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OCT 27 2006

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

ANDERSON & BOTHELL

Sierra Corporation Design, Inc.,

Plaintiff,

vs.

David Ritz and Ed Falk,

Defendant.

File No.: 09-05-C-1660

**ORDER GRANTING DEFENDANT,
ED FALK'S, MOTION TO DISMISS
AND
TO VACATE DEFAULT JUDGMENT**

Defendant, Ed Falk's Motion to Dismiss for Lack of Personal Jurisdiction was heard on March 21, 2006 and continued until May 9, 2006. The Court has reviewed the entire record, heard and considered the testimony given at the hearing, the Briefs and arguments of the parties and is fully informed in the premises.

BACKGROUND

Plaintiff, Sierra Corporate Design, is incorporated under the laws of Nevada with its primary place of business in Fargo, Cass County, North Dakota. Sierra describes itself as a specialized Internet service provider and web hosting provider. By way of Amended Complaint, Sierra brought an action against the Defendants, David Ritz ("Ritz") and Ed Falk ("Falk") and alleged that Defendant, Ritz, engaged in computer crime in violation of North Dakota Century Code § 12.1-06.1-08 with regard to various websites and addresses owned by Sierra. Sierra further alleged that the conduct by Ritz was intentional and done for the purpose of inflicting injury upon Sierra by exposing Sierra's computer systems to risks to "hacking."

Defendant, Ritz, is a resident of Wisconsin. Defendant, Falk, is a resident of California. The computer crimes complained about by the Plaintiff, Sierra Corporate Design, Inc., allegedly committed by Ritz, involve allegations that Ritz intentionally accessed Sierra's Fargo, North Dakota, mail server, DNS, on or about February 27, 2005. The Complaint further alleges that Ritz issued multiple state-of-

authority commands, without authorization and gathered information in the form of internal network configurations and NIP addresses for Sierra's network. It was further alleged that Ritz made unauthorized zone transfers on the Sierra's DNS servers and that Ritz intentionally took possession of, copied and published private domain name/IP address/company information. The Plaintiff has made various other allegations that Ritz intentionally took possession of and copied information and was not authorized to do so. According to the first Amended Complaint, Falk was involved because he was:

- a. Aware of Ritz's unauthorized access to Sierra's computers and computer systems;
- b. Falk assisted in the publication of Sierra's private system information by posting a link to Ritz's announcement on Usenet where Sierra's private domain information was published by Ritz.
- c. Copied data from Sierra's computers and computer systems in violation of North Dakota Century Code §12.1-06.1-08;
- d. Took possession of data from Sierra's computers and computer systems in violation of North Dakota Century Code §12.1-06.1-08;
- e. Disclosed data from Sierra's computer systems in violation of North Dakota Century Code §12.1-06.1-08;
- f. Intentionally contributed to the damage of Sierra's computers and computer systems.

Sierra also brings an action against Ritz and Falk for trespass to chattels. Again, this allegation is predicated upon alleged conduct by Ritz in which Falk is supposed to have assisted, conspired and aided.

As developed from the affidavits and testimony Defendant, Falk, has never been to the State of North Dakota. He does not engage in business in North Dakota and does not own any property in the State of North Dakota.

Apparently, as a past time, Falk participates in on-line discussions regarding Usenet spam.

"Spam" is a term that is used to describe unwanted electronic junk mail or any sort of unwanted message sent by the Internet to a large group of people. As a general rule this unwanted junk e-mail consists of advertisements for products and services and is sent in bulk. Falk and others are concerned that the vast amount of spam has interfered with the usefulness of the Internet. Falk has created a website which identified spammers. Falk has compiled four hundred-thirty-four (434) case files on spammers and service providers. A case file is information on a spammer or service provider that supports spammers. The purpose of Falk's website was to monitor sources of spam that were flooding the Internet with explicit ads for pornography.

