

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Addicting Games, Inc.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:19cv-00056-CMH/IDD
)	
Addicting.com, <i>et al</i> ,)	
)	
and)	
)	
Federal Investment Group, LLC,)	
By special appearance,)	
)	
Defendants.)	

Memorandum of Law in support of Intervenor's Motion to Dismiss
Pursuant to Federal Rule of Civil Procedure 12(b)(2)
Or, in the alternative,
for Change of Venue Pursuant to Federal Rule of Civil Procedure 12(b)(3)
in accordance with either 1404(a) or 1406(a)

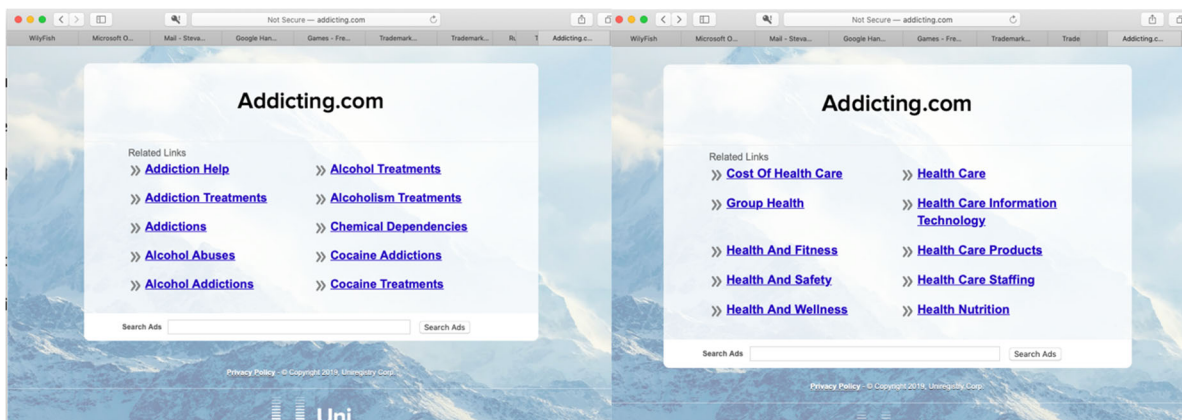
Comes Now Intervenor Federal Investment Group, LLC (hereinafter FIG), by special appearance to dispute this Court's jurisdiction and venue, on behalf of itself and the Defendant Domain addicting.com, and files this Memorandum of Law in Support of its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) or, in the alternative for change of venue pursuant to Federal Rule of Civil Procedures 12(b)(3).

The Plaintiff in the Complaint before the Court has exclusive rights to the term "addicting games" which it uses in generic fashion on its website, but seeks to extend this to all uses of the term addicting¹. Addicting means causing addiction, a compulsive need for and use of a habit-

¹ See Exhibit 1, Westreich Declaration. at ¶3, Plaintiff's webpage (hereinafter Westreich Dec.).

forming substance.² The Plaintiff in this matter is over reaching attempting to extend its rights to “addicting games”³ to the Defendant Domain, addicting.com owned by intervenor FIG.

Since registration in 1999, FIG has directed its domain addicting.com to Pay-Per-Click on-line advertising services (hereinafter “PPC”) (See Exhibit 3, Dec. of Krikor Bedrossian, ¶ 6.) (Hereinafter KB Dec.) which in this jurisdiction is sufficient use for ACPA relief making FIG the senior trademark user.⁴ The Plaintiff asserts in its amended complaint that the domain addicting.com sends users to a webpage with advertisements for games. (See Amended Complaint, Dkt. 5, at ¶ 27 *et seq.*). However, when counsel goes to the page initially it is focused on addiction services and a refresh of the page shows healthcare and it is therefore assumed that the delivery of advertising by Uniregistry’s provider (likely Google) is either randomized or based on the users previous online searches. That is, the reason the Plaintiff found games advertised on addicting.com is that the Plaintiff had previously been searching for addicting games. Counsel for the intervenor found dramatically different results. (See Exhibit 2, Westreich Dec. ¶ 3.



² <https://www.merriam-webster.com/dictionary/addiction>

³ These “rights” are questionable as the Plaintiff’s use certainly appears to be generic.

⁴ (See Exhibit 2, Report and Recommendation in Weitzman v. Lead Networks Domains Pvt., Ltd., at page 13, incorporated into the Order issued October 26, 2010 by Judge Hilton.

