
8 makes its argument for personal jurisdiction based primarily on specific jurisdiction. The  
9 Ninth Circuit utilizes a three-prong test to evaluate the nature and quality of Defendant's  
10 contacts for purposes of specific jurisdiction; the test provides:

11 1) the nonresident defendant must do some act or consummate  
12 some transaction with the forum or perform some act by which  
13 he purposefully avails himself of the privilege of conducting  
14 activities in the forum, thereby invoking the benefits and  
15 protections; 2) the claim must be one which arises out of or  
16 results from the defendant forum related activities; and 3)  
17 exercise of the jurisdiction must be reasonable.

18 EDIAS Software Intern., LLC v. BASIS Intern. Ltd., 947 F. Supp. 413, 417 (D. Ariz. 1996).  
19 All three factors must exist for personal jurisdiction to apply. Omeluk v. Langstein Slip &  
20 Batbyggeri A/S, 52 F.3d 267, 270 (9<sup>th</sup> Cir. 1995).

21 In support of establishing specific jurisdiction, Plaintiff relies exclusively on the  
22 allegations set forth in its Complaint. Plaintiff alleges that these Individual Defendants  
23 participated in the posting of the websites at issue in Arizona that have violated Plaintiff's  
24 Lanham Act and Trademark rights by confusing the public as to ownership and skydiving  
25 locations in Arizona. Most notably, Plaintiff alleges against the Individual Defendants that  
26 by selling these "certificates" to consumers in Arizona and representing that the "certificates"  
27 are redeemable with Plaintiff, the Individual Defendants have caused harm to Plaintiff and  
28 Defendants have received revenues from such activities. (Compl.¶22).

Plaintiff argues that the purposeful avilment prong of the specific jurisdiction  
analysis is satisfied based upon the allegation of Plaintiff's Complaint that the individual  
Defendants maintained websites in Arizona that are interactive in that Arizona consumers

1 purchase the "certificates" from the websites. See Neogen Corp. v. Neo Gen Screening, Inc.,  
2 282 F.3d 883, 890 (6<sup>th</sup> Cir. 2002) (holding that defendant purposefully availed itself of the  
3 privilege of doing business in the state by granting clients passwords to access its services  
4 on the website). Plaintiff also alleges that the "arising out of" requirement of the specific  
5 jurisdiction analysis is satisfied based upon the allegation in the Complaint that the harm to  
6 Plaintiff occurred in Arizona based upon the Individual Defendants activities in Arizona  
7 including operating websites that make false or misleading representations. Lastly, Plaintiff  
8 argues that specific jurisdiction is proper because the individual Defendants make no  
9 argument that exercising jurisdiction in Arizona would be unreasonable. See Burger King  
10 Corp v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174 (1985).

11       However, the allegations specified above are based entirely upon Plaintiff's Complaint  
12 and are not sufficient to rebut the sworn statements made in the Individual Defendants'  
13 affidavits. The Individual Defendants provide their sworn statements rebutting the  
14 allegations in Plaintiff's Complaint. The Individual Defendants state that they have no  
15 personal contacts with Arizona, such as owning property, visiting, or transacting personal  
16 business in Arizona. (Motion to Dismiss, (Dkt.#7) Exhibits A and B; Notice of Filing  
17 Original Affidavits (Dkt.#16)). Moreover, the Individual Defendants relate that, at most, the  
18 only connection they have to Arizona is through their status as owners of the Corporations  
19 named as Defendants in this matter. (Id). Defendant Quattrocchi relates that while he is an  
20 owner of the Corporations named in Plaintiff's Complaint, he has no personal involvement  
21 in Arizona. (Id., Exhibit A). Defendant Butler provides a similar affidavit stating that he is  
22 part of owner of the Corporations named in Plaintiff's Complaint, but has no personal  
23 contacts with Arizona. (Id., Exhibit B).