Falk does not conduct a business over his website. The website is entirely noninteractive and only changes when Falk sits down at a keyboard and changes it.

In 1997 Falk added Netzilla to his list of spammers being tracked and began to compile a case file. By 1999 Netzilla appeared to be the single largest source of spam on the Internet. Falk did not create a case file for Sierra Corporate Design. Sierra Corporate Design is just one of several names in the Netzilla case file which was just one of the more than four (400) hundred case files on Falk's website. Netzilla, a large source of pornographic purveying spam, apparently went to great lengths to hide its actual identity and roamed from one service provider to another as they were denied service. In compiling information on Netzilla, Falk learned that Netzilla owned the domain name of Newsfeeds.com. Public information which Falk obtained about Newsfeeds.com indicated that it was based out of Las Vegas, Nevada. Although incorporated in Nevada Newsfeeds' servers are located in North Dakota. Newsfeeds is not a plaintiff in this matter. Falk did not know that the Newsfeeds' server was located in North Dakota.

The primary issue that this Court must decide is whether or not this Court has personal jurisdiction over the Defendant, Ed Falk.

ANALYSIS

The Internet does not have geographical boundaries. The Internet is everywhere in the sense that it can be accessed from anywhere in the world where there is appropriate technology to connect. In determining jurisdiction a court must decide whether and to what extent establishing a presence on the Internet makes that individual present in any jurisdiction from which its website may be accessed. The usual two step analyses to determine personal jurisdiction over a nonresident defendant begins with determining that the defendant must be amenable to suit under the State's "long-arm" statute and the exercise of personal jurisdiction must not deny due processes under the Fifth and Fourteenth Amendments to the United States Constitution.

North Dakota's long-arm statute is found at N.D.R.Civ. P 4(b)(2) which provides in pertinent part:

(2) Personal Jurisdiction Based Upon Contacts. A court of this State may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this State that the exercise of personal jurisdiction over the person does not offend against traditional notions of justice or fair play or the due process of law, under anyone or more of the following circumstances:

(c) committing a tort within or without this State causing injury to another person or property within this State.

To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction. Atkinson v. McLaughlin, 343 F.Supp. 2d 868, 870 (D.N.D. 2004). The Plaintiff's prima facie showing must be tested, not by pleadings alone, but by the Affidavits and Exhibits presented with the motions and in opposition thereto. Id. (Citing Dever v. Hentzen Codings, Inc., 380F.3d 1070, 1072 (8th Cir. 2004)). Questions of personal jurisdiction must be decided on a case by case basis depending on the particular facts and circumstances. Beaudoin v. South Texas Blood and Tissue Center, 2005 ND 120, ¶ 9, 699 N.W.2d 421, 424.

The nature of the action against David Ritz and Ed Falk is that Ritz unlawfully accessed

Sierra's computer systems, stole and published confidential and proprietary information secured from Sierra's server over the Internet on or about February 27, 2005. The allegation in the Complaint against Falk contends that Falk was aware of Ritz's unauthorized access to Sierra's computers; assisted Ritz in the publication of Sierra's private computer systems' information by posting a link to Ritz's announcement on Usenet which then linked the Usenet announcement to Ritz's website. Sierra further contends Falk copied data from Sierra's computers and computer systems in violation of North Dakota law and that Falk took possession of data from Sierra's computers and computer systems in violation of North Dakota law. There is a further allegation that Falk disclosed data from Sierra's computers and that he intentionally contributed to the damage to Sierra's computers and computer systems. Essentially, this is an allegation that Falk was a co-conspirator with Ritz in violating the North Dakota Computer Crime Statute. There is also an allegation that Ritz committed a trespass to chattels by unlawfully interfering with Sierra's rights in the enjoyment of its chattels which would be its computers and computer systems.

