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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANDREY ZHEREBKO,

Plaintiff,

No. C 13-00843 JSW

v.

VIKTOR REUTSKYY, ET AL,

Defendant.

**ORDER GRANTING MOTION TO  
DISMISS**

Now before the Court is the motion to dismiss for lack of personal jurisdiction filed by Defendants Viktor Reutsky ("Reutsky"), Nataliya Galifianakis ("Galifianakis"), and Otizito, LLC ("Otizito") (collectively "Defendants"). The Court has considered the parties' papers, relevant legal authority, and the record in this case. The Court GRANTS Defendants' motion.

**BACKGROUND**

Plaintiff Andrey Zherebko ("Zherebko") resides in Kyiv, Ukraine. (Compl. ¶ 1.) Defendant Reutsky resides in Europe. (Declaration of Viktor Reutsky ("Reutsky Decl."), ¶ 1.) Defendant Galifianakis resides in New York State. (Declaration of Nataliya Galifianakis ("Galifianakis Decl."), ¶ 1.) Defendant Otizito is a limited liability company with its sole place of business in New York State. (*Id.* at ¶ 3.)

According to the allegations in the Complaint, in April 2011, Zherebko and Reutsky jointly developed an Android application known as This Side Up. (Compl. ¶ 11.) This application contained copyrighted materials exclusively owned by Zherebko. (*Id.*) Reutsky registered This Side Up with Google, Inc. on June 15, 2011. (*Id.*) Subsequently, Zherebko

1 collaborated with his agent, Pavlo Shelyazhenko, to develop an Android application known as  
2 Move the Box, which allegedly incorporated the copyrighted material. (*Id.* at ¶¶ 1, 12.) In  
3 November 2011, Zhrebko and Reutsky collaborated to develop an iPhone version of Move  
4 the Box. (*Id.* at ¶ 13.) Users could either download a free version of the game or pay to  
5 download a “Pro” version and game hints. (Compl., Ex. A.) Shortly thereafter, Defendants  
6 allegedly reproduced, adapted, and distributed the copyrighted material as well as other  
7 intellectual property that Zhrebko contributed to This Side Up, all without Zhrebko’s  
8 authorization. (Compl. at ¶¶ 14, 17.)

9 On or about March 12, 2012, Otizito was formed. (*Id.*) Several days later, Otizito  
10 became the registered owner of the iPhone version of Move the Box. (*Id.*) Zhrebko believed  
11 that in registering Move the Box with Apple Inc., both Galifianakis and Otizito expressly  
12 agreed that any disputes in connection with Move the Box would be subject to the exclusive  
13 venue and jurisdiction of courts located in Santa Clara County, California. (*Id.*)

14 Based on these and other allegations, Zhrebko filed suit against Defendants alleging  
15 causes of action for copyright infringement, contributory copyright infringement, and breach of  
16 an oral contract against Defendants.

17 The Court shall address additional facts as necessary in the remainder of this Order.

## 18 ANALYSIS

### 19 A. **Applicable Legal Standard for Motion to Dismiss Pursuant to Federal Rule of Civil 20 Procedure 12(b)(2).**

21 Federal Rule of Civil Procedure 12(b)(2) governs dismissal for lack of personal  
22 jurisdiction. It is the plaintiff’s burden to establish the court’s personal jurisdiction over a  
23 defendant. *Menken v. Emm*, 503 F.3d 1050, 1056 (9th Cir. 2007). Courts may consider  
24 evidence presented in affidavits to assist in its determination and may order discovery on  
25 jurisdictional issues. *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285  
26 (9th Cir. 1977). However, when “a district court acts on a defendant’s motion to dismiss  
27 without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of  
28 jurisdictional facts to withstand the motion to dismiss . . . That is, the plaintiff need only

1 demonstrate facts that if true would support jurisdiction over the defendant.” *Ballard v. Savage*,  
2 65 F.3d 1495, 1498 (9th Cir. 1995) (citations omitted); *see also AT&T v. Compagnie Bruxelles*  
3 *Lambert*, 94 F.3d 586, 588 (9th Cir. 1996) (holding that where the trial court ruled on  
4 jurisdictional issue based on affidavits and without holding an evidentiary hearing, plaintiff  
5 need only make a prima facie showing). Where the facts are not directly controverted,  
6 plaintiff’s version of the facts is taken as true. *See AT&T*, 94 F.3d at 588. Likewise, conflicts  
7 between the facts contained in the parties’ affidavits must be resolved in a plaintiff’s favor for  
8 purposes of deciding whether a prima facie case for personal jurisdiction exists.  
9 *Schwarzenegger v. Fred Martin Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

10 “Personal jurisdiction over a defendant is proper if it is permitted by a long-arm statute  
11 and if the exercise of that jurisdiction does not violate federal due process.” *Pebble Beach Co.*  
12 *v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006) (citing *Fireman’s Fund Ins. Co. v. Nat’l Bank of*  
13 *Cooperatives*, 103 F.3d 888, 893 (9th Cir. 1996)). Because California’s long arm statute is co-  
14 extensive with federal due process requirements, the jurisdictional analyses under California  
15 law and federal due process are the same. *See Schwarzenegger*, 374 F.3d at 801.

