

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

NETSPHERE, INC., MANILA
INDUSTRIES, INC., AND MUNISH
KRISHAN,

Plaintiffs,

v.

JEFFREY BARON AND ONDOVA
LIMITED COMPANY,

Defendants.

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Civil Action No. 3:09-CV-0988-F

**NON-PARTY INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS'
REPLY TO THE RECEIVER'S RESPONSE TO ORDER TO SHOW CAUSE**

I. EXECUTIVE SUMMARY

Non-party Internet Corporation for Assigned Names and Numbers ("ICANN") submits this reply because The Receiver's assertion of ICANN's powers vis-à-vis WIPO – assertions made based on information and belief only – are simply wrong. ICANN administers the Internet's Domain Name System ("DNS") on behalf of the Internet community pursuant to a series of agreements with the United States Department of Commerce. Following a community-driven policy development process, ICANN approved the UDRP (Uniform Domain Name Dispute Resolution Policy) for all accredited registrars in the .com, .net, and .org top-level domains. ICANN's involvement with the UDRP and proceedings commenced under the UDRP ends there. ICANN is not a party to or otherwise a participant in UDRP proceedings; ICANN does not administer or govern UDRP proceedings; and ICANN lacks the power to dictate the rules or procedures implemented by a dispute resolution provider (like WIPO) hearing complaints filed under the UDRP.

The Receiver's declarant offers nothing more than his "belief that ICANN simply does not want to get involved in the UDRP proceeding regarding funnygames.com." (Declaration of Damon Nelson, ¶ 8) (Dkt. # 730). But the declarant lacks personal knowledge of the "facts" he purports to attest to and, as a result, his declaration should be rejected. By contrast, the sworn affidavit filed herein by ICANN's Senior Vice President, Stakeholder Relations could not be more reliable – or clear: **ICANN does not have authority to "stay or abate" UDRP proceedings or otherwise instruct WIPO to do so.** (Declaration of Kurt Pritz ("Pritz Decl.") ¶¶ 15, 16, attached hereto as Exhibit 1)

In addition, ICANN is not a proper party to the Court's November 28, 2011 Order because the United States District Court for the Northern District of Texas lacks personal jurisdiction over ICANN. The Receiver attempts to establish "nationwide" jurisdiction pursuant to 28 U.S.C. § 754 "by virtue of this matter being a federal equity receivership proceeding." (Resp. at 4.) But Section 754 is ineffective to afford the Court nationwide personal jurisdiction where, as here, service of process has not been properly effectuated. Nor can The Receiver refute the evidence submitted in ICANN's declaration establishing that ICANN lacks the minimum contacts necessary for this Court to exercise personal jurisdiction over ICANN.

For these and the reasons set forth below, ICANN respectfully requests that the Court vacate its November 28, 2011 and December 2, 2011 Orders requiring ICANN to stay and abate the UDRP proceeding on www.funnygames.com.

II. BACKGROUND ON ICANN'S LIMITED INVOLVEMENT WITH THE UDRP

On August 26, 1999, the ICANN Board of Directors, on the recommendation of the then ICANN community policy making body, the Domain Names Supporting Organization, adopted a Uniform Domain Name Dispute Resolution Policy ("UDRP") for all accredited registrars in the .com, .net, and .org top-level domains. (Pritz Decl. ¶ 5) The UDRP is – by its terms – a policy

that dictates, in part, the rights and obligations between a registrar and its customer (*i.e.*, a registrant). The UDRP is incorporated into the written registration agreements that all ICANN-accredited registrars must enter into with each of their customers. (*Id.* ¶ 6)

The UDRP establishes a forum for dispute resolution proceedings arising from alleged abusive registrations of domain names (for example, cyber squatting). Generally, trademark holders initiate such dispute resolution proceedings. (*Id.* ¶ 7)

WIPO is one of four ICANN-approved dispute resolution providers that can hear complaints under the UDRP. Each provider follows the Rules for the UDRP as well as its own supplemental rules. ICANN does not have authority to dictate a provider's supplemental rules. (*Id.* ¶ 8) ICANN does not administer UDRP proceedings. (*Id.* ¶ 10) Aside from receiving notice of the commencement of and final decision in a UDRP proceeding, ICANN is not party to any communications with the WIPO regarding ongoing UDRP proceedings and does not receive notice of filings submitted in connection with UDRP proceedings. (*Id.*)

ICANN is not a party to any UDRP proceedings, including WIPO proceedings, commenced under the UDRP. The participants in a WIPO proceeding commenced under the UDRP are: (1) the domain name registrant; and (2) a third party alleging abusive registration and use of that domain name. ICANN is not a participant in any fashion. (*Id.* ¶ 9)

In sum, while ICANN has approved dispute resolution providers, including WIPO, to administer UDRP proceedings, ICANN does not have the authority to require WIPO (or any other provider) to manage UDRP proceedings in any particular manner. (*Id.* ¶ 11) The rules for the UDRP can be found at <http://www.icann.org/en/dndr/udrp/uniform-rules.htm>. The section discussing the "General Powers of the Panel" (*i.e.*, the Panel is a panel of arbitrators appointed by the dispute resolution provider) states that "[t]he Panel shall conduct the administrative

proceeding in such manner as *it* considers appropriate in accordance with the Policy and these Rules." (*Id.* (emphasis in original)) The rules do not authorize ICANN to mandate how the dispute resolution provider administers UDRP proceedings. (*Id.*)

III. ICANN DOES NOT HAVE AUTHORITY TO "STAY AND ABATE" ANY UDRP PROCEEDING

The Receiver complains that ICANN has not explained "why ICANN cannot intervene" in the UDRP proceedings. (Resp. at 2) The reason is simple: it is beyond ICANN's mandate. The UDRP policy itself establishes the procedures governing dispute proceedings arising from alleged abusive registrations of domain names. There is nothing in the UDRP policy that authorizes ICANN to "intervene" or otherwise direct how proceedings commenced under the UDRP may proceed (or not proceed, as The Receiver wishes). (Pritz Decl. ¶¶ 11-13) The Receiver fails to point the Court to any rule or process or contract language or anything in the UDRP policy (or anywhere else) that would even arguably grant ICANN the authority to "intervene" in UDRP proceedings. Nor does The Receiver offer evidence that there exists a process by which ICANN could effectuate such an "intervention." The Receiver further fails to show the Court any rule or other construction that would obligate WIPO to follow ICANN's request, even if ICANN undertook to "instruct" WIPO to stay UDRP proceedings.

The sworn declaration of Kurt Pritz, ICANN's Senior Vice President, Stakeholder Relations, establishes that ICANN lacks the authority to effectuate the relief sought by The Receiver (notwithstanding The Receiver's declarant's "belief" to the contrary):

- ICANN is not a party to UDRP proceedings. (Pritz Decl. ¶ 9)
- ICANN does not administer UDRP proceedings. (*Id.* ¶ 10)
- While ICANN approves dispute resolution providers, including WIPO, to administer UDRP proceedings, ICANN does not have the authority to require WIPO or any other provider to manage UDRP proceedings in any particular

manner. (*Id.* ¶ 11)

- Nor does ICANN govern UDRP proceedings. (*Id.* ¶ 12)

The only "enforcement" action that ICANN is authorized to undertake with respect to UDRP proceedings comes after a decision is issued by WIPO (or whichever dispute resolution provider is hearing a complaint). (*Id.* ¶ 14) Specifically, the Registrar Accreditation Agreement that ICANN enters into with each ICANN-approved registrar requires the registrar to comply with the UDRP. (*Id.*) To the extent that a registrar fails to comply with a UDRP decision, ICANN may deem the registrar in breach of its agreement. But, even then, ICANN does not have any authority to force the registrar to comply with a UDRP decision. (*Id.*)

The key point here is summarized by Mr. Pritz:

- "In short, ICANN does not have the authority to stay or abate UDRP proceedings. There is nothing within the UDRP authorizing ICANN to undertake such action." (*Id.* ¶ 15)
- "Nor does ICANN have authority to require WIPO to stay or abate UDRP proceedings. There is nothing within the UDRP authorizing ICANN to undertake such action." (*Id.* ¶ 16)

This is not to say that The Receiver is without remedy. The most logical party to effectuate the relief sought by The Receiver is actually Fabulous.com, the registrar of www.funnygames.com, the domain name registration at issue in the proceedings. In the event a court of competent jurisdiction orders Fabulous.com not to transfer www.funnygames.com, and Fabulous.com complies with that order, whether or not a UDRP decision says that the domain name should be transferred, Fabulous.com would still be deemed in compliance with the UDRP and its Registrar Accreditation Agreement with ICANN. See UDRP, ¶ 3, available at <http://www.icann.org/en/dndr/udrp/policy.htm> (Registrar "will cancel, transfer or otherwise make changes to domain name registrations . . . [upon Registrar's] receipt of an order from a

court or arbitral tribunal, in each case of competent jurisdiction, requiring such action."); *see also* Form of Registrar Accreditation Agreement, ¶ 3.7.2 ("Registrar shall abide by applicable laws and governmental regulations.").

ICANN has forwarded the Court's Order to WIPO for its information, but ICANN does not have the authority to undertake any further action to require WIPO to comply with that Order. As such, the Court's November 28, 2011 Order and December 2, 2011 Order To Show Cause should be vacated as to ICANN.

IV. THIS COURT LACKS PERSONAL JURISDICTION OVER ICANN

A. The Receiver Has Not Satisfied The Requirements For Statutory Jurisdiction Over ICANN

In offering up 28 U.S.C. § 754 as a panacea for the Court's lack of personal jurisdiction over ICANN, the Receiver ignores a fundamental issue: ICANN has not been properly served in this action. Section 754 is ineffective to afford the Court nationwide personal jurisdiction where service of process is not properly made.

On its face, Section 754 deals exclusively with *in rem* jurisdiction over receivership property. 28 U.S.C. § 754. Section 754 is therefore insufficient, standing alone, to serve as the basis for jurisdiction with regard to an individual non-party. *Gilchrist v. General Elec. Capital Corp.*, 262 F.3d 295, 300-301 (4th Cir. 2001) (reasoning that reliance on Section 754 may be insufficient to establish personal jurisdiction in injunctive proceedings). In fact, it is only when read in conjunction with Federal Rule of Civil Procedure 4(k)(1)(C) and 28 U.S.C. § 1692—and when the individual requirements of those statutes are satisfied—that Section 754 can be used as a "stepping stone" for the exercise of in personam jurisdiction. *SEC v. Vision Commc'ns, Inc.*, 74 F.3d 287, 290 (D.C. Cir. 1996).

To use Section 754 as a "stepping stone" to personal jurisdiction, a receiver must meet certain basic statutory requirements—the most important of which is effectuating proper service under Federal Rule of Civil Procedure 4(e). *See, e.g., SEC v. Ross*, 504 F.3d 1130, 1140 (9th Cir. 2007) ("That the district court could have obtained jurisdiction over Bustos tells us nothing about whether it actually did so. . . . The power to exercise jurisdiction nationwide is not self-executing. . . . [I]n order for the court to assert personal jurisdiction over a party-in-interest, the party must be properly served."). In pertinent part, Rule 4(e) provides that service in a judicial district of the United States may be accomplished by: (1) following state law for service (here, California); or (2) personally serving either (a) the individual; (b) someone of suitable age or discretion at the individual's usual place of abode; or (c) the individual's agent. FED. R. CIV. P. 4(E); *see also* FED. R. CIV. P. 66 ("These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued."); *United States v. Bradley*, No. 4:05-CR-059, 2008 WL 228064, at *12 (S.D. Ga. Jan. 25, 2008) (striking a receiver's collection efforts where the receiver failed to provide any evidence of proper service under Fed. R. Civ. P. 4). **Service by mail is not appropriate under Rule 4(e) or under California state law.** *See, e.g., Flint v. Krause*, No. 11-CV-0480, 2011 WL 4626149, at *3 (S.D. Cal. Oct. 5, 2011) (service by certified mail "fails to meet the Federal Rules requirements of service of process"); Cal. Civ. Pro. Code §§ 415.10, 415.20, 416.10 (providing for personal service only).

