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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

LOUJAIN HATHLOUL ALHATHLOUL, Plaintiff, v. DARKMATTER GROUP, MARC BAIER, RYAN ADAMS, and DANIEL GERICKE, Defendants.	Case No. 3:21-cv-01787-IM **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR JURISDICTIONAL DISCOVERY**

INTRODUCTION

Nine months after Plaintiff's initial complaint was dismissed for lack of personal jurisdiction; seven months after she filed an amended complaint; two months after briefing on Defendants' motion to dismiss that amended complaint concluded; and weeks after the Ninth Circuit decided a personal-jurisdiction appeal that strongly supports Defendants (*Briskin v. Shopify, Inc.*, 87 F.4th 404 (9th Cir. 2023)), Plaintiff belatedly moves for jurisdictional discovery. This Court should reject her transparent attempt to forestall dismissal.

Plaintiff's motion is untimely and flouts Ninth Circuit precedent. Plaintiff may not obtain discovery at this late stage at all, let alone based on a "hunch that it might yield jurisdictionally relevant facts" that "neither [her] complaint nor [any] affidavit allege[s]." *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). Defendants have not (for purposes of their motion to dismiss) disputed Plaintiff's non-conclusory allegations. Plaintiff's requested discovery would be a fishing expedition to buttress those inadequate allegations—raising the same due process and comity concerns that led the Court to grant Defendants' first motion to dismiss.

Plaintiff's "discovery" motion also spills considerable ink pushing back on Defendants' supposed "mischaracteriz[ations]" of her allegations. (ECF 76 at 2.) That amounts to a procedurally improper sur-reply in opposition to Defendants' pending motion to dismiss. But Defendants do *not* mischaracterize Plaintiff's allegations. And even treating Plaintiff's new allegations as part of her amended complaint, Plaintiff does not come close to establishing personal jurisdiction over Defendants—confirming that jurisdictional discovery is pointless.

The Court should deny Plaintiff's motion and grant Defendants' motion to dismiss.[1]

[1] Plaintiff's discovery motion is subject to Local Rule 26-3, including Rule 26-3(c)'s prohibition on reply briefs not directed by the Court.

I. PROCEDURAL BACKGROUND

Plaintiff brought this case in December 2021, and Defendants moved to dismiss the original complaint in May 2022. (ECF 1, 28.) Rather than disputing Plaintiff's jurisdictional allegations, Defendants accepted those allegations "as true" (for purposes of their motion only) but argued they did "not establish personal jurisdiction." (*E.g.*, ECF 39 at 4 n.3.) Plaintiff never moved for jurisdictional discovery; instead, Plaintiff raised the possibility of such discovery for the first time at oral argument on March 7, 2023. (ECF 45 at 32.) On March 16, 2023, the Court granted Defendants' motion to dismiss with leave to amend. (ECF 44.) Like Defendants, the Court "accept[ed] as true" Plaintiff's non-conclusory allegations. (*Id.* at 5.) But those allegations "failed to meet either the first or second prong of the 'minimum contacts' analysis," and exercising jurisdiction over Defendants would have been "unreasonable" regardless. (*Id.* at 20.)

Plaintiff filed an amended complaint on May 8, 2023. (ECF 54.) Defendants again moved to dismiss—and again took Plaintiff's allegations as true for purposes of their motion. (ECF 63 at 10; ECF 73 at 16.) Despite purporting to "reserve[] the right to seek jurisdictional discovery" in her opposition brief, Plaintiff again failed to move for such discovery. (ECF 70 at 12.) Briefing concluded on October 30, 2023. (ECF 73.) On November 30, 2023, Defendants notified the Court of the Ninth Circuit's intervening decision in *Briskin*, 87 F.4th 404, which reinforced the weakness of Plaintiff's jurisdictional theory. (*See* ECF 74.) Several weeks later, on December 26, 2023, Plaintiff moved for jurisdictional discovery. (ECF 76.)