16 Due process precludes a court from asserting jurisdiction over a defendant unless the  
17 defendant has certain minimum contacts with the forum state. *See International Shoe Co. v.*  
18 *Washington*, 326 U.S. 310, 320 (1945). The defendant’s “conduct and connection with the  
19 forum State” must be such that the defendant “should reasonably anticipate being haled into  
20 court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Lastly,  
21 the maintenance of an action in the forum must not offend traditional conceptions of fair play  
22 and substantial justice. *See International Shoe*, 326 U.S. at 320.

23 Whether a party’s contacts with the forum are sufficient to permit the state to exercise  
24 jurisdiction depends upon the particular facts of each case. *Thos P. Gonzalez Corp. v. Consejo*  
25 *Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1251 (9th Cir. 1980). For specific  
26 jurisdiction, “the issue of whether jurisdiction will lie turns on an evaluation of the nature and  
27 quality of the defendant’s contacts in relation to the cause of action.” *Data Disc*, 557 F.2d at  
28 1287; *see also Calder v. Jones*, 465 U.S. 783, 788 (1984) (“In judging minimum contacts, a

1 court properly focuses on the relationship among the defendant, the forum, and the litigation.”)  
2 (internal quotations and citation omitted).

3 Specific jurisdiction over a defendant exists where: (1) the defendant has purposefully  
4 directed his or her activities at residents of the forum state or in the forum state itself; (2) the  
5 plaintiff’s claim arises out of or relates to those activities; and (3) the assertion of personal  
6 jurisdiction is reasonable and fair. *Schwarzenegger*, 374 F.3d at 802; *see also Burger King*  
7 *Corp. v. Rudzewicz*, 471 U.S. 462, 472-77 (1985). “The plaintiff bears the burden of satisfying  
8 the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs, personal  
9 jurisdiction is not established in the forum state.” *Schwarzenegger*, 374 F.3d at 802 (internal  
10 citation omitted). “On the other hand, if the plaintiff succeeds in satisfying both of the first two  
11 prongs, the burden then shifts to the defendant to present a compelling case that the exercise of  
12 jurisdiction would not be reasonable.” *Menken*, 503 F.3d at 1057 (internal quotations and  
13 citations omitted).

14 **B. The Court Does Not Have Jurisdiction Over the Parties.**

15 **1. Purposeful Availment.**

16 Purposeful availment, “[d]espite its label . . . includes both purposeful availment and  
17 purposeful direction.” *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d  
18 1199, 1206 (9th Cir. 2006). Availment and direction are two distinct concepts: whereas  
19 purposeful availment analysis usually applies in contract cases, purposeful direction analysis  
20 usually applies in tort cases. *Schwarzenegger*, 374 F.3d at 802. Zhrebko’s infringement of  
21 copyright claims are analyzed under the purposeful direction framework, and his breach of  
22 contract claim is analyzed under the purposeful availment framework. *See id.*

23 **A. Infringement of Copyright Claims.**

24 Purposeful direction is the proper analytical framework for determining personal  
25 jurisdiction in a copyright infringement case. *Brayton Purcell LLP v. Recordon & Recordon*,  
26 606 F.3d 1124, 1128 (9th Cir. 2010). Under the three-part ‘effects’ test, a defendant  
27 purposefully directed the activities to the forum state if he or she (1) committed an intentional  
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1 act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely  
2 to be suffered in the forum state. *Schwarzenegger*, 374 F.3d at 803.

3 An intellectual property misuse claim can be considered “expressly aimed” at California  
4 if the victim is in California. *See Love v. Associated Newspapers*, 611 F.3d 601, 609 n.4 (9th  
5 Cir. 2010). However, if the victim is not a resident of California, even an intentional misuse of  
6 intellectual property is not “expressly aimed” at California. *Id.*; *see also Brayton Purcell*, 606  
7 F. 3d at 1129-1130. Indicia of residency include property ownership, voting registration, and  
8 place of business. *See Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986).

9 Zhrebko is not a resident of California and does not allege any ownership interest in  
10 any business in California. He does not allege that he owns or leases any property in California,  
11 or that he has a bank account or telephone listing in California. Therefore, even if Defendants  
12 intentionally misused Zhrebko’s intellectual property, this intentional act is not “expressly  
13 aimed” at anyone in California. *See Love*, 611 F.3d at 609 n.4.

