IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DAVIDSON & ASSOCIATES, INC., D.B.A. BLIZZARD ENTERTAINMENT, and VIVENDI UNIVERSAL GAMES, INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 4:02CV498 CAS
INTERNET GATEWAY, INC., TIM JUNG, an individual, ROSS COMBS, an individual, ROB CRITTENDEN, an individual, YI WANG, an individual, and JOHN DOES 1-50,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE

Plaintiffs submit this memorandum in opposition to defendants' Motion to Transfer Venue. Defendants' extraordinary attempt to transfer the case from the forum in which the two principal defendants reside, nearly six months after entry of the Case Management Order, fails to satisfy the heavy burden placed on a defendant who seeks to transfer a case from the forum chosen by plaintiff.

NATURE OF THE ACTION

Plaintiff Davidson & Associates, Inc., D.B.A. Blizzard Entertainment ("Blizzard") operates Battle.net®, an online gaming service that allows remote multiplayer play of high quality computer games for which plaintiff owns registered copyrights. On April 5, 2002, plaintiffs sued defendant Internet Gateway, Inc. ("Internet Gateway"), located in St. Louis, and its president, Tim Jung ("Jung"), residing in St. Louis, alleging that Internet Gateway operated a

computer program called "bnetd" that acts like the Battle.net® service, but which permits persons to play Blizzard games online with unauthorized copies of the games. Plaintiffs also alleged that Internet Gateway and Jung unlawfully copied computer code and other elements of Blizzard games and infringed trademarks belonging to Blizzard. The initial complaint alleged claims for federal copyright infringement, federal trademark infringement, dilution and false designation of origin, and common law trademark infringement and unfair competition.

In subsequent amended complaints, plaintiffs added Ross Combs ("Combs") (a Texas resident) and Rob Crittenden ("Crittenden") (a Maryland resident), individuals who contributed to the development of the bnetd program hosted by Internet Gateway, as defendants. Plaintiffs also added claims for circumvention of copyright protection systems in violation of the federal Digital Millennium Copyright Act, trafficking in technology designed for the purpose of circumventing copyright protection systems in violation of the Digital Millennium Copyright Act, and for breach of contract.

Defendants answered the complaints and asserted counterclaims invoking the jurisdiction and venue of this Court, without reference to any inconvenience of this forum and without reference to the forum selection clause in the contracts. On December 3, 2002, again without reference to any asserted inconvenience of this forum, defendants joined with plaintiffs in the submission of a Joint Proposed Scheduling Plan that assumed the litigation and trial of this case before this Court. When defendants appeared at the pre-trial conference on December 6, 2002, they said nothing about the forum being inconvenient. This Court then entered a Case Management Order on December 9, 2002 on the assumption that the case will be litigated before this Court. Since entry of the order, defendants have served plaintiffs with interrogatories and requests for the production of documents, and responded to plaintiffs' discovery requests.

On March 6, 2003, defendants filed a notice of appearance of additional counsel. Then, on May 28, 2003, almost fourteen months into the lawsuit, defendants' new lawyers served their instant motion to transfer venue, asserting for the first time that this Court is somehow an inconvenient forum for the litigation of this dispute.

ARGUMENT

Section 1404(a) permits transfer "[f]or the convenience of the parties and witnesses, in the interest of justice ... ." 28 U.S.C. § 1404(a) (1994). Thus, there are "three general categories of factors that courts must consider when deciding a motion to transfer: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice." Terra Int'l, Inc. v. Mississippi Chem. Corp., 119 F.3d 688, 691 (8th Cir. 1997).

It is well-settled that "[i]n considering a §1404(a) motion, **the Court must give great weight to the plaintiff's choice of a proper venue**. [Citation omitted.] That choice should only be disturbed upon a clear showing that the balance of interests weighs in favor of the movant's choice of venue. * * * [U]nless the balance of interests is strongly in favor of the movant, the plaintiff's choice of forum should prevail." Anheuser-Busch, Inc. v. City Merch., 176 F. Supp. 2d 951, 959 (E.D. Mo. 2001) (emphasis supplied).

A. The Forum Selection Clause In The License Agreements Does Not Control The Disposition Of The 1404(a) Motion.

Defendants rely heavily on the forum selection clause in the license agreements for the Blizzard computer games in support of their argument that the case should be transferred to the Central District of California. (Def. Mem. 8-9.) This argument is a red herring.