II. THE COURT SHOULD REJECT PLAINTIFF'S UNTIMELY REQUEST TO CONDUCT A FISHING EXPEDITION

"If a party needs jurisdictional discovery, that party has an obligation to request it in a timely manner." *Barrett v. Lombardi*, 239 F.3d 23, 28 (1st Cir. 2001). "[T]he appropriate time to request jurisdictional discovery is in opposition to the defendant's motion—whether a plaintiff

files a separate motion for jurisdictional discovery or . . . request[s] jurisdictional discovery in a detailed manner in the opposition to the motion to dismiss." *Dearing v. Magellan Health Inc.*, No. CV-20-00747-PHX-SPL, 2020 WL 7041048, at *2 (D. Ariz. Sept. 29, 2020) (quoting *Cockrum v. Donald J. Trump for President, Inc.*, 319 F. Supp. 3d 158, 187 (D.D.C. 2018)).

Because Plaintiff did neither, this Court should deny Plaintiff's "eleventh-hour" motion on timeliness grounds. *E.g.*, *Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 819 (9th Cir. 1995) (district court properly denied jurisdictional discovery where party waited months to request discovery (citing *Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37, 39 (9th Cir. 1978))). Plaintiff "expressly recognized the [purported] utility of jurisdictional discovery" as early as the March 2023 oral argument. *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1280 (11th Cir. 2009). It makes no difference that Plaintiff "reserved the right" to seek discovery later. (ECF 70 at 12.) "[B]ur[ying] such requests in [her] briefs as a proposed alternative to dismiss[al]" is not the sort of "formal action" that is necessary to move for discovery. *Mazer*, 556 F.3d at 1280-81; *see also Briskin*, 87 F.4th at 424 (request without any "supporting argument" insufficient). Even measuring from when briefing on Defendants' pending motion to dismiss concluded, Plaintiff waited months before belatedly moving for jurisdictional discovery. She does not (and cannot) explain that delay.

The Court should also reject Plaintiff's untimely motion because she has not even alleged personal jurisdiction in the first place. Plaintiff may not obtain discovery based on a "hunch that it might yield jurisdictionally relevant facts" that "neither [her] complaint nor [any] affidavit allege[s]," *Boschetto*, 539 F.3d at 1020; *see also LNS Enters. LLC v. Continental Motors, Inc.*, 22 F.4th 852, 864-65 (9th Cir. 2022). To be sure, jurisdictional discovery can sometimes be appropriate "where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Data Disc, Inc. v. Systems Tech. Assocs.,*

Inc., 557 F.2d 1280, 1285 n.1 (9th Cir. 1977). For example, parties often submit affidavits and evidence giving rise to "disputed questions of fact with regard to jurisdiction," and discovery may "aid" in answering such questions. *See id.* at 1285 & n.1. But when the absence of jurisdiction is "not based on a failure to prove the facts alleged, but the failure to even allege the necessary facts, . . . [d]iscovery will not cure this." *Robinson ex rel. Hunsinger v. Daimlerchrysler AG*, No. 07-3258 SC, 2008 WL 728877, at *6 (N.D. Cal. Mar. 17, 2008).

Here, Defendants have repeatedly emphasized they are not disputing any factual allegations for purposes of personal jurisdiction. As discussed below, *see* Part III, *infra*, Plaintiff's (incorrect) argument that Defendants have mischaracterized her allegations is about the sufficiency of those allegations, not any factual dispute. Plaintiff's request for discovery is thus rooted in "speculation" that she will turn up new facts that will "enable [her] to demonstrate sufficient [jurisdictional] contacts." *Butcher's Union Loc. No. 498, United Food & Com. Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986). Such wishful thinking cannot justify jurisdictional discovery. *See id.*; *see also Getz v. Boeing Co.*, 654 F.3d 852, 860 (9th Cir. 2011) (district court properly denied discovery request based on "purely speculative allegations of attenuated jurisdictional contacts"); *Key Tronic Corp. v. SMART Techs. ULC*, No. 2:16-CV-0028-TOR, 2016 WL 7104252, at *9 (E.D. Wash. Dec. 5, 2016) (denying discovery where "the facts . . . are taken in the light most favorable to" the party seeking discovery, "and even under this lens, the issues . . . are disposed of completely"); *Brown v. Carnival Corp.*, 202 F. Supp. 3d 1332, 1346 (S.D. Fla. 2016) (denying jurisdictional discovery "because there is no genuine dispute on a material jurisdictional fact" (quotation omitted)).