14 Because Defendants’ alleged conduct was not expressly aimed at the forum state under  
15 the effects test, Zhrebko did not meet his burden under the first prong regarding the copyright  
16 infringement claims. Therefore, the Court grants Defendants’ motion to dismiss these claims.

17 **B. Breach of Contract Claim.**

18 The Court turns to whether Zhrebko’s breach of contract claim constitutes purposeful  
19 availment. “‘Purposeful availment’ requires that the defendant ‘have performed some type of  
20 affirmative conduct which allows or promotes the transaction of business within the forum  
21 state.’” *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (citing *Sinatra v. National*  
22 *Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988)). With respect to websites and internet  
23 activity, the Ninth Circuit applies the “sliding scale” approach to jurisdiction utilized by the  
24 district court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).  
25 *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997). “The likelihood that  
26 personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and  
27 quality of commercial activity that an entity conducts over the internet.” *Cybersell*, 130 F.3d at  
28 419 (adopting *Zippo* and holding that this approach applies to website and internet activity).

1 At one end of this sliding scale, the defendant conducts business  
2 transactions over the Internet with residents of the forum . . . . In  
3 such situations, jurisdiction is almost always proper, because the  
4 defendant has asserted itself into the forum and made actual contact,  
5 often commercial, with a forum resident . . . . At the other end of the  
6 scale are ‘passive’ Web sites, through which the defendant simply  
7 posts information to those who access the site, such as  
8 advertisements and informational pieces about the Web site host.

9 *Callaway Golf Corp. v. Royal Canadian Golf Ass’n*, 125 F. Supp. 2d 1194, 1202-03 (C.D. Cal.  
10 2000) (citations and quotations omitted); *see also Stomp, Inc. v. Neato, LLC*, 61 F. Supp. 2d  
11 1074, 1078 (C.D. Cal. 1999) (“personal jurisdiction is not appropriate when a website is merely  
12 . . . passive . . . , but is appropriate when an entity is conducting business over the Internet”).

13 In sum, courts look “to the ‘level of interactivity and commercial nature of the exchange  
14 of information that occurs on the Web site’ to determine if sufficient contacts exist to warrant  
15 the exercise of jurisdiction.” *Cybersell*, 130 F.3d at 419 (quoting *Zippo*, 952 F. Supp. at 1124).  
16 Apps that access the internet are, for purposes of personal jurisdiction, equivalent to websites.  
17 *See* Joanna Sibilla Taatjes, Note, *Downloading Minimum Contacts: The Propriety of Exercising*  
18 *Personal Jurisdiction Based on Smartphone Apps*, 45 Conn. L. Rev. 357, 362 (2012).

19 Move the Box is not a passive app because its users pay to download versions and also  
20 purchase game hints. Because of this high level of interactivity and commercial exchange of  
21 information in Move the Box, sufficient contacts exist to warrant the exercise of jurisdiction  
22 over Defendants. *See Cybersell*, 130 F.3d at 419 (quoting *Zippo*, 952 F. Supp. at 1124).  
23 Zherebko has met his burden under the first prong to demonstrate jurisdiction over the breach of  
24 contract claim.

## 25 **2. Forum-Related Activities.**

26 The second prong used to determine whether activities are forum-related requires that  
27 “the contacts constituting purposeful availment must be the ones that give rise to the current  
28 suit.” *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000). To  
determine whether a claim arises out of forum-related activities, “courts consider[] whether  
plaintiff’s claims would have arisen *but for* [defendants’] contacts with California.” *Doe v.*  
*Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001).

1 Here, the Defendants distributed Move the Box through Apple, Inc.’s App Store. Any  
2 time a user downloads Move the Box, the title first electronically passes through Apple in  
3 California. (*See* Compl., Ex. B.) But for the Defendants’ distribution of Move the Box through  
4 Apple, Inc.’s App Store, Zhrebko would have no breach of contract claim.

5 Accordingly, Zhrebko has shown that the breach of contract claim arises out of the  
6 Defendants’ activities with the State of California and has, therefore, met the second prong  
7 burden.

8 **3. Reasonableness of Exercising Jurisdiction.**

9 Lastly, the Court must determine whether the exercise of jurisdiction is reasonable.  
10 *Sher*, 911 F.2d at 1361. In analyzing the reasonableness of exercising jurisdiction, the Court  
11 must apply a seven-factor analysis:

12 (1) the extent of the purposeful interjection into the forum state, (2)  
13 the burden on the defendant of defending in the forum, (3) the extent  
14 of conflict with the sovereignty of defendant’s state, (4) the forum  
15 state’s interest in adjudicating the dispute, (5) the most efficient  
judicial resolution of the controversy, (6) the importance of the forum  
to plaintiff’s interest in convenient and effective relief, and (7) the  
existence of an alternative forum.