24       It is clear that based upon the affidavits submitted by the Individual Defendants, that  
25 personal jurisdiction does not exist over the individual Defendants based upon Plaintiff's  
26 theories set forth in its Complaint. Plaintiff's allegations in the Complaint are not sufficient  
27 to rebut the sworn affidavit statements by these Defendants. See Data Disc, 557 F.2d at 1284  
28 (noting that plaintiff cannot rest on allegations in complaint in opposition to affidavits



1 regarding personal jurisdiction and stating "[i]f only side of the conflict was supported by  
2 affidavit, our task would be relatively easy, for we may not assume the truth of allegations  
3 in a pleading which are contradicted by affidavit."). The sworn statements of the Individual  
4 Defendants convey that their involvement in Arizona was limited only to their ownership of  
5 the named Corporations. It is well settled that in such circumstances personal jurisdiction  
6 does not exist over the corporate officers as "a corporate officer who has contact with a  
7 forum only with regard to the performance of his official duties is not subject to personal  
8 jurisdiction in that forum." Travelers Cas. & Sur. Co. of America v. Telestar Constr. Co.,  
9 Inc., 252 F. Supp.2d 917, 934 (D. Ariz. 2003) (quoting Forsythe v. Overmyer, 576 F.2d 779,  
10 783-84 (9<sup>th</sup> Cir. 1978), *cert denied*, 439 U.S. 864 (1978). Also, as discussed below, Plaintiff's  
11 conclusory claim of a conspiracy existing between these Individual Defendants referenced  
12 in ¶ 231 of the Complaint is not sufficient to meet Plaintiff's burden demonstrating personal  
13 jurisdiction. See Kipperman v. McCone, 422 F. Supp 860, 873, n.14 (N.D. Cal. 1974)  
14 (stating "personal jurisdiction over any non-resident individual must be premised upon  
15 forum-related acts personally committed by the individual. Imputed conduct is a connection  
16 too tenuous to warrant the exercise of personal jurisdiction).

17 Lastly, Plaintiff's request that the Court reserve its ruling so that Plaintiff can conduct  
18 discovery to prove its theory that these Individual Defendants have sufficient personal  
19 contacts with the state of Arizona is unavailing. In certain instances, the Ninth Circuit has  
20 held that it is improper to deny a plaintiff's request for jurisdictional discovery. See Harris  
21 Rutsky & Co. Ins. Services, Inc., v. Bell & Clements, Ltd., 328 F.3d 1122, 1135 (9<sup>th</sup> Cir.  
22 2003) (holding that it was error for trial court to deny plaintiff's motion for jurisdiction  
23 discovery where further discovery may demonstrate sufficient facts to support alter ego or  
24 agency theory). However, here, Plaintiff fails to controvert any statement made in the  
25 Individual Defendants' affidavits and instead relies on the allegations of its Complaint.  
26 Moreover, in simply relying on its Complaint, it is important to note that there is not one  
27 allegation of Plaintiff's 55-page Complaint that is made expressly as to the personal conduct  
28 of the Individual Defendants in Arizona. Plaintiff also fails to provide any basis of what

1 jurisdictional discovery will reveal in requesting such relief in its briefing to the Court. It  
2 was not until the very day of the hearing that Plaintiff attempted to introduce any specific  
3 evidence against the Individual Defendants in their individual capacity in Arizona. However,  
4 as noted above, Plaintiff's declarations have been struck by the Court based upon the time  
5 that they were submitted and Plaintiff's failure to demonstrate "excusable neglect." This  
6 Court must make its determination of whether jurisdictional discovery is appropriate based  
7 upon the record before it. In doing so, it is clear that jurisdictional discovery would be  
8 wholly speculative. The record demonstrates that, at best for Plaintiff, the Individual  
9 Defendants engaged in conduct in Arizona in the capacity of officers of the named Defendant  
10 Corporate Defendants. There is no independent basis suggesting that these Individual  
11 Defendants possess any personal contacts in Arizona. In light of the unopposed specific  
12 statements set forth in the Individual Defendants' affidavits, it is apparent that there is no  
13 basis for the inquiry regarding personal jurisdiction to go forward. See Pebble Beach Co. v.  
14 Caddy, 453 F.3d 1151, 1160 (9<sup>th</sup> Cir., July 12, 2006) (affirming district court's decision to  
15 deny jurisdictional discovery and noting that "where a plaintiff's claim of personal  
16 jurisdiction appears to be both attenuated and based upon bare allegations in the face of  
17 specific denials made by the defendants, the Court need not permit even limited discovery...")  
18 (quoting Terracom v. Valley Nat. Bank, 49 F.3d 555, 562 (9<sup>th</sup> Cir. 1995); see also Carefirst  
19 of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402-03 (4<sup>th</sup> Cir. 2003) (stating  
20 that denial of jurisdictional discovery is proper where plaintiff "offers only speculation or  
21 conclusory assertions about contacts in forum state.").