Plaintiff "offers nothing to support h[er] contention that [s]he is entitled to go on a court-endorsed fishing expedition" to cure her "utter failure to . . . establish[] that these defendants had

sufficient contacts" with the United States. *Burns v. Lavender Hill Herb Farm, Inc.*, 167 F. App'x 891, 894 (3d Cir. 2006). Her two cases are inapposite: *Data Disc* stated only that a district court "may" allow discovery "to aid in clarifying . . . controverted factual questions." 557 F.2d at 1289. No such questions exist here. And *Ali v. Carnegie Institute of Washington*, 967 F. Supp. 2d 1367 (D. Or. 2013), which *denied* jurisdictional discovery, in no way stands for the broad and amorphous proposition that any "reasonable probability" of "additional facts" supporting jurisdiction entitles a plaintiff to discovery. (ECF 76 at 5-6 (quoting *Ali*, 967 F. Supp. 2d at 1372).) That would make jurisdictional discovery the default (rather than the exception) and negate Plaintiff's burden to allege personal jurisdiction. *See Boschetto*, 539 F.3d at 1015.

Jurisdictional discovery is especially inappropriate here because Plaintiff's request is not limited to "jurisdictional" facts. Plaintiff seeks evidence of alleged (i) "code that comprised the malware," (ii) "system architecture . . . showing the pathway of interactions between [her] device and Defendants' servers," (iii) "commands sent by Defendants to the malware," (iv) "Defendants' awareness of [her] physical presence in the United States," (v) "the identity of the companies Defendants procured anonymization services and proxy servers from," (vi) "the exact services Defendants procured," (vii) "the role and purpose of these services and proxy servers in further hacking activity," and (viii) "the reason for choosing these particular anonymization services and proxy servers." (ECF 76 at 6-7.) In other words, under "the guise of jurisdictional discovery," Plaintiff seeks to prove that Defendants hacked her phone, and how they did so—*i.e.*, to "prove [her] case" on the merits. *Eliahu v. Israel*, No. 14-cv-01636-BLF, 2015 WL 981517, at *9 (N.D. Cal. Mar. 3, 2015) (denying motion for jurisdictional discovery under the Foreign Sovereign Immunities Act where "Plaintiff ha[d] not satisfied his initial burden of even alleging"

jurisdiction), *aff'd*, 659 F. App'x 451 (9th Cir. 2016). That is "further reason to reject Plaintiff's request." *Id.*

At bottom, Plaintiff's position is that her insufficient jurisdictional allegations somehow entitle her to engage in freewheeling discovery that would circumvent Defendants' due process rights. That gets things backwards. "Because jurisdictional discovery takes place prior to a determination that the court actually has jurisdiction over this dispute and th[ese] defendant[s], it is particularly important to avoid imposing undue burdens on a party who may not even be subject to the court's power." *Key Tronic*, 2016 WL 7104252, at *8 (citation omitted). Especially for foreign Defendants: Just as "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field," *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987), "American courts . . . should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position," *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987); *cf.* ECF 44 at 20-22 (recognizing that "the exercise of jurisdiction over Defendants would be unreasonable" under the Due Process Clause, in part because of "the extent of conflict with the sovereignty" of the UAE and the fact that the "relevant parties, documents, and witnesses are located abroad").

