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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LIONS GATE ENTERTAINMENT)	Case No. CV 15-05024 DDP (Ex)
INC., a Delaware)	
corporation,)	ORDER DENYING IN PART AND
)	GRANTING IN PART DEFENDANTS'
Plaintiff,)	MOTION TO DISMISS
)	
v.)	[Dkt. No. 49]
)	
TD AMERITRADE SERVICES)	
COMPANY, INC., a Delaware)	
corporation; TD AMERITRADE,)	
INC., a New York)	
corporation; AMERIVEST)	
INVESTMENT MANAGEMENT, LLC,)	
a Delaware limited liability)	
company; HAVAS WORLDWIDE NEW)	
YORK, INC., a Delaware)	
corporation,)	
)	
Defendants.)	
_____)	

Presently before the Court is the Motion to Dismiss of Defendants TD Ameritrade Services Company, TD Ameritrade, Inc., Amerivest Investment Management, LLC, and Havas Worldwide New York, Inc. (collectively, "Defendants"). (Dkt. No. 49.) After considering the parties' submissions and hearing oral argument, the Court adopts the following Order.

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1 **I. BACKGROUND**

2 This copyright and trademark infringement case arises from
3 Plaintiff Lions Gate Entertainment, Inc.'s intellectual property
4 rights in the movie *Dirty Dancing* that Plaintiff alleges Defendants
5 infringed. (First Am. Compl. ("FAC") ¶¶ 15, 22, 32.)

6 Plaintiff Lions Gate is a "global entertainment company" that
7 produces, distributes, finances, licenses, and performs other
8 related activities for movies and television shows. (Id. ¶¶ 15-
9 16.) *Dirty Dancing* "is a world famous, Oscar-winning film, which
10 was released in 1987 and became a massive box office hit, with
11 hundreds of millions of dollars in worldwide earnings reported."
12 (Id. ¶ 17.) Many scenes and lines from the film are particularly
13 well-known. (Id.) The FAC notes in particular the line "Nobody
14 puts Baby in a corner," said by Patrick Swayze to Jennifer Grey in
15 the final climactic scene of the film. (Id. ¶ 21.) The line is
16 followed by the final dance between the two main characters,
17 culminating with Swayze lifting Grey over his head (the "dance
18 lift"). (Id.)

19 Lions Gate claims to own "all right, title and interest in,
20 and . . . the copyright in," the film. (Id. ¶ 22.) Lions Gate
21 also claims to own common-law trademark rights in DIRTY DANCING and
22 NOBODY PUTS BABY IN A CORNER, the latter mark being one associated
23 with *Dirty Dancing* the movie and both of which are used in motion
24 pictures, various items of merchandise, and other adaptations of
25 the film. (Id. ¶ 18-19, 23-24.) Lions Gate also claims to have
26 registered the trademark DIRTY DANCING and to have applied for
27 trademark registration in NOBODY PUTS BABY IN A CORNER. (Id. ¶
28 24.) The latter trademark registration is "based on actual use of

1 the mark for certain goods and on an intent to use the mark for the
2 remaining goods identified in the applications." (Id.) Plaintiff
3 claims that it has licensed the marks DIRTY DANCING and NOBODY PUTS
4 BABY IN A CORNER for the "manufacturing, marketing, and sale of a
5 variety of merchandise through approved licensees." (Id. ¶ 26.)
6 Further, Plaintiff claims that it "licenses elements from *Dirty*
7 *Dancing* to third parties, who use *Dirty Dancing* to advertise,
8 market, or promote their goods and services." (Id.) Plaintiff
9 claims that the trademarks have secondary meaning and are famous,
10 as well as are associated with goodwill and quality, creating high
11 value in the marks for Plaintiff and its licensees. (Id. ¶¶ 28-
12 29.)