16 *See Bancroft & Masters*, 223 F.3d at 1088 (citing *Burger King*, 471 U.S. at 476).

17 **A. Extent of Purposeful Interjection.**

18 Purposeful interjection is analogous to the purposeful availment and purposeful  
19 direction analyses. *Sinatra*, 854 F.2d at 1199. The Court has already found that Zhrebko  
20 made a prima facie showing that Defendants purposefully availed themselves of California.  
21 The Court finds that this factor is satisfied.

22 **B. Burden on Defendants.**

23 Turning next to the issue of the burden on Defendants, the Court must examine the  
24 “burden on the defendant in light of the corresponding burden on the plaintiff.” *Brand v.*  
25 *Menlove*, 796 F.2d 1070, 1075 (9th Cir. 1986). Unless the inconvenience to defendant is “so  
26 great as to constitute a deprivation of due process, it will not overcome clear justifications for  
27 the exercise of jurisdiction.” *Roth v. Marquez*, 942 F.2d 617, 623 (9th Cir. 1991). If  
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1 nonjurisdictional methods of lessening the inconveniences faced by a foreign defendant exist,  
2 this factor is satisfied. *See Sinatra*, 854 F.2d at 1199 (citing *Burger King*, 471 U.S. at 477-78).

3 In this case, none of the parties reside in California. Otizito and Galifianakis reside in  
4 New York while Zhrebko and Reutskyy reside in Europe. It presents as much of a burden for  
5 Defendants to litigate in California as it does for Zhrebko to litigate in New York. Because  
6 nonjurisdictional methods of lessening the inconveniences faced by Defendants exist, the Court  
7 declines to hold the burden on Defendants so great as to constitute a deprivation of due process.  
8 *See Sinatra*, 854 F.2d at 1199 (citing *Burger King*, 471 U.S. at 477-78). This factor is satisfied.

9 **C. Conflict with Sovereignty of Defendant’s State.**

10 Litigation against a foreign defendant “creates a higher jurisdictional barrier than  
11 litigation against a citizen from a sister state because important sovereignty concerns exist.”  
12 *Sinatra*, 854 F.2d at 1199. However, conflict with the sovereignty of a defendant’s state is not  
13 dispositive because, if given controlling weight, it would always prevent suit against a foreign  
14 defendant in a United States court. *See Gates Learjet*, 743 F.2d at 1333. Even though  
15 Defendants are foreign, this is not given controlling weight. *See id.* Therefore, this factor is  
16 satisfied.

17 **D. Forum State’s Interest in Adjudicating the Suit.**

18 California has an interest in providing effective redress for its residents. *Sinatra*, 854  
19 F.2d at 1200 (citing *Brand*, 796 F.2d at 1076). Neither Zhrebko nor Defendants are residents  
20 of California. The Court does not have an interest in providing effective redress for  
21 nonresidents. *See id.* Therefore, this factor weighs in Defendants’ favor.

22 **E. Efficient Judicial Resolution.**

23 In order for jurisdiction to be reasonable, there must be a shared interest of several states  
24 in obtaining an efficient judicial resolution. *World-Wide Volkswagen Corp.*, 444 U.S. at 292.  
25 Because the Court does not have an interest in adjudicating this contract dispute between non-  
26 citizens, there is not a shared interest in obtaining an efficient judicial resolution. Therefore,  
27 this factor weighs in favor of Defendants.  
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**F. Convenience and Effectiveness of Relief for Plaintiff.**

Maintaining a suit in California is inconvenient and costly not only to Zherebko, as Plaintiff, but also to Defendants because no parties are residents of California. Therefore, this factor weighs in Defendants' favor.

**G. Existence of an Alternative Forum.**

Whether another reasonable forum exists "becomes an issue only when the forum state is shown to be unreasonable." *Sinatra*, 854 F.2d at 1201 (citing *Melcher*, 824 F.2d at 791).

After balancing all seven factors, the Court finds that the Defendants have demonstrated a compelling case that the current forum is unreasonable. An alternative forum may exist where the oral contract was formed. *See McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (finding single forum state contact sufficient if the cause of action arises out of that particular purposeful contact).

The Court finds that Defendants have met their burden to demonstrate that the assertion of personal jurisdiction is fair and reasonable. Therefore, the Court grants Defendants' motion to dismiss the breach of contract claim.

**CONCLUSION**

For the foregoing reasons, the Court HEREBY GRANTS defendants' motion to dismiss for lack of personal jurisdiction. A separate judgment shall issue and the Clerk is directed to close the file.

**IT IS SO ORDERED.**

Dated: August 12, 2013

  
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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE

