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8 Nexon America, Inc. and NEXON Korea
9 Corporation

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

13 NEXON AMERICA, INC., a Delaware
corporation, and NEXON KOREA
14 CORPORATION, a Korean
corporation,

15 Plaintiffs,

16 v.

17 GAMEANARCHY, LLC, a Georgia
Limited Liability Company, DAVID
18 ALLEN BAKER, a/k/a "Drunken
Cheetah," an individual, and DOES 1
19 through 10,

20 Defendants.

Case No. CV12-02083 MWF (PLAx)

Honorable Michael W. Fitzgerald

**OPPOSITION OF PLAINTIFFS TO
MOTION OF DEFENDANT DAVID
ALLEN BAKER TO DISMISS ON
THE GROUND OF LACHES;
DECLARATION OF BRADLEY
MULLINS IN SUPPORT**

Date: December 3, 2012
Time: 10:00 a.m.

1 **Introduction**

2 The Motion of Defendant David Baker to dismiss on the basis of laches is in
3 fact a procedurally improper and incomplete motion for summary judgment, seeking
4 dismissal as a matter of law on highly factual issues pertaining to his affirmative
5 defense of laches. Regardless of how the motion is styled, and even putting aside
6 the procedural defects, Baker offers nothing (either by way of evidence or legal
7 authority) that possibly could support his purported “laches” defense. Indeed,
8 Baker’s motion is completely devoid of *any* evidence (far less admissible or
9 undisputed evidence) to support either element of the laches defense (unreasonable
10 delay and prejudice). This also warrants denial of the motion. Moreover, the single
11 piece of evidence that Baker has submitted (without any foundation) directly
12 *contradicts* his claim of delay and plainly establishes not only that Nexon filed this
13 lawsuit diligently, but that Baker acted willfully by continuing to infringe Nexon’s
14 rights *after* being warned of the consequences of doing do.

15 The background facts (omitted from Baker’s motion) are straightforward.
16 Nexon America, Inc. and NEXON Korea Corporation (collectively, “Nexon”) own
17 or administer all rights, including the copyright, in the popular online computer
18 game titled “Combat Arms.” Defendants developed, own, distribute, and promote a
19 software product and service known as “Game Anarchy.” For a monthly fee, Game
20 Anarchy enables members of the public to install and use a variety of “hacks” that
21 allow them to cheat in Combat Arms. Because Combat Arms is a multiplayer
22 online game, the use of cheats enabled by Game Anarchy destroys the game by
23 unbalancing the playing field and giving certain participants unfair advantages over
24 others. Game Anarchy has caused severe harm to Nexon, including by devaluing
25 Combat Arms and by causing users to grow frustrated and quit the game, thereby
26 depriving Nexon of its basic revenue from the sale of “add-ons” and enhancements.

27 On March 12, 2012, Nexon filed this lawsuit, asserting, *inter alia*, claims for
28 violation of the DMCA’s anti-circumvention provisions (Section 1201), copyright

1 infringement, breach of contract, and intentional interference with contract.
2 Defendants answered the Complaint on April 4, 2012. On October 11, 2012,
3 Defendants' counsel withdrew from the case, and Baker has elected to proceed in
4 *pro per*. (The corporate defendant is unrepresented). Now, one week after counsel
5 withdrew and months after filing his answer, Baker has filed two motions to
6 dismiss, including this Motion and a motion to dismiss for lack of standing and
7 failure to join an indispensable party. Baker did not advise Nexon of his intention to
8 file either motion, as he was required to do pursuant to Local Rule 7-3. Nexon has
9 advised Baker of his obligation to do so, and he has elected to proceed with his
10 motions nevertheless.