In asserting this Court's jurisdiction, the Plaintiff asserts that there is no entity to be served as a party defendant. (See Amended Complaint, Dkt. 4, paragraphs 76 and 77.) The principal behind Addicting Games, Inc., Bill Karamousiz and the owner of intervenor FIG, Krikor Bedrossian, met at the T.R.A.F.F.I.C Domain Conference and Expo held October 14-19, 2011 and discussed addicting.com and possibly working together. (KB Dec. at ¶ 8) At the time of this discussion, the WHOIS record for addicting.com was the same as it is now. (KB Dec. at ¶ 9)

I. STATEMENT OF FACTS

A. Federal Investment Group

Intervenor FIG is a Nevada LLC with a registered address of 3773 Howard Hughes Parkway, Suite 5005, Los Vegas, Nevada 89169-6014 and a primary business address of 1707 Royal Boulevard, Glendale California 91207. (KB Dec. at ¶ 2.) Krikor Bedrossian is FIG's managing member and sole owner. (KB Dec. at ¶ 3.) FIG, started on May 20, 1997, registered addicting.com on March 1, 1999 under the name of CostNet (aka CostaNet), a branch office of FIG. (See KB dec. at ¶ 4.) On January 19, 2001 FIG established a branch office in Vietnam and on November 15, 2004 retitled addicting.com under FIG, Vietnam. (See KB dec. at ¶ 5.) FIG has, since registration, operated addicting.com continuously and without interruptions for PPC advertising through its offices in Vietnam and California notably without any contacts in Virginia. (KB Dec. at ¶¶ 6 & 7)

B. Plaintiff's Use of ADDICTING GAMES as a mark & its knowledge

Plaintiff is the junior trademark user of "addicting." Plaintiff's application for U.S. Federal registration of the ADDICTING GAMES mark was filed on November 1, 2005, registered on October 30, 2007 and has a claimed date of first use of May 9, 2007 for Entertainment services,

namely providing on-line computer games and video games. (See Exhibit E to Plaintiff's Amended Complaint, Dkt. 4-5.) Plaintiff states that its principal business address is in California. (See Amended Complaint, Dkt 4, page 1.) In an oral communication and subsequent emails from prior counsel dated February 26, 2019, Plaintiff's counsel was informed that it was the junior user and provided evidence thereof. (See Exhibit 4, Keating Dec. at ¶ 4 and attachment.)⁵

II. JURISDICTIONAL STANDARD OF REVIEW

A Motion to Dismiss for lack of jurisdiction requires the Court to weigh the evidence and satisfy itself of its power to hear a case. See Williams v. United States, 50 F.3d 299, 304 (4th Cir.1995). Although conclusory arguments about the merits will not suffice to defeat jurisdiction (see Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946)), the Plaintiff bears the burden of proving that jurisdiction actually exists, and the Court must dismiss the action if the facts so require. See Richmond, Fredericksburg & Potomac Ry. Co. v. United States, 945 F.2d 765, 768 (4th Cir.1991); Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir.1982). Courts generally cannot exercise *in rem* jurisdiction to adjudicate the status of property unless the Due Process Clause would have permitted *in personam* jurisdiction over those who have an interest in the *res*. Porsche Cars North America, Inc. v. Porsch.Com, 51 F.Supp.2d 707, 712 (E.D. Va., 1999). FIG has no connections to the Commonwealth of Virginia. (KB Dec at ¶ 7) FIG is a Nevada LLC with an owner based in California who does all of his work in California. (KB Dec at ¶ 2.)

⁵ The Plaintiff in its amended complaint states that addicting.com is aware of the action, meaning the Plaintiff knew the identity of the registrant of addicting.com, but proceeded *in rem* despite knowing that addicting.com was represented by counsel and that, therefore, it could have easily determined a party to be served.

III. ACPA

By the express terms of Section 1125(d)(2)(A)(ii) of the ACPA, a plaintiff may proceed with an *in rem* action against a domain name if, and only if, the Court finds either that the plaintiff is (1) unable to obtain *in personam* jurisdiction over the domain name registrant, or (2) that the plaintiff is unable to find the domain name registrant. (15 U.S.C. § 1125(d)(2)(A); see also Lucent Technologies, Inc. v. Luentsucks.Com, 95 F.Supp.2d 528, 531-532 (E.D. Va., 2000). Where the Plaintiff is aware of a person who would have been a defendant in a civil action, *in rem* jurisdiction is not available. (Id. citing 15 U.S.C. § 1125(d)(2)(A)(ii)(II)(aa)).

The Plaintiff knew the actual owner of the domain name from a conversation years before this action was filed. (KB Dec at ¶ 8.) Even where the Plaintiff to claim that he forgot about that conversation, he did not do any due diligence to find the owner of the domain name. In February of this year, counsel for the Plaintiff had an oral and subsequent email exchange with former counsel, Paul Keating, for addicting.com in which counsel discussed the ownership of addicting.com making clear that counsel's client owned addicting.com. (See Exhibit 4, Keating declaration with email exchange with counsel.) The Plaintiff, therefore, knew the identity of the owner of addicting.com, the client of Mr. Keating.

In Lucent Technologies, the court found that the Plaintiff failed to satisfy the due diligence requirements of Section 1125(d)(2)(A)(ii)(II)(aa) because it did not allow a reasonable time for Johnson to respond to its notice before filing the *in rem* complaint. Id. at 532. The Plaintiff in this case did far less than the Plaintiff in Lucent. It does not allege that it tried to email the address on the Whois. It did not file an UDRP which would have revealed the ownership information behind privacy and certainly started a conversation. Importantly, despite knowing the identify of counsel for addicting.com, the Plaintiff chose to proceed *in rem* rather than

inquire as to the identity and location of a party who would be a defendant in any action. This cannot be seen as sufficient due diligence sufficient for the filing of an *in rem* claim.