First, the gravamen of this case is defendants' violation of the Digital Millennium Copyright Act, as well as the claims for federal copyright infringement, federal trademark

infringement, dilution and false designation of origin, and common law trademark infringement and unfair competition. None of these claims are related to the forum selection clause that is contained in the End User License Agreement ("EULA") that accompanies Blizzard's computer games. In fact, the original complaint did not even contain an allegation that any EULAs had been violated by defendants. The breach of contract claim, upon which most of defendants' arguments are based, is ancillary to the main focus of this case.

Moreover, the Supreme Court of the United States has expressly ruled that forum selection clauses do not control the determination of a transfer motion under Section 1404(a). Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32 (1988). Thus, even when a defendant seeks transfer to a venue specified in a forum selection clause, the courts examine other factors in determining whether to order transfer under Section 1404(a). For example, in Choice Equip. Sales, Inc. v. Captain Lee Towing, L.L.C., 43 F. Supp. 2d 749 (S.D. Tex. 1999), a motion to transfer a case from Texas to Louisiana was denied, notwithstanding a forum selection clause calling for a Louisiana forum. The court held that, "[w]hile the selection clause provides some indication that the convenience of the parties would presumably be better served by transfer to the Eastern District of Louisiana, its existence by no means ends the analysis. Such a clause is at best only one factor in the decision. [Citations omitted.] Defendant bears the burden of showing that, on balance, the remaining factors favor transfer." Id. at 754.

The forum selection clause in the instant case is of little significance under controlling Eighth Circuit authority, which holds that the clause applies only to the breach of contract cause of action in the complaint, and not to the multiple federal statutory claims. In Terra, the court reviewed the applicability of a forum selection clause to a particular complaint under three different tests adopted by other federal courts: (1) whether the non-contract claims "ultimately

depend on the existence of a contractual relationship between the parties"; (2) whether resolution of the claims "relates to interpretation of the contract"; and (3) whether the claims "involv[e] the same operative facts as a parallel claim for breach of contract." 119 F.3d at 694-95.

The statutory claims in this case do not depend in any way on the existence of the contract; defendants' conduct would violate the statutes even if no contract existed. Similarly, the statutory claims do not relate to interpretation of the contract. Finally, while there is some overlap of operative facts between the breach of contract claim and some aspects of the copyright claims, there is no overlap with respect to the federal trademark infringement claims, and no overlap with respect to the claims for circumvention and trafficking in circumvention technology under the Digital Millennium Copyright Act.

In short, the forum selection clause should not guide this Court's decision on defendants' motion.

B. The Convenience Factors Do Not Support Transfer.

The Eighth Circuit and this Court have noted that the convenience of the parties and witnesses encompasses at least the following considerations: "(1) the convenience of the parties, (2) the convenience of the witnesses--including the willingness of witnesses to appear, the ability to subpoena witnesses, and the adequacy of deposition testimony, (3) the accessibility to records and documents, (4) the location where the conduct complained of occurred, and (5) the applicability of each forum state's substantive law." Terra, 119 F.3d at 696; Biometics, LLC v. New Womyn, Inc., 112 F. Supp. 2d 869, 875 n.4 (E.D. Mo. 2000).

1. The Convenience Of The Parties Does Not Favor Transfer.

Here, plaintiffs want to litigate the case in this Court, so plaintiffs' convenience is not an issue. Defendants Internet Gateway and Jung are located in St. Louis, so California can hardly be a more convenient forum for them, notwithstanding their stated willingness to litigate there. Defendants Combs and Crittenden, located in Texas and Maryland respectively, will need to travel to testify at trial in either forum, but the trip to St. Louis is obviously shorter for each than the trip to California.

Defendants misleadingly quote this Court's statement in Biometics that "The plaintiff's choice of forum is accorded less weight ... where it is not the plaintiff's residence." 112 F. Supp.2d at 877; Def. Mem. 10. Biometics was a patent infringement case where, unlike the instant case, the defendants had "little contact" with plaintiff's chosen forum and the infringing conduct occurred primarily in the proposed transferee forum. In the instant case, as noted earlier, the principal defendants reside in St. Louis and their misconduct was centered in St. Louis. This Court acknowledged in Biometics that factors such as those present here would increase the deference accorded to plaintiff's choice of forum: "The Court therefore gives less deference to plaintiff's choice of forum than it would if plaintiff resided here or if defendants' allegedly infringing activity was centered here." Id. at 877 (emphasis supplied).

