

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

DAVID ALLISON d/b/a CHEAT CODE)	
CENTRAL, a sole proprietorship,)	
)	
Plaintiff,)	
)	No. 1:07-cv-00143-WYD
v.)	
)	
JEREMY N. WISE, an individual;)	
DAVID SHEPHERD, an individual; and)	
STUART WRIGHT, an individual,)	
)	
Defendants.)	

DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT

NOW COMES Jeremy Wise (“Mr. Wise”), by and through his attorney, and respectfully moves this Court to dismiss Plaintiff’s Complaint for lack of personal jurisdiction and improper venue pursuant to Rules 12(b)(2) and 12(b)(3), respectively, of the Federal Rules of Civil Procedure (“Rule 12(b)(2)” and “Rule 12(b)(3)”). In support thereof, Defendant states as follows:

INTRODUCTION

This lawsuit involves a dispute over hints or tricks that can be used to accentuate an individual consumer’s experience and/or performance in playing electronic games. The trade term for these electronic game hints or tricks is “cheat codes.” The creation of a cheat code originates with the software developer who writes, either intentionally or inadvertently, a “cheat” into an electronic game’s source code. In fact, software developers have intentionally written many “cheat codes” into their game source code

for purposes of allowing “beta testers” to quickly maneuver through playing the game.

When activated, a “cheat” will provide the individual playing the electronic game with a certain bonus or reward (eg skipping a skill level). As individual consumers explore electronic games, they will inevitably discover these cheats and oftentimes share them with other users of the same electronic games. Numerous individuals have collected these cheat codes and published them on the Internet. Because many individuals play the same electronic games and will discover the same cheat codes (either through their own game play or reading cheat codes discovered by others), these cheat codes often can be found on multiple websites. Also, individuals who discover “cheat codes” will often proudly submit their discoveries to multiple websites. At present, there exist hundreds of websites on the Internet that provide cheat codes to electronic visitors. Affidavit of Jeremy Wise (“Wise Aff.”) ¶ 21. Indeed, a search on www.google.com for “cheat codes ps2” (“ps2” means PlayStation 2) reveals more than 3,000,000 hits.

In the instant case, the Plaintiff, who publishes cheat codes on the Internet from Colorado, has alleged that Mr. Wise, who publishes cheat codes on the Internet from Ohio, copied some cheat codes found on his website. Despite the absence of any connections between Mr. Wise and Colorado (allegations to the contrary are noticeably absent from the Complaint), the Plaintiff has brought his lawsuit in Colorado. For the reasons below, the Plaintiff has thereby subjected his lawsuit in this Court to dismissal for lack of personal jurisdiction over Mr. Wise and for improper venue.

FACTUAL BACKGROUND

For purposes of this motion, the relevant facts are straightforward. Jeremy Wise is a citizen and resident of Ohio. Wise Aff. ¶ 2. Mr. Wise is not domiciled in Colorado, and has never resided in Colorado. Id. ¶¶ 3, 6. Mr. Wise has never had a Colorado's driver's license, never owned property or paid rent to anyone in Colorado, and has no family or friends in Colorado. Id. ¶¶ 7, 8, 9. Mr. Wise has not sought to provide any goods or services to Colorado. Id. ¶ 14. He does not have any offices, statutory agents, telephone listings or mailing addresses in Colorado. He does not have any bank accounts, licenses or other operations in Colorado. Id. ¶ 16. Mr. Wise operates his websites from Ohio. Id. ¶ 20. However, Mr. Wise does not generate any revenues from Colorado through any of his websites. Id. ¶¶ 11, 17. In fact, Mr. Wise's only contact with Colorado arises from having driven through Colorado once as a young child on a family vacation. Id. ¶ 10.

ARGUMENT

The Plaintiff's Complaint should be dismissed for lack of personal jurisdiction over Mr. Wise and improper venue pursuant to Rule 12(b)(2) and Rule 12(b)(3).

I. MR. WISE IS NOT SUBJECT TO PERSONAL JURISDICTION IN COLORADO

This Court lacks personal jurisdiction over Mr. Wise. Mr. Wise does not have systematic contacts with Colorado sufficient to warrant exercising general personal jurisdiction over him. Additionally, there do not exist sufficient contacts with Colorado in relation to the alleged conduct to warrant the exercise of specific personal jurisdiction over him. Furthermore, exercising personal jurisdiction over Mr. Wise would not

comport with due process under either the federal or Colorado constitutions. For these reasons, this Court should dismiss the Complaint as to Mr. Wise pursuant to Rule 12(b)(2).