22 **B. Individual Defendants' Alternative Basis for Dismissal, Failure to State a**  
23 **Claim.**

24 In addition to moving to dismiss for lack of personal jurisdiction, the Individual  
25 Defendants also contend that dismissal is appropriate based upon Plaintiff's failure to state  
26 a claim against them individually. The Individual Defendants argue that the allegations of  
27 Plaintiff's Complaint assert potential claims against them based only upon theories of "alter  
28 ego" and "conspiracy"; however, neither is sufficiently alleged to state a claim.

1 Plaintiff, on the other hand, argues that at the pleading stage, Plaintiff's Complaint  
2 against the Individual Defendants satisfactorily states a claim. Plaintiff cites ¶'s 4-7 and 231  
3 supporting Plaintiff's theory of liability against the Individual Defendants. Paragraphs 4-7  
4 allege that each of the Corporate Defendants named in the Complaint "is a business that  
5 engages in misleading and deceptive practices including selling certificates for skydives  
6 using, *inter alia*, commercial Internet websites that misrepresent the nature, characteristics,  
7 qualities, and geographic origin of its services" (Compl. ¶'s 4,5) or is a business that "engages  
8 in misleading and deceptive practices and provides resources, personnel, and/or facilities for  
9 use in connection with a common plan or scheme with the other defendants to engage in  
10 misleading and deceptive practices." (Compl. ¶'s 6,7). Plaintiff alleges that the each  
11 Corporate Defendant is "the alter ego of Defendant Cary Quattrochi and/or Defendant  
12 Butler." (Compl. ¶4-7). Additionally, ¶ 231 of Plaintiff's Complaint alleges in relevant part:

13 Defendants have engaged in a civil conspiracy with a common plan or scheme  
14 to use deceptive websites to deceive consumers and obtain money from such  
15 consumers in exchange for "certificates" that are represented to be redeemable  
16 for one or more skydives at fictitious skydiving centers. Defendants have  
17 engaged in a civil conspiracy and/or common plan or scheme to use words,  
18 terms, names, symbols, and combinations thereof, and false designations of  
19 origin, false and misleading descriptions of fact, and false and misleading  
20 representations of fact, that are likely to cause confusion, or to cause mistake,  
21 or to deceive as to affiliation, connection, or association of Defendants with  
22 another person,...

19 Plaintiff contends that "[t]hese uncontroverted allegations are sufficient to withstand  
20 a motion to dismiss for failure to state a claim." (Plaintiff's Response, p.16). However, this  
21 Court does not agree.

22 First, Plaintiff's Complaint does not sufficiently allege an alter ego theory against the  
23 Individual Defendants. As the Individual Defendants note, the law will not lightly disregard  
24 the corporate status of a defendant. See American Tel. & Tel. Co. v. Compagnie Bruxelles  
25 Lambert, 94 F.3d 586 (9<sup>th</sup> Cir. 1996). As a general matter, under Arizona law, "[t]he  
26 corporate fiction will be disregarded when the corporation is the alter ego or business conduit  
27 of a person, and when to observe the corporation would work an injustice. The alter-ego  
28 status is said to exist when there is such unity of interest and ownership that the separate

1 personalities of the corporation and owners cease to exist." Dietel v. Day, 492 P.2d 455, 457  
2 (Ariz. App. 1972). Plaintiff's Complaint, without explanation, alleges that each of the  
3 Corporate Defendants named in the Complaint are alleged to be the alter ego of the  
4 Individual Defendants. Other than these conclusory statements, Plaintiff offers no basis to  
5 suggest the existence of an alter ego relationship between the Individual Defendants and the  
6 Corporate Defendants named in the Complaint. For example, there are no allegations  
7 suggesting that the interest and ownership of the Corporate Defendants and the Individual  
8 Defendants are one in the same. In such circumstances, the Court finds that Plaintiff fails to  
9 sufficiently allege an alter ego theory against the Individual Defendants. See Hokama v. E.F.  
10 Hutton & Co., Inc., 566 F. Supp.636, 647 (C.D. Cal., 1983) (finding that plaintiff failed to  
11 state claim against individual defendant were complaint contained only conclusory allegation  
12 of alter ego status without alleging elements of doctrine); Hockey v. Medhekar, 30 F.  
13 Supp.2d 1209, 1211 n.1 (dismissing conclusory allegation at pleading stage based upon Rule  
14 12(b)(6) motion regarding alter ego theory against defendant).

15 The Court also finds that dismissal of Plaintiff's civil conspiracy theory against the  
16 Individual Defendants is appropriate as well. While alleging a civil conspiracy, Plaintiff  
17 does not identify either Individual Defendant specifically, and provides no explanation as to  
18 either Individual Defendants' role or participation in the alleged conspiracy. See Wells Fargo  
19 Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust  
20 Fund, 38 P.2d 12,36 (Ariz. 2002) (stating that for civil conspiracy to exist two or more  
21 people must agree to accomplish an unlawful purpose or to accomplish a lawful object by  
22 unlawful means). In response to these omissions, Plaintiff alleges that "discovery will  
23 demonstrate that Defendant Quattrocchi and Defendant Butler controlled and directed the  
24 wrongful acts that give rise to the claims asserted in this action." (Plaintiff's Response, p.16).

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1 However, Plaintiff provides no such specific allegations in its Complaint and this Court will  
2 not permit such a theory to go forward based upon speculation alone.<sup>1</sup>

3 **C. The Corporate Defendants' Motion to Dismiss for Failure to State a**  
4 **Claim or, in the Alternative, Motion to Strike**

5 The Corporate Defendants move to dismiss certain allegations contained in Plaintiff's  
6 Complaint. The Corporate Defendants assert that the allegations contained in paragraphs 23  
7 and 150 through 228 of Plaintiff's Complaint fail to state a claim and should be dismissed  
8 pursuant to Rule 12(b)(6) Fed.R.Civ.P. In the alternative the Corporate Defendants contend  
9 that these allegations should be struck from Plaintiff's Complaint under Rule 12(f)  
10 Fed.R.Civ.P. because the allegations are immaterial and impertinent to the pending litigation.

11 **1. Complaint Allegations at Issue**

12 Paragraph 23 of Plaintiff's Complaint alleges that the Defendants "stole copyrighted  
13 photographs from a website in Arizona that belonged to Brent Finley, a well-known  
14 skydiving videographer who is a resident of Arizona, and used the photographs on  
15 Defendants' website to falsely represent Defendants' goods and services." These photographs  
16 are alleged to include a photograph of a group of skydivers at Plaintiff's facility in Arizona;  
17 however, the Defendants represented the picture on several of their websites and represented  
18 it as a photograph of the Defendants' experienced staff of skydivers at one of its locations.  
19 (Compl. ¶ 23).

20 The allegations in ¶'s 150-181 are all nearly identical to ¶ 23. The Complaint alleges  
21 that the Defendants misrepresent their websites, which are all located outside of Arizona, by  
22 posting on the respective websites an unauthorized copyrighted picture taken by Brent  
23 Finley, the photographer from Arizona. (Compl.¶ 152-53). The Defendants allegedly took  
24 the picture from Mr. Finley's website in Arizona and reproduced it without permission by  
25

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26  
27 <sup>1</sup>In finding that dismissal is proper under Rule 12(b)(6) grounds as well, the Court will  
28 not grant Plaintiff leave to amend in light of the Court's ruling on personal jurisdiction over  
the Individual Defendants.

1 posting it on their respective websites in Green Bay, Wisconsin; Springfield, Illinois;  
2 Nashville, Tennessee; Georgia; and Atlanta, Georgia. (Compl. ¶'s 150-181).

3 Plaintiff's allegations in ¶'s 182-201 address the Defendants' conduct in unlawful use  
4 of photographs taken from a website owned and operated by a Canadian citizen, Mr. Tim  
5 Eason. (Compl. ¶182). Plaintiff alleges that Defendants copied the "text, graphics, logos,  
6 photographs, layout, and design of Mr. Eason's legitimate 'Adventure Skydiving' website."  
7 (Compl. ¶183). Plaintiff alleges that Defendants copying of Mr. Eason's webpage is used to  
8 misrepresent themselves for fictitious centers in Kansas, Arkansas, Colorado, Connecticut,  
9 Illinois, Iowa, Washington, Oregon, Ohio, North Carolina, North Dakota, Montana,  
10 Mississippi, Minnesota, Pittsburg, Trenton and St. Louis (Compl. ¶199).