2. The Convenience Of Witnesses Also Does Not Favor Transfer.

Plaintiffs' employee witnesses are willing to come to St. Louis to testify, so their convenience is not an issue. Defendant Jung, the most important witness on the defense side, lives in St. Louis.

Defendants make much of the fact that a potential third-party witness named Mark Baysinger lives in California. (Def. Mem. 11-12.) But defendants do not show that Mr. Baysinger would be unwilling to testify at a St. Louis trial. Indeed, as defendants' own production illustrates, Mr. Baysinger already has offered to testify on their behalf. On March 12, 2002, Mr. Baysinger sent the following email to the developers of the bnetd program:

> Hey guys. Glad to see that there is still a lot of interest in bnetd. Just wanted to let you know that I agree 100% with your decision to stand up to Vivendi. And if there is anything I can do to help out your cause (like testify :) just holler! Thank you for all your hard work.
>
> -Mark

(Email attached as Exhibit A.) As Chief Judge Sachs has observed, the possibility of unavailability of a third-party witness "does not carry much weight where the defendant merely assumes the witnesses in question would not appear voluntarily at trial." DeBruce Grain, Inc. v. Farmland Mut. Ins. Co., No. 90-0428-CV-W-6, 1990 U.S. Dist. LEXIS 15689, at *6-7 (W.D. Mo. Nov. 16, 1990); Houk v. Kimberly-Clark Corp., 613 F. Supp. 923, 931 (W.D. Mo. 1985). Moreover, defendants have not shown that the use of a videotaped deposition would be inadequate in the event that Mr. Baysinger reneges on his offer and declines to testify in St. Louis. See Houk, 613 F. Supp. at 931.[1]

In any event, Mr. Baysinger's testimony would be peripheral, at most, to the issues to be litigated here. While defendants correctly state that Mr. Baysinger originated the bnetd software project in 1998, he abandoned the project in December of that year, and Jung and the other

[1] Defendants cite this Court's decision in Biometics for the proposition that the Court "may assume that Mr. Baysinger will not voluntarily appear in this District." (Def. Mem. 12 and n.51.) However, in Biometics, this Court did not use that assumption to support keeping the case in the forum where those witnesses resided. Instead, in Biometics, this Court assumed that the witnesses would not voluntarily appear in the proposed transferee forum, but ordered the transfer anyway, noting their testimony could be obtained by other means such as affidavit or deposition. So could Mr. Baysinger's.

defendants took control of the project shortly thereafter. Plaintiffs have not sued Mr. Baysinger, and the defendants' activities are distinct from those of Mr. Baysinger. Indeed, plaintiffs' case is focused entirely on the conduct of the people who took over the project from Mr. Baysinger -- defendants Internet Gateway, Jung, Combs, and Crittenden. It is these defendants' post-Baysinger conduct, in violation of the copyright laws, the trademark laws, and the license agreements, for which plaintiffs seek relief in this lawsuit. And, significantly, defendants have not alleged that Mr. Baysinger is responsible for any of the unlawful conduct alleged in the complaint and they have not sought to shift responsibility to him.

3. The Accessibility Of Records And Documents Does Not Favor Transfer.

Document production already has taken place, and would not be expedited or improved by a transfer to California. Defendants do not even argue that this factor supports transfer.

4. The Location Of The Conduct Complained Of Does Not Favor Transfer.

Defendants do not discuss the location of the conduct complained of. In fact, St. Louis, Missouri was the nexus for much of the conduct that took place:

- The bnetd website -- the primary resource for information about and access to the bnetd program -- resided in St. Louis
- The computer server for the email discussion groups and other discussion forums that facilitated development of the bnetd program resided in St. Louis
- Copies of the bnetd program resided in St. Louis
- Copies of the source code for the bnetd program resided in St. Louis
- Copies of at least one other computer program based on the bnetd program resided on computer servers in St. Louis
- Trafficking in the bnetd program and other programs occurred in St. Louis
- Copies of the computer code plaintiffs allege was copied from Blizzard games resided in St. Louis

- Other files illegally copied from Battle.net® servers were placed on computer servers in St. Louis

- Copies of BNS.exe, a program written by defendants to modify users' computers so that the Blizzard games would connect to the bnetd program rather than to the Battle.net® service, resided in St. Louis

Accordingly, the factor of the location of the complained of conduct strongly supports keeping the case in St. Louis rather than transferring pursuant to Section 1404(a).