A. Standard For Exercising Personal Jurisdiction

Rule 12(b)(2) provides for the dismissal of actions and claims where the Court lacks personal jurisdiction over a defendant. See Fed. R. Civ. P. 12(b)(2). In reviewing a Rule 12(b)(2) motion, the Plaintiff bears the burden of establishing that personal jurisdiction exists. Soma Med. Int'l v. Std. Chtd. Bank, 196 F.3d 1292, 1295 (10th Cir. 1999). For such purposes, the allegations of a Complaint must be taken as true unless contradicted by affidavits submitted by the defendant. Behagen v. Amateur Basketball Ass'n. of U.S.A., 744 F.2d 731, 733 (10th Cir. 1984). To establish a *prima facie* case for personal jurisdiction, a Plaintiff must first establish that the defendant is amenable to service in the forum state. Peay v. BellSouth Medical Assistance Plan, 205 F.3d 1206, 1209 (10th Cir. 2000). A non-resident defendant is amenable to service if a federal statute provides for such service or if a forum state's long-arm statute subjects the non-resident defendant to the jurisdiction of a court within the forum state. Fed. R. Civ. P. Rule 4(k).

Second, the plaintiff must establish that the court's exercise of personal jurisdiction over the non-resident defendant comports with principles of due process. Peay, 205 F.3d at 1209. Colorado's long-arm statute codifies the "minimum contacts" test of International Shoe Co. v. Washington, 326 U.S. 310, 319, 90 L. Ed. 95, 103 (1945), and extends the courts' jurisdiction to the maximum extent consistent with the

Due Process Clause of the Fourteenth Amendment. Wise v. Lindamood, 89 F. Supp.2d 1187, 1189 (D. Colo. 1999). Thus, the two-step analysis described above actually collapses into a single examination of whether the exercise of jurisdiction is consistent with the principles of due process. Id.

To comport with federal due process, a defendant may be subject to jurisdiction within a state only if he has “minimum contacts” with that state “such that the maintenance of the suit does not offend the traditional notion of fair play and substantial justice.” International Shoe Co., 326 U.S. at 316. The purpose of the “minimum contacts” requirement is to protect the defendant against the burden of litigation at a distant or inconvenient forum, and to ensure that states do not reach beyond the limits of their sovereignty imposed by their status in the federal system. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). The purposeful availment requirement ensures that defendants will not be haled into a jurisdiction through ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); see Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1532-33 (10th Cir. 1996). The central concern of any jurisdictional inquiry is the relationship between the defendant, the forum, and the litigation. Shaffer v. Heitner, 433 U.S. 186, 204 (1977). The constitutional limitations on the exercise of personal jurisdiction further depend upon whether a plaintiff seeks general or specific personal jurisdiction over a non-resident defendant. Intercon v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244, 1249 (10th Cir. 2000).

B. General Jurisdiction Inapplicable to Mr. Wise¹

Mr. Wise is not subject to personal jurisdiction in Colorado under the principle of general jurisdiction. Plaintiff has not alleged that Mr. Wise has systematic contacts with Colorado to find general jurisdiction applicable. Consequently, with respect to Mr. Wise, Plaintiff has waived any general jurisdiction argument. Assuming, *arguendo*, the Plaintiff has not waived this argument, Mr. Wise does not have sufficient contacts with Colorado to warrant application of general jurisdiction over him.

General jurisdiction occurs in suits that do not arise out of or are not related to the defendant's contacts with the forum state. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 1872 n. 8 (1984). A court may exercise general jurisdiction based on a defendant's overall contacts with the forum state. OMI Holdings, Inc. v. Royal Ins. Co. of Canada, 149 F.3d 1086, 1091 (10th Cir. 1998). General jurisdiction can only occur where the defendant is either domiciled in the forum state or has "substantial, continuous, and systematic general business contacts" with the forum. Helicopteros Nacionales de Colombia, S.A., 466 U.S. at 414-416, 104 S.Ct. at 1873; Trierweiler, 90 F.3d at 1533.