11 Baker's strategy seems to be to bombard Nexon and the Court with a
12 scattershot of motions cribbed from documents he finds on the Internet. While
13 Baker's standing motion was taken from a brief filed 12 years ago in another
14 DMCA anti-circumvention case, this time Baker has copied-and-pasted the entire
15 text of the recent Ninth Circuit decision Evergreen Safety Council v. RSA Network,
16 Inc., --- F.3d ---, No. 11-35680, 2012 WL 4902830 (9th Cir. Oct. 17, 2012). That
17 case (an appeal from a summary judgment decision) is so different from the instant
18 case that it actually confirms the inapplicability of the laches defense here.
19 Evergreen involved a plaintiff that "slept on its rights" for more than 10 years,
20 during which time the corporate executive had died and all relevant documents had
21 been destroyed. No such evidence is present here. To the contrary, it is undisputed
22 that Nexon promptly advised Baker of its claims and asserted its claims well within
23 the three-year limitations period.

24 The laches defense does not apply here, and Baker's motion should be denied.
25
26
27

1 **I. BAKER’S MOTION IS PROCEDURALLY IMPROPER AND**
2 **WITHOUT EVIDENTIARY BASIS.**

3 Baker’s Motion initially should be denied because it is procedurally improper
4 and lacks even the most basic evidentiary foundation. Baker’s motion is not a
5 proper motion to dismiss, but rather appears to be an improper motion for summary
6 judgment, relying entirely on unsupported factual assertions and purported evidence
7 outside the scope of the pleadings. Moreover, Baker has not made any effort to
8 identify *any* undisputed factual basis for the motion – far less presented a statement
9 of such undisputed facts and their evidentiary basis as required by the Local Rules.
10 Accordingly, the Court cannot treat the Motion as a motion for summary judgment
11 and the motion should be denied on this basis.

12 Moreover, even affording Baker every procedural benefit as a *pro se*
13 defendant, his motion does not contain a single piece of evidence to support his
14 defense. Even though Baker bears the burden of proving his affirmative defense, he
15 has not attached any documentary evidence to his Motion. Nor has he provided any
16 testimony (far less credible testimony) from any person or entity pertaining to the
17 purported conduct at issue in the Motion. Indeed, the *only* document that Baker has
18 attached to his motion is a printout of a 2009 e-mail sent from Nexon to Defendants’
19 Internet Service Provider. Even this letter was submitted without any foundation or
20 context, and is wholly inadmissible. It also does not support any claims made by
21 Baker. To the contrary, the e-mail confirms that Nexon first learned of Game
22 Anarchy in 2009, less than three years prior to this lawsuit – *not* “4+ years,” as
23 Baker claims. Perhaps more critically, this document reflects that Baker had full
24 and adequate notice that he might be liable for his conduct and that he might be sued
25 by Nexon, but persisted in his infringing conduct.

26 Baker’s failure to supply any evidence in support of his affirmative defense
27 (on which he bears the burden) alone mandates denial of his motion, and the Court
28 need go no further. Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)

1 (affirming denial of summary judgment on affirmative defense where defendant
2 failed to “come forward with evidence which would entitle it to a directed verdict if
3 the evidence went uncontroverted at trial.” (citation omitted)).

4
5 **II. THERE IS NO BASIS FOR DISMISSAL ON THE BASIS OF LACHES.**

6
7 “Laches is an equitable time limitation on a party’s right to bring suit, resting
8 on the maxim that one who seeks the help of a court of equity must not sleep on his
9 rights.” Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 (9th Cir.
10 2002) (quotation and citation omitted). “To demonstrate laches, the defendant must
11 prove both an unreasonable delay by the plaintiff and prejudice to itself.” Danjaq
12 LLC v. Sony Corp., 263 F.3d 942, 951 (9th Cir. 2001) (quotation and citation
13 omitted). Baker cannot prove, and indeed, has not even attempted to prove, either
14 prong of the laches defense.

15 **A. Unreasonable Delay.**

16 “Generally speaking, the relevant delay is the period from when the plaintiff
17 knew (or should have known) of the allegedly infringing conduct, until the initiation
18 of the lawsuit in which the defendant seeks to counterpose the laches defense.”
19 Jacobsen v. Deseret Book Co., 287 F.3d 936, 949 (10th Cir. 2002). Baker’s only
20 argument for unreasonable delay is his claim, purportedly supported by his Exhibit
21 A, that “Nexon first voiced objections to Game Anarchy as early as 2008 – 4 years
22 before bringing this action.” Motion at 3. Baker’s claim actually is contradicted by
23 his Exhibit A, which reflects that Nexon learned of his website in **2009** – less than
24 **three years** before filing this lawsuit.