11 Plaintiff's allegations in ¶'s 202-208 address Defendants' alleged fraudulent theft of  
12 a 1-800 telephone number belonging to a skydiving facility in Tennessee that was selling the  
13 facility. Plaintiff alleges that after news of Chris Martin's, the owner of the Tennessee  
14 facility, death, Defendants phoned the telephone company, AT&T, and had the Tennessee  
15 skydiving facility's 1-800 number changed so that when customers phoned the old number  
16 it would be forwarded to the Defendants' telemarketing center. (Compl. ¶206).

17 Lastly, the allegations in ¶'s 209-228 relate similar deceptive practices outside of  
18 Arizona. Specifically, Plaintiff alleges the Defendants have posted false testimonials from  
19 supposed customers regarding their experience skydiving through Defendants' facilities.  
20 Such false testimonials from the same person, Sheila Haigler, are said to have been posted  
21 on websites for the Atlanta Skydiving Center; Montana Skydiving Center; Jersey City  
22 Skydiving Center; Salt Lake Skydiving Center; Hawaii Skydiving Center; Skydive  
23 Knoxville; Skydive Birmingham/Alabama Skydiving Center; and Skydive Nashville.  
24 (Compl. ¶'s 209-219). Plaintiff also alleges that Defendant entirely misrepresent the  
25 existence of skydiving centers in certain locations, when in fact no such skydiving centers  
26 exist. (Compl. ¶220-228).

27  
28 **2. Analysis**

1 The Corporate Defendants do not challenge the claims asserted against them by  
2 Plaintiff. Rather, Plaintiff challenges only certain allegations in support of these claims and  
3 requests that they be stricken from Plaintiff's Complaint. The Court is unaware of any  
4 situation in which a Rule 12(b)(6) motion is used to strike certain allegations in support of  
5 a claim, where the underlying claim itself is not challenged. Rather, in such situations, a  
6 challenge based upon Rule 12(f) is the appropriate Rule to review and apply.

7 The issue before the Court is whether Plaintiff's Complaint is overreaching by  
8 asserting allegations that may not be related to its own claim(s) against Defendants. The  
9 Corporate Defendants make note that the allegations specified in ¶'s 23, 150 through 228 do  
10 not relate to conduct that has direct bearing on Plaintiff. For instance, in ¶ 23, the  
11 photographs that are alleged to be wrongfully used belong not to Plaintiff, but to an unrelated  
12 third party, Brent Finley. Further, in ¶'s 150-201 the pictures alleged to be wrongfully used  
13 by Defendants all relate to locations outside the state of Arizona and do not directly compete  
14 with Plaintiff in Arizona. Lastly, Plaintiff's allegations of theft and continued false  
15 representations all involve non-parties and locations outside the state of Arizona. (Compl.  
16 ¶ 202-228).

17 Despite the apparent detached relationship between these allegations and the instant  
18 suit, Plaintiff relies on the language of the Lanham Act in support of the relevancy of these  
19 allegations. Specifically, 15 U.S.C. § 1125(a) provides in pertinent part:

20 Any person who... uses in commerce any word, term, name, symbol, or device,  
21 or any other combination thereof ... which

22 (A) is likely to cause confusion, or to cause mistake, or to deceive as  
23 to the affiliation, connection, or association of such person with  
another person... or

24 (B) in commercial advertising or promotion, misrepresents the  
25 nature, characteristics, qualities, or geographic origin of his or  
her or another person's goods, services or commercial activities,

26 shall be liable in a civil action by any person who believes that he or she is or  
is likely to be damaged by such act.

27 Plaintiff relies on the language that "any person" may assert a Lanham Act action that  
28 believes he or she is likely to be damaged. Plaintiff alleges that when the Corporate

1 Defendants are successful in diverting business to themselves using deceptive trade practices,  
2 they succeed in diverting business away from Plaintiff. (Response to Corporate Defendants'  
3 Motion to Dismiss, p.4). Plaintiff also alleges that such practices by the Corporate  
4 Defendants are "damaging the skydiving industry" and causing damage to the goodwill of  
5 this industry as well as to Plaintiff. (Id.).

