

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 07-cv-00143-REB-PAC

**DAVID ALLISON**, doing business as **CHEAT CODE  
CENTRAL**, a sole proprietorship,

Plaintiff,

v.

**JEREMY N. WISE**, an individual;  
**DAVID SHEPHERD**, an individual; and  
**STUART WRIGHT**, an individual,

Defendants.

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**DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION  
TO DISMISS FIRST AMENDED COMPLAINT**

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NOW COMES Jeremy Wise ("Wise"), by and through his attorney, and respectfully submits his reply memorandum in support of his Motion to Dismiss Plaintiff David Allison's ("Allison") First Amended Complaint ("Motion") and states the following:

**INTRODUCTION**

In his Response to Wise's Motion ("Response"), Allison misrepresents facts and ignores well-established precedent involving the Internet and personal jurisdiction. Once these veils of misdirection have been withdrawn, it becomes clear that no facts, conduct, or circumstances at issue suffice for this Court to exercise personal jurisdiction over Wise.

**I. CLARIFICATION OF FACTS**

Before proceeding into a discussion of Allison's strained construction of the law,

clarification of certain factual issues must be made. First, Allison fails to accurately describe the nature of cheat codes. Cheat codes represent hints or tricks that can be used to accentuate an individual consumer's experience and/or performance in playing electronic games. A cheat code remains, at its essence, a fact. The cheat code describes what will happen when a player engages in certain conduct. For example, examine the following cheat code: "If you hit the orange button, you will earn \$100." This cheat code expresses a fact about the particular game. More particularly, it conveys how the software will work given certain parameters in the format "given conduct x, result y will occur." In essence, a cheat code will consistently be a species of the format "if x, then y" or the reverse "If you want y, then do x." Because cheat codes are facts, most cheat codes will not have sufficient original expression to warrant copyright protection. At present, there exist hundreds of websites on the Internet that provide cheat codes to electronic visitors. Affidavit of Jeremy Wise ("Wise Aff.") ¶ 21. With respect to the Parties in the above-captioned action, Allison and Wise represent two of the multitude of individuals hosting some of the hundreds of websites on the Internet providing "cheat codes." Indeed, a search on [www.google.com](http://www.google.com) for "cheat codes ps2" (ps2 means PlayStation 2) reveals more than 3,000,000 hits.

Next, Allison misrepresents the extent to which Wise obtained any content from Allison's website. See Plaintiff's Response to Defendant's Motion to Dismiss First Amended Complaint ("Pl.'s Resp.") p. 3. In actual fact, Wise neither copied Allison's website nor did he copy and thereafter publish any entire webpage from Allison's website. At most, Wise acquired some fact-based cheat codes for games that did not

exist in his cheat code database that he had been building since 2000 through his own research and collection efforts.

Allison further misrepresents the technical nature of browsing the World Wide Web (“WWW”) and visiting websites. An individual who accesses the Internet does so through a computer with an Internet connection. This Internet connection will be provided by an Internet Service Provider (“ISP”) through a telephone line, digital subscriber lines (DSL), cable connection, T1 lines, or by wireless means.

When an individual opens a program to browse the WWW, the individual may then enter a domain name such as www.cnn.com. Allison suggests that once an individual enters such a domain name, the individual’s computer magically connects directly to the server hosting the website associated with such a domain name. In actual fact, the individual’s computer sends digital signals to one or more name servers to obtain the Internet Protocol (“IP”) address associated with the domain name. At this juncture, the individual accessing the domain name www.cnn.com most likely does not know the IP address for the website, who owns the IP address, the web server with which the IP address is associated, or where the web server is located.

Once the individual’s computer obtains the IP address, it can properly send signals through a variety of communications networks and servers that will ultimately reach the web server that has made content of the website publicly available. The web server will then send the content of the website through the same or other communications networks and servers that will ultimately reach the individual’s computer. Throughout this process, however, the individual has no idea through which

networks or server locations his request happens to be traveling. Moreover, the individual likely does not ultimately know where the web server for [www.cnn.com](http://www.cnn.com) (or a potential mirrored site) is located. Rather, the individual's knowledge will most likely be limited to the intention of obtaining content from [www.cnn.com](http://www.cnn.com) that the webhost has intentionally made available.<sup>1</sup>

As one can see, Allison makes great effort to simplify the technology involved and make it appear as though Wise intended to and actually did enter Colorado for purposes of obtaining content that he knew to be located in Colorado. His perception of the technology clouds what actually occurs. By merely visiting a web page, an individual visiting a website cannot and does not enter the jurisdiction (most likely unknown to the individual) in which the website happens to be hosted.

Finally, Allison misleadingly contends that conduct occurred in Colorado. See Pl.'s Resp. p. 3. No conduct occurred in Colorado. Wise resides in Ohio from which he operates his websites. Wise Aff. ¶¶ 2, 20. He operated his computers, accessed the Internet, and published his sites from Ohio. See id.