C. The Interests Of Justice Factors Do Not Support A Transfer.

The interests of justice are not served by transfers which would delay the proceedings. Here, defendants waited until more than a year after the case was filed, and more than six months after this Court entered its Case Management Order, to advise anyone that St. Louis -- the residence of the two principal defendants -- is somehow an inconvenient forum for the lawsuit. Courts decline to transfer cases when the transfer is sought after the case has been pending for many months. See McGraw-Edison Co. v. Van Pelt, 350 F.2d 361 (8th Cir. 1965) (denying motion to transfer after case was pending for five months); DeBruce Grain, 1990 U.S. Dist. LEXIS 15689 (denying motion to transfer when party waited "nearly five months" before bringing motion). The unstated premise of the motion filed by the new members of defendants' litigation team is that it would be more convenient for them to litigate this matter in California. However, defendants also have been represented and continue to be represented by the same counsel since the inception of this case on April 5, 2002. The appearance of additional counsel is not by itself sufficient to excuse a fourteen-month delay.

While defendants argue that the transfer would not entail delay because of the comparative speed with which cases are adjudicated in the two districts (Def. Mem. 13), defendants overlook that, once transferred, this case may not get the same priority for trial as a

case filed fourteen months ago in the Central District of California. In addition, "[a] venue transfer would not only delay these proceedings but it would also inconvenience the parties because they would have to adapt to a new tribunal. For instance, schedules and court documents would need to be duplicated and the parties would need to hire [California] counsel." DeBruce Grain, 1990 U.S. Dist. LEXIS 15689, at *8.

If this case were transferred, the transferee court would need to repeat the efforts this Court undertook in establishing a Case Management Order. Additionally, although (as defendants note) plaintiffs' counsel's firm has an office in Los Angeles, no Los Angeles lawyer in the firm has worked on the case, so plaintiffs' trial preparation would be delayed by having to involve new lawyers in the case. Both the California court's and plaintiffs' counsel's resources would be wasted by having to duplicate efforts already undertaken -- when the problem could have been avoided had defendants timely voiced their objection to the convenience of the forum at the inception.

CONCLUSION

Defendants' tardy motion to transfer is founded on the unlikely proposition that the home of the two principal defendants is an inconvenient forum. Defendants have fallen far short of their burden of demonstrating that the balance of interests supports a transfer from plaintiffs' chosen forum. Defendants' motion should be denied.

Dated: June 18, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kirill Y. Abramov, an attorney, hereby certify that a copy of the foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE was served upon:

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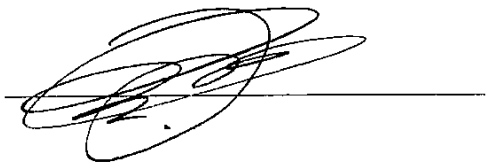
via facsimile and first class U.S. mail, postage prepaid, this 18th day of June, 2003.



[bnetd-dev] Bnetd / EFF

Mark Baysinger bnetd-dev@bnetd.org
Tue, 12 Mar 2002 13:06:06 -0800 (PST)

- Previous message: [bnetd-dev] Warriors :)
- Next message: [bnetd-dev] registry update
- **Messages sorted by:** [date] [thread] [subject] [author]

Hey guys. Glad to see that there is still a lot of interest in bnetd.
Just wanted to let you know that I agree 100% with your decision to stand
up to Vivendi. And if there is anything I can do to help out your cause
(like testify :) just holler! Thank you for all your hard work.

-Mark

(If you reply, be sure to include my address in the To field, since I'm
not on the list.)

--
Mark Baysinger
mb@baysinger.org

- Previous message: [bnetd-dev] Warriors :)
- Next message: [bnetd-dev] registry update
- **Messages sorted by:** [date] [thread] [subject] [author]