The Receiver has *not* effectuated personal service upon ICANN. The Receiver did not personally serve upon ICANN the original complaint in this matter. (*See* Resp. Ex. B and Ex. C (reproducing a "Distribution List" for service of complaint and order appointing receiver, including ICANN, and stating that the list was "Served via Regular U.S. Mail")) Nor did he personally serve upon ICANN his November 21, 2011 *Verified Emergency Motion to Enforce*

Stay upon ICANN, the Court's November 28, 2011 order approving it, or the Court's December 2, 2011 *Order to Show Cause*. (Dkt. #s 722, 724, 726 (served via ECF-filing, which did not electronically serve ICANN, a non-party)) Because the Receiver failed to effectuate personal service upon ICANN, Section 754 is ineffective to bring ICANN within this Court's jurisdiction.

B. This Court Lacks General Personal Jurisdiction Over ICANN

Nor can The Receiver establish, as he must, that jurisdiction over ICANN comports with The Due Process Clause of the Fourteenth Amendment. To determine whether jurisdiction comports with the Due Process Clause, courts ask whether there are sufficient "minimum contacts . . . such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In other words, to satisfy constitutional concerns, the non-resident defendant should reasonably expect to be haled into court in the forum. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Minimum Contacts within the forum may give rise to two types of personal jurisdiction: specific or general jurisdiction. *See Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414-15. Here, The Receiver claims only general personal jurisdiction. It is The Receiver's burden to establish a prima facie case of general personal jurisdiction. *See Digman v. Cummings*, No. 2:11-CV-91-J, 2011 WL 5822422, *2 (N.D. Tex. Nov. 16, 2011).

Here, the Receiver has not introduced sufficient material facts to establish that jurisdiction over ICANN comports with The Due Process Clause of the Fourteenth Amendment. To assert general jurisdiction, The Receiver must establish that ICANN has "continuous and systematic" contacts with Texas. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 415. Factors that weigh against general jurisdiction include a lack of business or a business license in

the forum, *id.* at 416, a lack of property ownership in the forum, *Dominion Gas Ventures, Inc. v. N.L.S., Inc.*, 889 F. Supp. 265, 268 (N.D. Tex. 1995), or a lack of any bank accounts, telephone listings, or mailing addresses in the forum. (*Id.* at 268)

ICANN is not subject to general jurisdiction in Texas. ICANN has no employees, assets, bank accounts, real property, personal property, offices, or other facilities in Texas. (Pritz Decl. ¶¶ 17, 19-21) ICANN is not licensed to do business in Texas, does not have a registered agent for service of process in Texas, and has no phone numbers or mailing addresses in Texas. (*Id.* ¶¶ 18, 22-23) ICANN thus has none of the contacts with Texas that are relevant to the general jurisdiction inquiry. *See Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 416.

The Receiver argues that ICANN is subject to general jurisdiction in Texas because it maintains a passive Internet website that can be viewed by Texas residents if they so choose. (Resp. at 8.) But the Fifth Circuit has already held that the maintenance of a passive website, such as ICANN's, is not enough to subject an entity to personal jurisdiction. *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 335-36 (5th Cir. 1999). In *Mink*, the Fifth Circuit affirmed dismissal of a complaint because the maintenance of a website that posted information about products and services, including a link to printable mail-in order forms, was not "anything more than passive advertisement," and thus far from sufficient to satisfy the rigorous "continuous and systematic" test for general jurisdiction. *Id.* at 335-37. Here, ICANN's website is even more passive than that in *Mink*, as it does not offer anything for sale. (Pritz Decl. ¶ 25) Jurisdiction based on ICANN's website is therefore unwarranted. *See Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (ruling that the fact that the defendant "maintains a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction").