Here, Defendant Wise is neither domiciled in nor has "continuous and systematic general business contacts" with Colorado to warrant general jurisdiction. Wise Aff. ¶¶ 3,

¹ Although Fed. R. Civ. P. 4(k) provides for service where authorized by a statute of the United States, neither the Copyright Act (17 U.S.C. §§ 101 *et seq.*) nor § 43(a) of the Lanham Act (15 U.S.C. § 1125(a)) provide for nationwide service of process. See Janmark, Inc. v. Reidy, 132 F.3d 1200, 1201 (7th Cir. 1997) (Copyright Act) and Sports Auth. Mich., Inc. v. Justballs, Inc., 97 F.Supp. 2d 806, 809 (E.D. Mich. 2000) (Lanham Act). As such, the Court must consider whether Mr. Wise is amenable to service under Colorado's long-arm statute. See C.R.S. § 13-1-124(1)(a) and (b). Brownlow v. Aman, 740 F.2d 1476, 1481 (10th Cir. 1984).

5. He is a citizen and resident of Ohio. Id. ¶ 2; Compl. ¶ 6. He has never resided in Colorado. Wise Aff. ¶ 6. He has never knowingly derived any income from Colorado. Id. ¶ 17. Additionally, Mr. Wise does not conduct business in Colorado. Mr. Wise has neither offices nor employees in Colorado. Id. ¶ 15. He does not own or rent real property in Colorado. Id. ¶ 8. He has no bank accounts, licenses or other operations in Colorado. Wise Aff. ¶ 16. Mr. Wise does not have any telephone listings, mailing addresses or statutory agents in Colorado. Id. ¶ 15. Mr. Wise is not subject to taxation in Colorado. Id. ¶ 18. Mr. Wise does not place any advertisements in Colorado newspapers, magazines or other media. Id. ¶ 19. Mr. Wise does not generate any revenue from Colorado. Wise Aff. ¶ 17. The only contact with Colorado arises from having passed through Colorado as a young child on a family vacation. Id. ¶ 10. In essence, Mr. Wise has no contacts with Colorado. Id. ¶ 5. Certainly, at the very least, Mr. Wise does not have substantial contacts with Colorado. Consequently, there exists no possible basis for exercising general jurisdiction over Defendant Wise consistent with due process. See Trierweiler, 90 F. 3d at 153; OMI Holdings, Inc., 149 F.3d at 1091.

C. Specific Jurisdiction Inapplicable to Mr. Wise

Mr. Wise's acts at issue in this lawsuit do give rise to sufficient contacts with Colorado for this Court to exercise specific personal jurisdiction. Here, the Plaintiff does not allege specific jurisdiction over Mr. Wise in its Complaint. See generally Compl. Thus, the Plaintiff has waived any specific jurisdiction argument. Assuming, *arguendo*, the Plaintiff has not waived this argument, Mr. Wise does not have sufficient contacts with Colorado to warrant application of specific jurisdiction over him.

The main factor in specific jurisdiction analysis is foreseeability -- was it reasonably foreseeable to the defendant that its action could result in litigation in the state in question. Bell Helicopter Textron, Inc. v. Heliquest Int'l, Ltd., 385 F.3d 1291, 1295-96 (10th Cir. 2004) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-74 (1985)). Specific jurisdiction may be exercised where the defendant has "purposefully directed" its activities toward the forum jurisdiction and where the underlying action is based upon activities that arise out of or relate to the defendant's contacts with the forum. Kuenzle v. HTM Sport-Und Freizeitgerate AG, 102 F.3d 453, 456-7 (10th Cir. 1996). To support specific jurisdiction, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, 2 L. Ed. 2d 1283 (1958) (citation omitted); see also Fidelity and Cas. Co. of N. Y. v. Phila. Resins Corp., 766 F.2d 440, 445 (10th Cir. 1985). This requirement of "purposeful availment" for purposes of specific jurisdiction precludes personal jurisdiction as the result of "random, fortuitous, or attenuated contacts." Bell Helicopter Textron, Inc., 385 F.3d at 1296 (quoting Burger King, 471 U.S. at 475 (citations and internal quotation marks omitted)).

Here, the Plaintiff cannot establish specific personal jurisdiction over Mr. Wise. The Plaintiff alleges that Mr. Wise copied certain cheat codes from Plaintiff's website and thereafter published them on Mr. Wise's websites. Compl. ¶¶ 21-26. The act of visiting a website and copying publicly available information from the website cannot give rise by itself to specific personal jurisdiction. See Soma Med. Int'l v. Std. Chtd.