6 However, the Court does not read the application of the Lanham Act to apply as  
7 broadly as Plaintiff relates. If the Court were to accept Plaintiff's interpretation, any  
8 competitor within a certain industry could assert a Lanham Act claim where the competitor  
9 believed the defendant was acting unlawfully, even though that defendant's conduct was not  
10 impacting the competitor. At the very least, a Lanham Act plaintiff is required to  
11 demonstrate a realistic and identifiable injury resulting from the defendant's action. See L.S.  
12 Health & Son, Inc., v. AT&T Information Sys., 9 F.3d 561, 575 (7<sup>th</sup> Cir. 1993) (stating that  
13 to have standing to allege false advertising claim under Lanham Act, plaintiff must assert  
14 discernible competitive injury). The allegations at issue all relate to Defendants' actions  
15 against other parties and are based upon speculative resulting damages to Plaintiff. For  
16 instance, the Corporate Defendant's unauthorized use of Brent Finley's copyrighted photos  
17 and Tim Eason's website does not appear to bear any relationship to Plaintiff. (Compl. ¶'s 23,  
18 150-181, 182-201). Additionally, the false testimonials relate to skydiving sites other than  
19 Plaintiff's site. (Compl. ¶ 209-228). Plaintiff's apparent reliance on these allegations to  
20 demonstrate damage to the skydiving industry and loss of goodwill to Plaintiff does not  
21 suffice to demonstrate the relevance of such allegations. Plaintiff simply does not have  
22 standing to assert a claim for damages based upon damage to the skydiving industry overall  
23 resulting from the Corporate Defendant's alleged actions. Also, Plaintiff's argument based  
24 upon loss of goodwill to it resulting from Defendants' alleged actions involving these third  
25 parties does not suffice to demonstrate the relevance of these allegations. Plaintiff does not  
26 make one allegation that it lost sales or revenue as a result of the Corporate Defendants'  
27 actions involving these third parties. While the lessening of goodwill associated with a  
28 plaintiff's product is sufficient to support a claim for false advertising, Accumiage



1 Diagnosics Corp. v. Terarecon, Inc., 260 F. Supp.2d 941, 949 (N.D. Cal 2003), the alleged  
2 loss of goodwill must be based upon loss of goodwill to the plaintiff's product. With respect  
3 to Plaintiff's allegations involving third parties, it would be speculative for this Court to  
4 permit an inquiry of resulting damage to Plaintiff's goodwill based upon such allegations.

5 Thus, in reviewing the allegations to Plaintiff's Complaint involving Defendants'  
6 conduct with other third-parties and businesses and occurring in other jurisdictions, it is clear  
7 that such allegations are not relevant and material to the instant suit. To permit such  
8 allegations to stand would likely cause unnecessary confusion and potential prejudice against  
9 the Corporate Defendants at trial as Plaintiff would be permitted to raise issues in support of  
10 its Lanham Act claim that do not directly bear on the relationship between Plaintiff and the  
11 Corporate Defendants. As such, the Court finds that ¶'s 23, 150-181, 182-201, 202-208 and  
12 209-228 are "immaterial" and impertinent" to the pending litigation and are stricken from  
13 Plaintiff's Complaint.

14  
15 **Accordingly,**

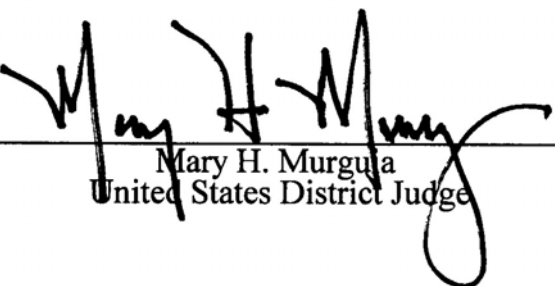
16 **IT IS HEREBY ORDERED** granting the Individual Defendant's Motion to Dismiss  
17 for Lack of Personal Jurisdiction and failure to state a claim upon which relief can be  
18 granted. (Dkt.#7). Plaintiff's claims against the Individual Defendants are dismissed without  
19 prejudice.

20 **IT IS FURTHER ORDERED** granting in part and denying in part the Corporate  
21 Defendant's Motion to Dismiss for Failure to State a Claim, or, in the Alternative, Motion to  
22 Strike Allegations of Plaintiff's Complaint. (Dkt.#9). The Corporate Defendants' Motion is  
23 denied to the extent they seek dismissal of any of Plaintiff's claims. The Corporate  
24 Defendant's Motion is granted to the extent that they move to strike ¶'s 23 and 150 through  
25 228 of Plaintiff's Complaint.

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27 **IT IS FURTHER ORDERED** directing the Clerk of the Court to strike ¶'s 23 and  
28 150 through 228 from Plaintiff's Complaint.

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DATED this 22<sup>nd</sup> day of August, 2006.



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Mary H. Murgula  
United States District Judge