With the foregoing factual clarifications made and as the legal analysis demonstrates below, it becomes evident that Wise engaged in no alleged conduct sufficient, by itself or collectively, to become subject to the jurisdiction of this Court.

## II. CLARIFICATION OF LAW

Throughout his memorandum, Allison vigorously attempts to formulate some

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<sup>1</sup> For additional discussion on the technology at issue, the following website will be most helpful: <http://www.howstuffworks.com/internet-infrastructure.htm> (Last visited June 6, 2007).

construction of personal jurisdiction jurisprudence that will overcome established precedent governing this case that clearly demonstrates the absence of personal jurisdiction over Wise. See generally Def.'s Mot. Dismiss; Pl.'s Resp. Despite his best efforts, Allison fails. In sum, merely accessing a website does not subject one to personal jurisdiction. Any alleged "copying" of content occurred in Ohio and cannot give rise to jurisdiction in Colorado. The same applies to the posting of content to the Internet by Wise. As such, Wise cannot be said to have purposely directed any activity to Colorado. As to any alleged injuries that may have occurred in Colorado, economic injury does not suffice for purposes of establishing personal jurisdiction. Finally, the Colorado long-arm statute fails to provide Allison with any different outcome. Therefore, Wise is not subject to personal jurisdiction in Colorado.

**A. Accessing A Website Does Not Equal Purposeful Availment**

Allison incredulously contends that accessing a website arises to purposeful availment. This argument could not be further from the truth.<sup>2</sup> In Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3rd Cir.1998), the Third Circuit recognized that the Calder "effects test" (Calder v. Jones, 465 U.S. 783, 789, 104 S.Ct. 1482 (1984)) can be satisfied only if a plaintiff points to contacts which demonstrate that a defendant *expressly* aimed tortious conduct at the forum *making it the focal point* of the tortious activity. See id. Given the nature of web server and Internet technology (briefly discussed above), the mere act of accessing a particular website cannot possibly constitute conduct expressly aimed at the forum in which the website's server exists.

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See Section I *supra*. Indeed, courts have held that the transmission of electronic signals to and from a forum does not, by itself, give rise to personal jurisdiction. See ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002). This would particularly be the case if one lacks knowledge as to the forum in which a website's server exists. However, even with such knowledge, accessing a website would not be sufficient.

In Imo Indus., the Court also held that a defendant's knowledge that the plaintiff's principal place of business was located in the forum would be insufficient in itself to meet the Calder "effects test." Imo Indus., 155 F.3d at 265. Similarly, the mere knowledge that a web server was located in a particular forum would be insufficient. See id. Thus, even if Wise knew that the web server for www.cheatcc.com was located in Colorado, that knowledge would not be sufficient to give rise to personal jurisdiction.

As the court explained in Barrett v. Catacombs Press:

It is certainly foreseeable that some of the harm would be felt in [the forum state] because Plaintiff lives and works there, but such foreseeability is not sufficient for an assertion of jurisdiction. While we agree that [forum] residents are among the recipients or viewers of such defamatory statements, they are but a fraction of other worldwide Internet users who have received or viewed such statements. The mere allegations that the Plaintiff feels the effect of the Defendant's tortious conduct in the forum because the Plaintiff is located there is insufficient to satisfy the effects test of [Calder]. Unless [the forum state] is deliberately or knowingly targeted by the tortfeasor, the fact that harm is felt in [the forum state] from conduct occurring outside [it] is never sufficient to satisfy due process.

Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 731 (E.D. Pa. 1999). Therefore, Wise has not subjected himself to the jurisdiction of Colorado by accessing the website

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<sup>2</sup> Indeed, Allison cites no authority supporting his position.

www.cheatcc.com.

**B. Copying Content on a Computer in Ohio Insufficient**

Wise cannot be subject to personal jurisdiction for the alleged copying of content on his computer in Ohio. First, any individual accessing a website has effectively caused the content on a website to be transmitted to and thus “copied” onto his computer from the website’s server. Allison recognizes this in his Response. See Pl.’s Resp. p. 10 fn. 2. As such, any further manipulation of the content (eg select, copy, and paste) by the individual viewing the website content must necessarily occur from the cached content on the individual’s computer, not on the web server. See id. Thus, in this case, any alleged manipulation by Wise of content in his cached computer files occurred not in Colorado, but Ohio, where Wise’s computer happened to be.

**C. Posting Content to Web Insufficient**

Wise cannot be subject to personal jurisdiction for the alleged posting of copyrighted material to his websites. Indeed, posting of material to the Internet does not subject the electronic publisher to the jurisdiction of any forum from which the posted material may be viewed. Def.’s Memo. pp. 9-10.