III. PLAINTIFF'S NEW ALLEGATIONS AND ARGUMENTS DO NOT SAVE HER CLAIMS FROM DISMISSAL

Despite formally seeking "discovery," much of Plaintiff's motion reads like a sur-reply. For example, Plaintiff disagrees with Defendants over whether she adequately alleged that they "act[ed] to exfiltrate data from her device while it was located in the United States." (ECF 76 at 4 (emphasis omitted).) But Plaintiff points only to paragraph 126 of her amended complaint, which alleges that an "attacker's server may send commands to the malware that the malware executes."

(ECF 54 ¶ 126 (emphasis added).) The next paragraph alleges that Plaintiff's device "continuously transmit[ted] data . . . to servers controlled by Project Raven." (*Id.* ¶ 127.) Indeed, Plaintiff *amended* her complaint to allege that here, the malware "*automatically* exfiltrate[d] data" from her device, negating any ambiguity as to whether Defendants were actively interacting with her device while she was in the United States. (*Id.* ¶ 137 (emphasis added); *see also* ECF 1 ¶ 110 (original complaint omitting "automatically").) Plaintiff cannot seek to undo that amendment, or otherwise buttress the allegations in her complaint, through briefing. *See* FED. R. CIV. P. 15(a)(2). And because the allegations that Defendants knew of her location or intentionally accessed her phone in the United States would still be insufficient to establish personal jurisdiction under the caselaw Defendants already cited—including *Will Co., Ltd. v. Lee*, 47 F.4th 917, 926 (9th Cir. 2022), *Hungerstation LLC v. Fast Choice LLC*, 857 F. App'x 349, 351 (9th Cir. 2021), and *Walden v. Fiore*, 571 U.S. 277, 289 (2014)—jurisdictional discovery would be pointless.

Similarly, Plaintiff argues that her allegations "already detail[] how . . . the location of . . . anonymization services and proxy servers mattered" to Defendants. (ECF 76 at 3). But neither the allegation that "Defendants utilized a U.S. company's anonymization services and proxy servers to prevent detection" (ECF 54 ¶ 107), nor anything else in the amended complaint, indicates that the *locations* of third-party companies in the United States made it easier to carry out the alleged hack. Once again, even that (unpleaded) allegation would not show that Defendants "expressly aimed tortious conduct" at the United States. *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1207 (9th Cir. 2020). To the extent Plaintiff argues that the locations of third-party companies made it easier to target "Apple (a U.S.-based company)" (ECF 76 at 3), this would, "at most, show[] that Defendants purposefully directed their conduct at a third party—Apple," "not the United States itself." (ECF 44 at 13, 14.) In *AMA*, there was no express aiming at the United

States despite a defendant's purchase of proxy domains and DNS services from American companies, even if such services made it easier "to appeal to the U.S. market"—absent any indication that the defendant was "targeting . . . the United States . . . as opposed to more users globally." *Id.* at 1212. But Plaintiff's own allegations—including that Defendants "continuously exfiltrat[ed] data" throughout the entire alleged "period of surveillance" (ECF 54 ¶¶ 139, 142), during which Plaintiff was allegedly in the United States for just five days (*id.* ¶ 148)—confirm that Defendants were in fact "*indifferent* to [her] location," *Briskin*, 87 F.4th at 422 (emphasis added).

In short, Defendants have not disputed the facts Plaintiff pleaded, and Plaintiff is not entitled to discovery even under the facts she *didn't* plead. For that reason—and because Plaintiff's new theories cannot overcome the additional reasons why this Court lacks personal jurisdiction over Defendants (*see* ECF 73 at 6-16)—her motion should be denied.

CONCLUSION

This Court should deny Plaintiff's motion for jurisdictional discovery and grant Defendants' motion to dismiss the amended complaint.

Respectfully submitted,

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