Bank, 196 F.3d 1292, 1296 (10th Cir. 1999). Indeed, whenever an individual visits a website, the individual's web browser copies web content to his computer. Were this conduct to give rise to specific personal jurisdiction, any visit to any website would subject an individual surfing the web to the jurisdiction of the courts from which the websites were either operated and/or hosted. The result would be completely unreasonable. Similarly, the act of posting information onto a website by itself does not give rise to the exercise of specific personal jurisdiction over a nonresident defendant. See Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1165 (W.D. Wisc. 2004) (holding the exercise of personal jurisdiction not proper over defendant who posted information on an Internet website accessible to others in a foreign jurisdictions). Even should the Plaintiff argue that the "effects" or harm of the alleged conduct has been most felt in Colorado, this does not suffice to exercise specific personal jurisdiction in this case. See Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3rd Cir.1998); Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. Partnership, 34 F.3d 410 (7th Cir. 1994); Reynolds v. Int'l Amateur Ath. Fed'n, 23 F.3d 1110, 1120 (6th Cir. 1994) ("the fact that the defendant could foresee that the statements would be circulated and have an effect in [the forum state] is not, in itself, enough to create personal jurisdiction."); Wallace v. Herron, 778 F.2d 391, 394 (7th Cir.1985). Thus, the conduct alleged by Plaintiff does not give rise to specific personal jurisdiction. See id.; Soma, 196 F.3d at 1296.

At the same time, Mr. Wise operates websites on which the material alleged to be infringing has been posted. Consequently, this Court must also examine whether

the operation of the websites at issue provide sufficient basis for exercising specific personal jurisdiction. In considering questions of personal jurisdiction relating to websites, the Tenth Circuit has applied the three-category “sliding scale” model developed in Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Penn. 1997); Soma, 196 F.3d at 1296.

In Zippo, the court found that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” Zippo, 952 F. Supp. at 1124. Consequently, the Zippo court developed a methodology for analyzing websites based on a continuum of circumstances directly related to the degree of a website’s interactivity. Zippo, 952 F. Supp. at 1124; Soma, 196 F.3d at 1296. On one end, “totally passive” websites do “little more than make information available to those who are interested in it.” Id. At the other extreme, highly interactive, commercial websites exist that permit “knowing and repeated transmission of computer files over the Internet.” Id. Falling between these extremes are moderately interactive websites which permit users to exchange some information with the host computer. Id. When considering this middle range, the court should consider the level of interactivity and commercial nature of the exchange of information that occurs on the website. See Lakin v. Prudential Securities, Inc., 348 F.3d 704, 711 (8th Cir. 2003); SCC Communications Corp., 195 F. Supp.2d 1257, 1260-61 (D. Colo. 2002).

The present case falls in Zippo’s “passive” category of websites. See Zippo, 952 F. Supp. 1119 at 1124. For, the websites operated by Mr. Wise passively make

available to the public cheat codes at no charge. Wise Aff. ¶¶ 11, 12. Indeed, Mr. Wise does not conduct business through the websites, and does not accept orders or enter into contracts through the websites. See Wise Aff. ¶¶ 11-12. In fact, the only commercial aspect of his websites arises from the placement of advertisements on them. That being said, the advertising is not related to any particular cheat code or any particular content on the website. Id. ¶ 13. This does not suffice to warrant or exercise specific personal jurisdiction. For, Courts cannot exercise personal jurisdiction over defendants who simply operate passive web sites that merely provide information or advertisements without more. See, e.g., ESAB Group, Inc. v. Centricut, L.L.C., 34 F. Supp. 2d 323, 331 (D.S.C. 1999) (no jurisdiction where no evidence showing that any South Carolina resident visited defendant's web page or purchased products based on web site advertisement); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-19 (9th Cir. 1997) (Internet advertisement alone is insufficient to subject an advertiser to jurisdiction); SF Hotel Co. v. Energy Investments, 985 F. Supp. 1032, 1035-36 (D. Kan. 1997) (no jurisdiction where defendant maintained a passive web site providing general information about its hotel). Thus, this level of interaction through Mr. Wise's websites does not suffice to confer jurisdiction under the sliding scale analysis described in Zippo. See Soma, 196 F.3d at 1296. Even were his websites to be considered moderately interactive, this by itself would not give rise to personal jurisdiction. See Wise, 89 F. Supp.2d at 1194. Accordingly, Mr. Wise is not subject to specific personal jurisdiction in Colorado and this case should be dismissed.²

² Some courts have applied the Zippo analysis to general personal jurisdiction. See Dagesse v. Plant