**D. Economic Injury Insufficient**

In his Amended Complaint, Allison claims that his alleged injuries felt in Colorado give rise to personal jurisdiction over Wise in Colorado. However, Allison speaks solely of the economic harm caused by Wise’s actions. See generally Am. Compl. ¶¶ 27, 29, 35, 40, 45, 48. Indeed, in each of his claims, Allison merely alleges he has suffered “monetary damages in an undetermined amount” from lost income and revenue. Id. As

this Court has held, "not all alleged 'injuries' that result from tortious conduct in a foreign state will trigger long-arm jurisdiction." Wenz v. Memery Crystal, 55 F.3d 1503, 1507-8 (D. Colo. 1995). Indeed, "that [plaintiff] may be economically impacted in Colorado, simply because he lives there, is insufficient to establish personal jurisdiction under [the tortious conduct provision] of the Colorado long-arm statute." Nat'l Bus. Brokers, Ltd. v. Jim Williamson Prods., 16 Fed. Appx. 959, 963 (10th Cir. 2001); accord Amax Potash Corp. v. Trans-Res., Inc., 817 P.2d 598, 600 (Colo. Ct. App. 1991). Because he has alleged only economic injury occurring in Colorado solely because he lives there, Allison has failed to alleged injuries sufficient to trigger personal jurisdiction. See id.

Additionally, even if Allison had alleged injuries other than economic (which he has not), an injury must also be "direct, not consequential or remote." Wenz, 55 F. 3d at 1508. The economic injuries of which Allison speaks are tenuous at best. For, Allison contends that (a) content on Wise's websites (b) alleged to be infringing Allison's cheat codes (c) have caused Wise to gain advertising revenue (d) generated by third parties visiting Wise's websites (e) as opposed to Allison's website (f) that should otherwise belong to Allison. Such tenuous damages cannot be construed as anything but "consequential or remote." As such, they do not suffice. Id.

#### **E. No Jurisdiction Under Colorado Long-Arm Statute**

Although Colorado's long-arm statute has been subsumed within an analysis of personal jurisdiction under the federal due process clause, see Wise v. Lindamood, 89 F. Supp.2d 1187, 1189 (D. Colo. 1999), Allison addresses the Colorado long-arm statute separately and concludes it would allow personal jurisdiction over Wise. Allison

is mistaken. As Wise demonstrates in his Motion and this Reply, he has not engaged in any tortious activity in Colorado. One accesses a website from one's own location. As such, Wise accessed www.cheatcc.com from Ohio. Given the complexity of the Internet, it cannot simply be said that visiting a website from one's home computer causes one to enter the jurisdiction in which the website's server exists. Indeed, accessing a website, whether or not one knows where the web server exists, does not give rise to personal jurisdiction. Any conduct in which Wise engaged relating to the copying and posting of content at issue in this litigation occurred from his own computer in Ohio. As such, all conduct in which Wise engaged occurred in Ohio, not Colorado. Because all conduct occurred in Ohio, Allison's sole remaining basis for jurisdiction under the Colorado long-arm statute relies upon an allegation that injury occurred in Colorado. However, even under the Colorado long-arm statute, economic injury alone does not suffice for purposes of personal jurisdiction. See Nat'l Bus. Brokers, Ltd., 115 F. Supp. 2d at 1255. Thus, the Colorado long-arm statute does not provide this Court with personal jurisdiction over Wise.<sup>3</sup> Even if it did, Allison would still need to survive an analysis of federal due process, which he cannot do. See Def.'s Mem.

### **III. This Court Should Not Allow Allison to Conduct Limited Discovery**

As to Allison's alternative request for jurisdictional related discovery, Wise

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<sup>3</sup> Although Allison relies upon Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244, 1247 (10th Cir. 2000), this case is inapplicable in this context. Here, Wise has never "entered" or "re-entered" Colorado. To the extent Wise modified any cheat codes after notice of this litigation, he did so from Ohio by modifying content already existing on his computers. Moreover, any efforts to further "factualize" the fact-based cheat codes were made in good faith to resolve any alleged conduct. Consequently, Intercon has no application to this case.

opposes this in its entirety. First, Allison has waived any general jurisdiction arguments. Second, Allison has not alleged any facts that “suggest with reasonable particularity the possible existence of constitutionally sufficient minimum contacts,” even with the requested discovery. See Clark Capital Mgmt. Group, Inc. v. Navigator Inv., LLC, No. 06-2234, 2006 U.S. Dist. LEXIS 66989, \*20-21 (E.D. Penn. September 19, 2006).

### CONCLUSION

For the foregoing reasons and those in his Motion, this Court should dismiss Plaintiff’s Complaint for lack of personal jurisdiction against Wise and, alternatively, for improper venue.

Counsel for Defendant Wise has read and complied with the Practice Standards of this Court governing the formatting and marshaling of a Motion filed under Rule 12(b)(2).

Dated: Chicago, Illinois

June 6, 2007

Respectfully submitted,

DEFENDANT JEREMY WISE

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