It is uncontested that the Court does not have general jurisdiction over the Defendant, Ed Falk. Mr. Falk does not live in North Dakota. He does not own property of any kind in North Dakota. He has never been to North Dakota. He does not do business in North Dakota. He does not have a bank account in North Dakota. Prior to the alleged incursions into the Sierra computer systems by Defendant, David Ritz, Falk's contact with North Dakota consisted of brief e-mail correspondence with Fargo Attorney, Michelle Donarski, who had contacted Falk for assistance (unpaid) in another law suit initiated by John Doe against her client. Ms. Donarski indicated in her e-mail to Falk that she had reviewed the Falk website, specifically the information contained therein regarding John Doe. Falk's prior contact with North Dakota was virtually nonexistent.

In trying to track spammers, Falk had determined in or around 1997 that there were various domain names associated with Netzilla. Falk checked public records for ownership of Internet sites.

Netzilla was identified as owned by Intel Telecom Corporation. In the process of gathering information to determine who the network service provider or providers were for Netzilla.net and Sexzilla.net, Falk or someone in his Usenet group ran a "tracer route" which traces the path that packets of data takes to get from one host to another. The tracer routes did hit servers that were located in North Dakota, but Falk was unaware of the location of the servers. To find personal jurisdiction it is necessary to find that the Defendant, Falk, purposely availed himself of the jurisdiction of North Dakota by directing his activities toward this State. North Dakota has identified five (5) factors used in determining personal jurisdiction over a nonresident defendant:

1. The nature and quality of the nonresident defendant's contacts with the Forum's State;
2. The quantity of the nonresident defendant's contacts with the Forum's state;
3. The relation of the cause of action to the contacts;
4. The Forum interest in providing a forum for its residents; and
5. The convenience of the parties.

Ensign v. Bank of Baker, 2004 ND 56 ¶ 12, 676 N.W. 2d 786, 791. It appears that in this case jurisdiction cannot be based on this State's Long Arm Rule. The claim for relief has to arise out of the nonresident's contact with the State of North Dakota. N.D.R.Civ. P. 4(b)(2). The Plaintiff cannot show that the cause of action against Falk arose out of any specific contact that Falk had with the State of North Dakota. There is nothing to indicate that the website targeted North Dakota or a North Dakota resident. A determination of personal jurisdiction due to Falk maintaining a website which does not contain material specific to North Dakota or to the Plaintiff, does not generate online exchanges with North Dakota residents and is not used for commercial purposes would offend the notion of justice and fair play and due process of the law. Falk did not purposefully direct any action at the State of North Dakota or at a North Dakota resident and the litigation did not arise out of or was related to his activities. There is no evidence that Falk ever worked with or assisted Ritz in allegedly

accessing the Plaintiff's computers and computer systems. Falk does not bear responsibility for the actions of third parties over whom he has no control.

The rest of the contacts that the Plaintiff is alleging Defendant, Falk, to have had with or about the State of North Dakota on which Plaintiff is attempting to base jurisdiction occurred after the commencement of litigation including responding to a companion lawsuit. Those contacts certainly do not arise out of the cause of action and are not considered by this Court.

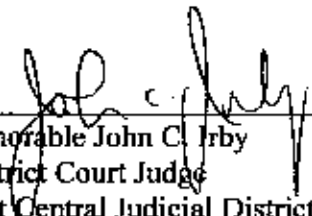
Defendant, Ed Falk, did not waive his jurisdictional defense by attending a deposition or by his counsel attending a hearing on damages wherein counsel reserved the right to raise a jurisdictional issue.

IT IS HEREBY ORDERED:

1. Plaintiff's Motion Limine is DENIED;
2. Defendant, Ed Falk's Motion to Dismiss for Lack of Personal Jurisdiction is hereby GRANTED;
3. The Plaintiff's Complaint against Defendant, Ed Falk, is hereby DISMISSED and the Default Judgment previously entered herein against Defendant, Ed Falk, is VACATED.

Dated this 26 day of October, 2006.

BY THE COURT:



Honorable John C. Irby
District Court Judge
East Central Judicial District