The Plaintiff is able to obtain *in personam* over FIG in either Nevada, its state of incorporation or California, the location of its owner, registered agent and its primary place of business. The Plaintiff, as of the filing of the amended complaint on April 11, 2019 knew the identity of a party defendant as well as how to serve the party. *In rem* jurisdiction is, therefore, improper.

IV. This Court may not Exercise Personal Jurisdiction over FIG

For this Court to exercise personal jurisdiction over FIG it must have certain minimum contacts with Virginia such that the maintenance of a suit does not offend traditional notions of fair play and substantial justice. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The Fourth Circuit has adopted a three-part inquiry to determine whether a defendant is subject to jurisdiction in a State because of its electronic transmissions to that State:

- (1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the forum state;
- (2) whether the plaintiff's claims [arose] out of those activities; and
- (3) whether the exercise of personal jurisdiction is constitutionally reasonable."

Zaletel v. Prisma Labs, Inc., 226 F.Supp.3d 599 (E.D. Va., 2016)

In determining whether a foreign defendant has purposefully availed itself of the privilege of conducting business in a forum state, the first question is whether the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. Id. (quoting Fed. Ins. Co. v. Lake Shore Inc., 886 F.2d 654, 658 (4th Cir. 1989)). Crucially, to satisfy this standard, "a defendant outside the forum State must have at least 'aimed' its challenged conduct at the forum State." Zaletel v. Prisma Labs, Inc., 226 F.Supp.3d 599 (E.D. Va., 2016).

In order to be subject to Virginia jurisdiction, the defendant's relationship to Virginia must arise out of contacts that the Defendant itself created. Walden v. Fiore, — U.S. —, 134 S.Ct. 1115, 1122, 188 L.Ed.2d 12 (2014) (quoting Burger King v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174 (1985)). Due process requires that jurisdiction be predicated on a defendant's own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts. . . ." Id.

As previously noted, FIG does not have any contacts with Virginia. FIG owns domain names and runs a business which sells diapers and incontinence products at wholesale. The business has one customer based in Wisconsin. (KB Dec at ¶ 11.) FIG has not placed any advertisements directed at Virginia. (KB Dec at ¶ 12.) FIG has not directed its activities to Virginia and has no connections to Virginia and, therefore, it is not constitutionally reasonable for this Court to exercise personal jurisdiction over FIG. As there is no basis for this Court to exercise either *in personam* over FIG or *in rem* jurisdiction over the Domain this action should be dismissed.

V. In the Alternative, FIG seeks Dismissal of this Action Based on Forum Non Conveniens or for Change of Venue Pursuant to 28 U.S.C. § 1404(A)

Federal Rule of Civil Procedure 12(b)(3) permits a defendant to challenge the plaintiff's choice of venue. It is the plaintiff's burden to establishing that venue is proper. See T. & B. Equip. Co. v. RI, Inc., No. 3:15-cv-337, 2015 WL 5013875, at *2 (E.D. Va. Aug. 24, 2015). The court need not accept the pleadings as true and may consider outside evidence. To survive a motion to dismiss for improper venue, the Plaintiff need only make a *prima facie* showing of proper venue. Mitrano v. Hawes, 377 F.3d 402, 405 (4th Cir. 2004).

Even if personal jurisdiction and venue are proper, the court may transfer pursuant to 28 U.S.C. § 1404(a) for the convenience of parties and witnesses or in the interest of justice. Brock v. Entre Computer Ctrs., Inc., 933 F.2d 1253, 1257 (4th Cir. 1991). The moving party bears the burden of demonstrating that transfer is proper. Intranexus, Inc. v. Siemens Med. Solutions Health Servs. Corp., 227 F. Supp. 2d 581, 583 (E.D. Va. 2002). If venue is improper, the court may dismiss the case or exercise its discretion to transfer pursuant to 28 U.S.C. § 1406(a). Quinn v. Watson, 145 F. App'x 799, 800 (4th Cir. 2005).

In the matter before the Court, both parties are based in Los Angeles, California. FIG has no contacts with this forum. It is unknown if Plaintiff has any contacts with this forum. Discovery in this case would be onerous for both parties flying across the country to do depositions for absolutely no reason when all of the principals are in Los Angeles, CA. This matter should never have been filed *in rem* and thus should be dismissed. In the alternative the only logical place to litigate this matter is in the Central District of California where the parties and evidence are located.

VI. CONCLUSION

For the foregoing reasons, intervenor FIG and addicting.com request that the complaint be dismissed as there is no basis for *in rem* jurisdiction over the Domain and this Court lacks person jurisdiction over FIG and, in the alternative, to dismiss in the interest of justice or transfer this matter to the Central District of California and such further relief as the Court may deem just and proper.

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Respectfully submitted,

Federal Investment Group, LLC
By Counsel

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