13 Defendants TD Ameritrade, TD Ameritrade Services, and
14 Amerivest (collectively, "TD Defendants") are related financial
15 services organizations. (Id. ¶¶ 4-8.) Havas Worldwide New York
16 ("Havas New York") is an advertising agency that was hired in 2014
17 to create a national advertising campaign for the TD Defendants.
18 (Id. ¶¶ 30-31.) The advertisements consisted of online videos,
19 digital displays, social media, email, television, and print ads.
20 (Id.) According to Plaintiff's FAC, "[t]he Advertising Campaign
21 was generally published and displayed in California and was
22 directly distributed to California residents, in accordance with
23 Defendants' plans and intentions." (Id. ¶ 31.) Further,
24 "[a]pproximately 20% of TD Ameritrade's nationwide branch offices
25 are in California" and "[e]mails sent as part of the Advertising
26 Campaign included in their fine print a link to TD Ameritrade's
27 online privacy statement, which includes information expressly
28 directed to email recipients that reside in California." (Id.)

1 Plaintiff claims that the advertising campaign "intentionally
2 copied the *Dirty Dancing* motion picture, and was intentionally
3 designed to create an association with Lions Gate and its
4 commercial activities by marketing TD Ameritrade's goods and
5 services with phrases" that modified the NOBODY PUTS BABY IN A
6 CORNER trademark and quote from *Dirty Dancing*, as well as the
7 signature dance lift. (Id. ¶¶ 32-34.) Essentially, the main line
8 of the advertisement campaign is: "Nobody puts your old 401k in a
9 corner," with an encouragement to enroll in the TD Defendants' IRA
10 plans. (Id. ¶ 32.) The advertisements often included images to
11 conjure up *Dirty Dancing*, such as "a still and/or moving image of a
12 man lifting a piggy bank over his head after the piggy bank ran
13 into the man's arms." (Id. ¶ 34.) Some versions of the
14 advertisements invoked the song, "(I've Had) the Time of My Life,"
15 which played during the final dance scene in the movie, with lines
16 like "[b]ecause retirement should be the time of your life." (Id.)
17 Plaintiff claims that all these uses render consumer confusion
18 likely to occur. (Id. ¶¶ 35-36.)

19 Plaintiff claims that the advertising campaign ran from
20 October 2014 to April 12, 2015, as Plaintiff contacted the TD
21 Defendants about the campaign in April after Plaintiff learned of
22 it. (Id. ¶¶ 37-38.) Havas New York responded to the cease and
23 desist letter on behalf of itself and the TD Defendants, claiming
24 that Plaintiff had no enforceable trademark rights and that
25 Defendants were making a parody. (Id. ¶ 39.) Shortly after an
26 exchange of letters regarding the advertising campaign, Defendants
27 ceased the campaign, but still refused to pay Plaintiff for their
28 alleged infringing use. (Id. ¶ 41.)

1 The parties continued communicating about settlement of
2 Plaintiff's potential claims, with Plaintiff stating in June 2015
3 that if settlement discussions did not engage in earnest, it would
4 file a lawsuit in the Central District of California. (Id. ¶ 42-
5 44.) After the parties failed to settle, Defendants filed a
6 declaratory judgment suit in the Southern District of New York.
7 (Id. ¶¶ 45-47.) Plaintiff filed a motion to transfer venue in the
8 New York case and also filed its own suit in the Central District
9 of California. (Id. ¶ 49; see also Compl., dkt. no. 1.) On
10 September 29, 2015, the New York federal court granted the motion
11 to transfer; shortly thereafter, Defendants voluntarily dismissed
12 their claims in the New York suit. (FAC ¶¶ 49-50.) Now,
13 Defendants have filed a Motion to Dismiss for (1) lack of personal
14 jurisdiction over Havas New York; and (2) Copyright Act preemption.

15 **II. LEGAL STANDARD**

16 **A. Motion to Dismiss Under Rule 12(b)(2)**

17 Federal Rule of Civil Procedure 12(b)(2) provides that a court
18 may dismiss a suit for lack of personal jurisdiction. The
19 plaintiff has the burden of establishing that jurisdiction exists,
20 but need only make "a prima facie showing of jurisdictional facts
21 to withstand the motion to dismiss." Pebble Beach Co. v. Caddy,
22 453 F.3d 1151, 1154 (9th Cir. 2006). "[U]ncontroverted allegations
23 in [the plaintiff's] complaint must be taken as true, and conflicts
24 between the facts contained in the parties' affidavits must be
25 resolved in [the plaintiff's] favor." Rio Props., Inc. v. Rio
26 Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002).

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