25 Since the statute of limitations for copyright infringement claims is three
26 years, the fact that Baker cannot identify a delay longer than the limitations period
27 alone disposes of his laches claim. “[T]here is a strong presumption that a plaintiff’s
28 suit is timely if it is filed before the statute of limitations has run. Only in the most

1 extraordinary circumstances will laches be recognized as a defense.” Peter Letterese
2 and Assocs., Inc. v. World Inst. of Scientology Enters., 533 F.3d 1287, 1320 (11th
3 Cir. 2008). No “extraordinary circumstances” are present here. See Home Design
4 Servs., Inc. v. Stewart, No. 3:09cv140-MCR/MD, 2011 WL 796741, at *5 (N.D.
5 Fla. Feb. 28, 2011) (“No evidence has been adduced, however, to substantiate a
6 claim that [plaintiff] knew of the alleged infringement as early as 1995. Because
7 this is the only argument advanced on this issue and there is no evidence in the
8 record to support it, this case does not involve extraordinary circumstances that
9 would avoid the presumption that the suit is timely if it is found to have been filed
10 within the statute of limitations.”).

11 In any event, Baker’s claim that the statute of limitations would have run
12 three years after learning of the infringement is wrong. Baker admits his conduct
13 has continued until this day, and that he refused to cease his infringing conduct even
14 *after* this lawsuit was filed. Claims for copyright infringement start anew upon each
15 act of infringement, including each time Game Anarchy distributed or sold its
16 infringing software product. See Chirco v. Crosswinds Communities, Inc., 474 F.
17 3d 227, 234 (6th Cir. 2007) (“The parties do not dispute that the statute of
18 limitations for a copyright infringement action is three years and that the plaintiffs’
19 filing . . . on November 14, 2003, would ordinarily permit the plaintiffs to recover
20 for any infringements that could be proven to have occurred after November 14,
21 2000.”). Thus, in no event would Nexon’s claims be time-barred, regardless of
22 when its first cease-and-desist letter was served.

23 **B. Prejudice.**

24 Even if Baker could prove unreasonable delay (he cannot), Baker offers
25 absolutely no evidence of *any* expectations-based or evidentiary prejudice resulting
26 from any purported “delay.”
27

1 **Expectations-Based Prejudice.** Perhaps most fatally to his claim of
2 expectations-based prejudice, Baker now admits that he was aware of Nexon’s
3 claims in 2009, but nevertheless continued to infringe for the next 3 years (and is
4 continuing to infringe). As a result, Baker knew that he was proceeding at the risk
5 of being sued by Nexon and cannot now claim that he somehow believed that his
6 activities were permissible. See Stewart v. Wachowski, No. CV03-2873 MMM
7 (VBKx), 2004 WL 5618385, at *6 (C.D. Cal. Sept. 28, 2004) (denying motion to
8 dismiss copyright infringement claim on basis of laches where plaintiff had alleged
9 that defendants had engaged in conduct with knowledge that such conduct
10 constituted copyright infringement). This is the *opposite* of expectations-based
11 prejudice, which typically is found when the plaintiff has sat on its rights and *failed*
12 to give notice to the infringer for many years before suing. See, e.g., Safeway
13 Stores, Inc. v. Safeway Quality Foods, Inc., 433 F.2d 99, 103 (7th Cir. 1970) (“For
14 sixteen years [plaintiff] did nothing to put the defendants upon notice of its
15 claims.”). In those circumstances, courts have found it unjust for plaintiffs to sit on
16 their rights, passively allow infringing conduct to continue, and sue only years later,
17 after the defendant has relied on the plaintiff’s inaction. That is not the case here,
18 and Baker’s claim that Nexon “sat on their rights” or “lulled Baker into a false sense
19 of security” is simply wrong. Nexon put Baker on notice of its claim and gave him
20 ample opportunity to comply with its demands before suing. In any event, Baker’s
21 claims that he “made investments” in Game Anarchy in reliance on any purported
22 delay by Nexon or that “Nexon made sporadic complaints to Game Anarchy over
23 the past 4+ years” are wholly unsupported by *any* evidence.¹