D. Exercise of Personal Jurisdiction Would be Unreasonable

Even if the Plaintiff could demonstrate the applicability of specific personal jurisdiction, the court must also consider whether the assertion of jurisdiction “comports with ‘traditional notions of fair play and substantial justice’ -- that is, whether it is reasonable under the circumstances of a particular case.” Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d. Cir. 1996) (quoting International Shoe Co., 326 U.S. at 316, 66 S. Ct. at 158) see also Bell Helicopter Textron, Inc., 385 F.3d at 1296 (citing Burger King Corp., 471 U.S. at 472-74); Intercon, Inc., 205 F.3d at 1247. Courts in the Tenth Circuit consider the following factors to decide whether exercise of jurisdiction is reasonable: (1) the burden on the defendant; (2) the forum state’s interest in resolving the dispute; (3) the plaintiff’s interest in receiving convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive policies. Bell Helicopter Textron, Inc., 385 F.3d at 1296; see also Burger King, 471 U.S. at 475, 105 S. Ct. at 2184; Intercon, Inc., 205 F.3d at 1249.

Upon consideration of the five-factor “fairness” test set forth in Asahi and Burger King, the exercise of jurisdiction by this Court would be unreasonable. Metropolitan Life, 84 F.3d at 568 (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-14, 107 S. Ct. 1026, 1032-33 (1987), and Burger King, 471 U.S. at 475, 105 S. Ct. at 2184). First, adjudication in Colorado would impose a significant burden on Mr. Wise

Hotel N.V., 113 F. Supp.2d 211, 221 (D. N.H. 2000) (general jurisdiction cannot be based solely on the existence of a website). As such, the foregoing analysis further supports the inapplicability of general personal jurisdiction to the instant case.

who resides in Ohio and has no meaningful presence in Colorado. Mr. Wise's interjections into Colorado - i.e., the mere fact that his websites could be accessed from Colorado - are attenuated and merely the result of the global availability of the Internet. The burden on Mr. Wise to litigate this claim in Colorado is significantly greater than the burden facing Plaintiff. Moreover, even if the burdens were equal, this factor would tip in favor of Mr. Wise because the law of personal jurisdiction is "primarily concerned with the defendant's burden." Terracom v. Valley Nat'l Bank, 49 F.3d 555 (9th Cir. 1995). For the same reason, the second factor should not be given as much weight as the first. For, this Court's only interest in adjudicating the dispute arises because Plaintiff resides in Colorado.

Although the Plaintiff resides in Colorado, adjudication in Colorado does not appear to advance the Plaintiff's "interest in obtaining convenient and effective relief" because of the burden placed on Mr. Wise and his witnesses. Ohio courts can just as effectively provide convenient and effective relief to Plaintiff. Fourth, adjudication in Colorado will not advance the "interest in obtaining the most efficient resolution of controversies" where Mr. Wise, his witnesses, and evidence will be located in Ohio. Finally, the Plaintiffs have suggested no "fundamental substantive policies" that favor the exercise of jurisdiction by Colorado courts. For the foregoing reasons, it will be unreasonable to require Mr. Wise to defend this action in Colorado. See Bell Helicopter Textron, Inc., 385 F.3d at 1296. Indeed, Mr. Wise could not have anticipated being haled into court in Colorado, and to require Mr. Wise to litigate in Colorado would offend traditional notions of fair play and substantial justice. Therefore, Plaintiff's claims

against Mr. Wise must be dismissed. See Burger King Corp., 471 U.S. at 472-74, 105 S. Ct. at 2183.

E. Mr. Wise Not Subject to Jurisdiction

For the foregoing reasons, the Court does not have personal jurisdiction over Mr. Wise and should dismiss the Plaintiff's Complaint against him.

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR IMPROPER VENUE

The Federal Venue Statute, 28 U.S.C. § 1391(b), provides:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Here, the only Defendant for which Plaintiff alleges residence happens to be domiciled in Ohio. See Compl. ¶ 6. Venue in the District of Colorado is therefore improper under subsection (1) since no defendant appears to reside therein, and under section (3), since no defendant may apparently be found therein and there is a district in which the action may otherwise be brought - namely, the Southern District of Ohio, where Mr. Wise resides. Venue is also improper under subsection (2), because a "substantial part of the events or omissions giving rise to the claim" did not occur in the District of Colorado. Plaintiff is arguing that venue is proper in Colorado because it felt economic harm there. However, intellectual property infringement takes place in the state of the infringement rather than the state of the trademark owner's domicile. See Lifeway Foods, Inc. v. Fresh Made, Inc., 940 F. Supp. 1316, 1319-20 (N.D. Ill. 1996).

Accordingly, venue is not proper in the District of Colorado. Therefore Plaintiff's Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(3).

III. CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's Complaint for lack of personal jurisdiction against Mr. 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

April 16, 2007

Respectfully submitted,

DEFENDANT JEREMY WISE

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