UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-160-GW(FFMx)	Date	September 18, 2012
Title	*Nexon America, Inc., et al. v. Ryan Michael Cornwall, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS (IN CHAMBERS): **ORDER DENYING MOTION TO DISMISS FOR FAILURE TO JOIN A PARTY AND DENYING MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OR TO CHANGE VENUE**

I. Background

Plaintiffs Nexon America and Nexon Korea Corporation (collectively "Plaintiffs") have filed suit against Defendants Ryan Cornwall, Yang Zhou, Douglas Crane, William Keister, Amarjot Gill, Derek Osgood, Colin Johnson, Linda Liu, Jeremy Simpson, and V.H. (Vince) (collectively "Defendants") alleging copyright infringement, inducement to infringe copyrights, contributory copyright infringement, vicarious copyright infringement, trafficking in circum-vention devices, unlawful circumvention, breach of contract, intentional interference with contractual relations, violation of the computer fraud and abuse. *See generally* First Amended Complaint ("FAC"), Docket No. 14.

Plaintiffs are the copyright holders to the computer game "MapleStory." FAC ¶ 11. MapleStory is an online computer multi-player, role-playing game that enables players to create and develop fictional characters and to interact with other players online. FAC ¶ 2. The game is available for free download, and players may purchase "virtual goods" (such as clothing) for their characters. FAC ¶ 27.

Plaintiffs allege that Defendants collectively own, operate and administer the GamerSoul website. FAC ¶ 51. GamerSoul is a website that allegedly develops, distributes, and sells software products (often called "hacks" or "cheats") designed to alter or modify MapleStory. FAC ¶ 52. A popular hack allegedly offered on GamerSoul, for example, allows players to quickly advance their characters and collect virtual items for their characters without actually having to play the game. FAC ¶ 54. GamerSoul also consists of a number of message boards which players use to share and discuss software hacks and cheats. FAC ¶ 57. Plaintiffs claim that Defendants have copied and adapted MapleStory to create their hacks and created derivative works in modifying the MapleStory game. FAC ¶¶ 59-61.

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Plaintiffs allege that Defendant Douglas Crane ("Defendant" or "Crane"), a Massachu-setts resident, is one of the primary administrators and operators of GamerSoul. FAC ¶ 15. Plaintiffs further aver that Crane has been selling GamerSoul's software and has been involved in marketing these products. Id.

Currently before the Court is Defendant Crane's Motion to Dismiss for Failure to Join a Party and Motion to Dismiss for Lack of Personal Jurisdiction or to Change Venue, which he filed pro se. Docket Nos. 35, 36. On June 14, 2012, these motions were originally set for a July 17th hearing by the Honorable Ronald Lew (Docket No. 38), but later taken under submission without oral argument by Judge Lew on June 29, 2012 (Docket No. 47). On August 31, 2012, this case was assigned to the Honorable George H. Wu. Docket No. 65.

II. The Motion to Dismiss for Failure to Join a Party

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(7) allows a defendant to bring a motion to dismiss based on a plaintiff's failure to join a party under Federal Rule of Civil Procedure 19 ("Rule 19"). The moving party has the burden of persuasion in arguing for dismissal. *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992).

Rule 19 provides for a two-step analysis to determine whether a party should or must be joined. *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985) (discus-sing the difference between a "necessary" party and an "indispensable" party).[1] First, Rule 19(a)(1) delineates who is considered a "required" party and states that a person who will not destroy subject matter jurisdiction must be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

[1] As noted in Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trail* § 7:55 at 7-27 (the Rutter Group 2011) ("*Schwarzer/Tashima*"):

> Rule 19 no longer uses either 'necessary' or 'indispensable' to determine those who should or must be joined under the terms of the rule. [See Comments to 2007 Amendment to Rule 19]. Nevertheless, these labels remain terms of art used by courts and commentators as a convenient shorthand for the analysis . . . . *E.E.O.C. v. Peabody Western Coal Co.*, (9th Cir. 2010) 610, F.3d 1070, 1078, fn. 1.

> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If a party is deemed "required," (that is, "necessary") the court must then determine whether the party is "indispensable" under Rule 19(b) before granting a motion to dismiss under Rule 12(b)(7). *Takeda*, 765 F.2d at 819. "'Necessary' refers to a party who *should* be joined *if feasible*. 'Indispensable' refers to a party whose participation is so important to the resolution of the case that, if not joined, the *suit must be dismissed*. [*Disabled Rights Action Comm. v. Las Vegas Events, Inc.* (9th Cir. 2004) 375 F.3d 861, 867, fn.5 . . . ." *Schwarzer/Tashima* § 7-55 at 7:27 (emphasis in original).

B. Discussion and Analysis

Defendant Crane contends that the following non-parties are required and indispensable to the suit: (1) the owners and operators of HackShield technology, Plaintiffs' anti-hacking software provider, and (2) the "other website communities, forums, developers, and coders" who have allegedly engaged in similar infringing activity as Defendants. FAC ¶ 34; Docket No. 36 ¶¶ 1-2. The Court finds that Defendant Crane has not met his burden of persuasion in demonstra-ting that either the owners/operators of HackShield or the "other website communities, developers and coders" are "required parties" under either of the two categories in Rule 19(a)(1).

HackShield's absence would not prevent "complete relief" among the existing parties as required under Rule 19(a)(1)(A). Under Rule 19, the moving party must support any argument with facts. *See Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 628 (5th Cir. 2009) (noting that courts can only evaluate a joinder claim after an "appraisal of the facts"). At best, Defendant provides a merely speculative argument. In his reply brief, Defendant asserts that he does not have the technical know-how to engage in the conduct Plaintiffs allege, and implies that non-party HackShield is the entity hacking MapleStory. Docket No. 49 at 2. Pure speculation does not overcome Rule 19's burden.

Plaintiffs allege that Defendant's actions, through his website GameSoul, are "disrupt[ing]" and "destroy[ing]" Plaintiffs' "immensely" successful online game MapleStory. FAC ¶ 2-3. Plaintiffs have not alleged and no proof has been proffered that the actions of HackShield affect Defendant's potential liability. Furthermore, other district courts have not required that third-parties who create security technologies, be joined as plaintiffs. *See, e.g., Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 927-30 (N.D. Cal. 2009); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

Rule 19(a)(1)(B) requires that an entity must assert "an interest relating to the subject of the action" to be a necessary party. *See United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (the "required" party must assert an interest in the claim). Here, the owners and operators of HackShield

technology have not claimed any interest in this lawsuit, and they are therefore not necessary.

In sum, Defendant Crane has failed to demonstrate that either of the two factors of Rule 19(a)(1) apply here such that HackShield or its owners/operators would qualify as even "necessary" parties. Thus, no further inquiry as to whether they are "indispensable" or otherwise "required" under Rule 19(b) is needed. *See Temple v. Synthes Corp.*, 498 U.S. 5, 8 (1990). With respect to the individuals who have provided similar hacking software, the Court finds that they are also not "required" parties under either factors of Rule 19(a)(1). First, under Rule 19(a)(1)(A), "complete relief" can be accorded to the existing parties without joining these other infringers as defendants. Copyright infringers are treated collectively as joint-tortfeasors, and as such, plaintiffs may elect to sue whichever tortfeasor they elect to sue. *Costello Publ'g Co. v. Rotelle*, 670 F.2d 1035, 1043 (D.C. Cir. 1981). Plaintiffs are seeking injunctive and monetary relief for Defendant Crane's own copyright infringement. Plaintiffs are not required to join all possible infringers in the same action to afford complete relief here. Vague assertions that others have also infringed will not allow Defendant to escape from defending his own actions. Second, these other infringers are also not required parties under Rule 19(a)(1)(B). They have not claimed any interest in the present lawsuit. Therefore, they are not necessary parties under either prong of Rule 19(a)(1).

III. Motion to Dismiss for Lack of Personal Jurisdiction or to Change Venue

A. Discussion and Analysis

1. Defendant has waived the defenses of personal jurisdiction and venue.

Under Rule 12(h)(1), a party waives the defenses of lack of personal jurisdiction and improper venue by failing to include them in a responsive pleading or in a pre-answer motion under Rule 12(b). Fed. R. Civ. P. 12(h)(1); *see also S.E.C. v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1337 (9th Cir. 1994).

First, Defendant Crane waived venue because his Answer admits that venue is proper in this District. Answer to Amended Complaint ¶ 8 ("Answer"), Docket No. 16; FAC ¶ 8.

Second, it is unclear whether Defendant Crane waived personal jurisdiction in his Answer. The Answer denies paragraph 7 of Plaintiffs' Complaint, which claims that there is jurisdiction over Defendants and that Defendants have infringed Plaintiffs' copyright, but the Answer does not appear to be asserting lack of personal jurisdiction as a defense. Answer ¶ 7; FAC ¶ 7. Defendant Crane's Answer raises various defenses, including waiver and estoppel, but does not raise improper venue or lack of personal jurisdiction. Answer ¶¶ 141-47.

Despite the Answer's ambiguity, Defendant Crane's subsequent conduct waived the defenses of personal jurisdiction and venue. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998) ("Most defenses, including the defense of lack of personal jurisdiction, may be waived as a result of the course of conduct pursued by a party during litigation."). Defendant Crane participated in a Rule 26 conference and filed a Rule 26(f) Discovery Plan on May 24, 2012, a month after he filed his Answer. He also continued to participate in the case for several months after his Answer without making any

objections to venue or personal jurisdiction. Therefore, the Court finds that Defendant Crane has waived lack of personal jurisdiction and venue as defenses.

2. Specific Jurisdiction

Leaving waiver aside, the Court has specific jurisdiction over Defendant. Specific jurisdiction exists if (1) the defendant has purposefully availed himself of the privilege of conducting activities in the forum by some affirmative act or conduct; (2) the plaintiff's claim arises out of, or results from, the defendant's forum-related contacts; and (3) the extension of jurisdiction is "reasonable." *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991). To defeat a motion to dismiss, the plaintiff need only make a prima facie showing of jurisdictional facts. *In re Pintlar Corp.*, 133 F.3d 1141, 1144 (9th Cir. 1997). The plaintiff need only allege facts which, if true, would support a finding of jurisdiction. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995).

a) Defendant Purposefully Availed Himself of the California Market

As to the test's first prong, "purposeful availment analysis examines whether the defendant's contacts with the forum are attributable to his own actions or are solely the actions of the plaintiff." *Sinatra v. Nat'l Enquirer*, 854 F.2d 1191, 1195 (9th Cir. 1988). To show purposeful availment, a plaintiff must show that the defendant "engage[d] in some form of affirmative conduct allowing or promoting the transaction of business within the forum state." *Gray & Co. v. Firstenberg Machinery Co.*, 913 F.2d 758, 760 (9th Cir. 1990).

In the internet context, "the Ninth Circuit utilizes a sliding scale analysis under which 'passive' websites do not create sufficient contacts to establish purposeful availment, whereas interactive websites may create sufficient contacts, depending on how interactive the website is." *Allstar Marketing Group, LLC v. Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1121 (C.D. Cal. 2009); *see also Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079-80 (9th Cir. 2003) (citing the "sliding scale" test as a test "that both our own and other circuits have applied to Internet-based companies.").

Plaintiffs allege that Defendants engaged in the development, sale, and distribution of software hacks and cheats in California. FAC ¶¶ 12, 52. Specifically, Plaintiffs allege that Defendant Crane was a chief administrator of the website, that he oversaw the sale of the products, and was involved in marketing and distributing the products. FAC ¶ 15. Plaintiffs assert more specifically that Defendant Crane collected revenue generated by the GamerSoul products: GamerSoul hack users submitted payment to a third-party payment service maintained by Defendant Crane. Declaration of Marc E. Mayer ¶ 12. Plaintiffs allege that between 10% and 25% of the sales from GamerSoul come from California customers. Id. ¶¶ 15-16. Defendant Crane allegedly distributed these revenues to the other GamerSoul operators. Id. Defendant Crane offers nothing to rebut Plaintiffs' allegations that he participated in these infringing sales in California. As such, the Court accepts Plaintiffs' allegations as true for the purposes of this motion. *See Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001)

("Where not directly controverted, plaintiff's version of the facts is taken as true for the purposes of a 12(b)(2) motion to dismiss.").

In sum, the Court concludes that by operating a highly commercial website through which Defendant made regular sales of allegedly infringing software to customers in this state, Defen-dant Crane, through the GamerSoul website, purposefully availed himself of the benefits of doing business in California, such that he should reasonably anticipate being hauled into court here in a lawsuit arising from that activity. *See Stomp, Inc. v. NeatO*, LLC, 61 F. Supp. 2d 1074, 1978 (C.D. Cal. 1999) (finding purposeful availment where NeatO's website allowed California consumers to purchase NeatO's products over the Internet); *Washington v. www.dirtcheapcig. com, Inc*., 260 F. Supp. 2d 1048, 1052 (W.D. Wash. 2003) ("Dirtcheap's sales of cigarettes to Washington residents through its interactive website constitutes purposeful availment . . . . [I]t is well settled that a non-resident's maintenance of an interactive website through which consumers may purchase goods or services is sufficient to meet this element.")

b) Plaintiffs' Claims Arise Out of Defendant Crane's Contacts

Next, the Court must consider whether Plaintiffs' claims arise out of Defendant Crane's forum-related activities. A lawsuit arises out of a defendant's contacts with a forum state if there is a direct nexus between the cause of action being asserted and the defendant's activities in the forum. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991). The Ninth Circuit follows a "but for test" in determining whether an action arises out of the defendant's contacts with the forum state. *Ballard*, 65 F.3d at 1500.

Here, Defendant Crane's contacts with the forum include the advertisement, distribution, and sale of allegedly infringing products to consumers in this state. These contacts are sufficient to satisfy the arising out of requirement given that "but for" the sale of products to California citizens, Plaintiffs would not have been injured. *Allstar*, 666 F. Supp. 2d at 1123 (finding that lawsuit would not have occurred "but for" defendant's interactive website and direct sales to California customers); *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1021 (9th Cir. 2002) ("[T]his requirement was satisfied where [defendant's misappropriation] of [plaintiff's] trademark had the effect of injuring [plaintiff] in California.").

c) Exercising Jurisdiction is Reasonable

The final prong of the jurisdictional test examines whether it is reasonable to subject a defendant to suit in the forum state. Since the first two prongs have been satisfied, the burden now shifts to Defendant Crane "to 'present a compelling case that the exercise of jurisdiction would not be reasonable." *Ballard*, 65 F.3d at 1498. Defendant Crane has not met this burden, as he merely states conclusorily: "Any travel to California in connection with this lawsuit would be a significant burden for

many reasons including his medical ability to do so . . . ." Docket No. 35 at 3.

Reasonableness is assessed by the following factors: (1) the extent of the defendants' purposeful interjection into the forum; (2) the burden on the defendant in litigating in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993).

The Ninth Circuit has held that the first factor "parallels the question of minimum contacts" in determining the reasonableness of exercising specific jurisdiction. *Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc.*, 1 F.3d 848, 852 (9th Cir. 1993); *Roth*, 942 F.2d at 623 ("In light of the first prong of purposeful availment, analysis of this first factor in the third prong would be redundant"). As such, because Defendant Crane purposefully availed himself on California by serving as an administrator of GamerSoul, this Court also concludes that he purposefully interjected himself on California, supporting a finding of reasonableness.