24 _____
25 ¹ Byron v. Chevrolet Motor Div. of General Motors Corp., No. 93 Civ. 1116 (AJP),
26 1995 WL 465130 (S.D.N.Y. Aug. 7, 1995), is easily distinguishable from the
27 present facts. In Byron, the plaintiff waited nearly *seven* years to assert his claims,
28 without any legally cognizable excuse. Id., at *8. Moreover, in an early cease-and-
desist letter sent to the defendants, the plaintiff in Byron expressly threatened that he
would file suit within *48 hours* if he did not receive a response from the defendants.
Despite the defendants’ denial of the plaintiff’s claims, the plaintiff still delayed
over five more years before filing a lawsuit. Id., at *9. There is no similar delay
here.

EXHIBIT A

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA

3 NEXON AMERICA, INC., a)
 4 Delaware corporation, and)
 NEXON KOREA CORPORATION,)
 5 a Korean corporation,)
) CASE NO.
 6 Plaintiffs,)
) CV12-02083 MWF (PLAX)
 vs.)
 7)
 GAMEANARCHY, LLC, a Georgia)
 8 Limited Liability Company,)
 et al.,)
 9)
 Defendants.)
 10)

11
12 DEPOSITION OF

13 DAVID ALLEN BAKER

14
15 October 26, 2012
16 9:43 a.m.

17
18 Andaz Savannah Hotel
14 Barnard Street
Savannah, Georgia

19
20 Thomas J. Dorsey, RPR, CCR-2781
21
22
23

24 Job Number: 54888
25

1 A. Yes.

2 Q. Does anyone else help you with that?

3 A. No.

4 Q. Has anyone ever helped you with that?

5 A. I mean, I've read things off the Internet
6 from other people, if that's what you want to
7 include, but directly, no.

8 Q. Let me ask you. So I was going to say,
9 did you build it from scratch?

10 A. Yes.

11 Q. So did you use pieces and you found other
12 places?

13 A. Well, actually -- I'll kind of like
14 correct that.

15 Q. Okay.

16 A. Originally the software was given to me by
17 somebody, and I've maintained it myself over the
18 couple years. And I don't remember where it
19 originally came from. It was just a member on the
20 site.

21 Q. So the site existed before the software?

22 A. I figure you'd be talking specifically
23 about Nexon, the Combat Arms software.

24 Q. Well, for now let's just -- any software
25 that you had on the site. We'll start there and we

1 A. That handles server changes.

2 Q. Okay. So a server change would require
3 the software to be updated?

4 A. Yes.

5 Q. Why is that?

6 A. Because the IP of the server is hard-coded
7 into it.

8 Q. The IP of the server that hosts the
9 software?

10 A. Right.

11 Q. So, if you change servers, you have to
12 update the software?

13 A. Yes.

14 Q. Okay. And so is this loader software the
15 software you were given?

16 A. No.

17 Q. Did you create the --

18 A. I coded it up by myself.

19 Q. The loader?

20 A. Yes.

21 Q. And you did that before you started the
22 website?

23 A. Yes.

24 Q. Was that the reason for creating the
25 website?

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C E R T I F I C A T E

STATE OF GEORGIA:
COUNTY OF EFFINGHAM:

I hereby certify that the foregoing transcript was taken down, as stated in the caption, and the questions and answers thereto were reduced to typewriting under my direction; that the foregoing pages 1 through 177 represent a true, complete, and correct transcript of the evidence given upon said hearing, and I further certify that I am not of kin or counsel to the parties in the case; am not in the regular employ of counsel for any of said parties; nor am I in anywise interested in the result of said case.

This, the 2nd day of November, 2012.

THOMAS J. DORSEY, Certified
Court Reporter, 2781