The second factor, the burden on a defendant in litigating in the forum, must be examined in light of the corresponding burden on a plaintiff. *Sinatra*, 854 F.2d at 1199. Defendant Crane argues generally that travel to California would pose a significant burden because he has an unidentified medical disability. He offers no further information about his unnamed medical condition, and does not explain why it makes travel difficult. Docket No. 35 at 3. Requiring interstate travel is not unduly burdensome, *see Panavision*, 141 F.3d at 1323, and Defendant Crane has not provided enough information to make an exception to this general rule. Further, given the present state of technology (*e.g.* video conferencing, videotaping of depositions, *etc.*), it would not be difficult nor particularly burdensome for Defendant Crane to remain in his home state for medical reasons and still litigate this case in California.

The third factor involves evaluating the extent of any conflict with the sovereignty of Defendant Crane's home state. Here, Defendant Crane is a citizen of Massachusetts rather than a foreign nation. As such, "[a]ny conflicting sovereignty interests [can be] accommodated through choice-of-law rules." *Nissan Motor Co. Ltd. v. Nissan Computer Corp*., 89 F. Supp. 2d 1154, 1161 (C.D. Cal. 2000) (citing *Gray & Co.*, 913 F.2d at 761. As a consequence, this factor is of little importance in the Court's determination of reasonableness.

The fourth factor considers California's interest in adjudicating the controversy. Many courts have noted that states frequently have a "manifest interest in providing effective means of redress for its residents." *McGee v. Intn'l Life Ins. Co.*, 355 U.S. 220, 221 (1957). When Plaintiffs brought this case, Plaintiff Nexon America had its principal place of business in California and was a citizen of the state. As such, because California maintains a strong interest in redressing the injury of its resident/citizen, this factor weighs in favor of Plaintiff. *See Panavision*, 141 F.3d at 1323 (plaintiff's in-state principal place of business weighed in favor of exercising jurisdiction).

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The fifth factor - the most efficient judicial resolution of the controversy - primarily focuses on the location of the evidence and the witnesses. *Core-Vent Corp*., 11 F.3d at 1489. Plaintiffs' witnesses and business records are in California. Docket No. 42 at 25: 4-7. California is the only state where more than one Defendant resides. FAC ¶¶ 13-24. Defendant Ryan Cornwall, for example, has not contested personal jurisdiction or venue. Docket No. 42 at 23: 16-17. It would be contrary to the principles of judicial economy to have a separate proceeding in Massachusetts in order to accommodate Defendant Crane. Accordingly, this factor weighs in favor of Plaintiffs.

The sixth factor is the importance of the forum to a plaintiff's interest in convenient and effective relief. Here, Plaintiffs' evidence and witnesses are in California. Further Plaintiffs filed this action six months ago, and a transfer of this action would further delay any possible relief for Plaintiffs. This factor therefore tips in favor of Plaintiffs.

For the final factor - the availability of an alternative forum - a plaintiff "must carry the burden of proving the unavailability of an alternative forum." *Pacific Alt. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1331 (9th Cir. 1985). However, "this factor is significant only if other factors weigh against an exercise of jurisdiction," *Grokster*, 243 F. Supp. 2d at 1094, which is not the case here.

In sum, because all three requirements - purposeful availment, arising out of, and reasonableness - weigh in favor of a finding of specific jurisdiction, this Court concludes that it is appropriate to exercise personal jurisdiction over Defendant Crane.

IV. Conclusion

For the reasons stated above, the Court DENIES Defendant Crane's Motion to Dismiss Based on Failure to Join a Party and DENIES his Motion to Dismiss for Lack of Personal Jurisdiction or to Change Venue.

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