C. Lacking Personal Jurisdiction, the Court's Injunction of ICANN is Void

Because ICANN is not within this Court's jurisdiction, the injunction entered against it is void. It is well established that a federal court must have personal jurisdiction over any impacted party when issuing an injunction or otherwise ordering that party to take action. *See, e.g., 3M Co. v. Christian Investments LLC*, No. 1:11-CV-627, 2011 WL 3678144, at *3 (E.D. Va. Aug. 19, 2011) ("[S]ervice of process is a prerequisite to the issuance of an enforceable preliminary injunction."). As the Seventh Circuit Court of Appeals recently stated, "[a] judgment entered against a defendant over whom the court had no jurisdiction is void, and no court has discretion to refuse to vacate that judgment once it recognizes its lack of jurisdiction." *Philos Tech. Inc. v. Philos & D, Inc.*, 645 F.3d 851, 855 (7th Cir. 2011); *see also Recreational Props., Inc. v. Southwest Mortg. Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986) ("If a court lacks jurisdiction over the parties because of insufficient service of process, the judgment is void and the district court must set it aside."). The Order on The Receiver's Verified Emergency Motion to Enforce Stay is thus void as to ICANN.

V. CONCLUSION

ICANN has no authority to "stay and abate" the UDRP proceeding on www.funnygames.com. Furthermore, "nationwide" jurisdiction over ICANN is lacking because The Receiver failed to comply with the statutory requirements necessary to effectuate nationwide jurisdiction. Moreover, this Court lacks jurisdiction to issue orders with respect to ICANN as a matter of constitutional due process. For these reasons and those described more fully above, ICANN respectfully requests that the Court vacate its November 28, 2011 Order as to ICANN.

Dated: December 12, 2011

Respectfully submitted,

JONES DAY

/s/ Jason Cross

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*ATTORNEYS FOR NON-PARTY
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS*

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2011, I electronically filed the foregoing Non-Party ICANN's Reply in Support of its Response to Order to Show Cause with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court. The electronic case files system sent a "Notice of Electronic Filing" to the individuals who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Jason Cross

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NETSPHERE, INC., MANILA
INDUSTRIES, INC., AND MUNISH
KRISHAN,

Plaintiffs,

v.

JEFFREY BARON AND ONDOVA
LIMITED COMPANY,

Defendants.

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Civil Action No. 3:09-CV-0988-F

**DECLARATION OF KURT PRITZ IN SUPPORT OF NON-PARTY INTERNET
CORPORATION FOR ASSIGNED NAMES AND NUMBERS' REPLY TO THE
RECEIVER'S RESPONSE TO ORDER TO SHOW CAUSE**

I, Kurt Pritz, declare and affirm as follows:

1. I am Senior Vice President, Stakeholder Relations for the Internet Corporation for Assigned Names and Numbers ("ICANN"), a non-party in this action. I have personal knowledge of the matters set forth herein and am competent to testify to those matters. I make this declaration in support of ICANN's reply to The Receiver's response to the Court's order to show cause.

Background on ICANN

2. ICANN is a not-for-profit public benefit corporation organized under the laws of the State of California. Its principal place of business is in Marina del Rey, which is in Los Angeles County, California.

3. ICANN does not engage in commercial business. Rather, ICANN administers the Internet's Domain Name System ("DNS") on behalf of the Internet community, pursuant to a series of agreements with the United States Department of Commerce. Background on the privatization of the Internet is available in a publication published by the Department of

Commerce on June 5, 1998 entitled *Management of Internet Names and Addresses* and is available at 63 Fed. Reg. 31741 (1998).

4. ICANN's role is fulfilled in certain ways. For example, consumers (known as "registrants") may obtain the right to use second-level domain names (such as funnygames.com or uscourts.gov) through companies known as "registrars." ICANN has created principles and rules to determine which entities can serve as registrars; ICANN's accreditation system has produced a highly competitive registrar marketplace, with over 900 accredited registrars. ICANN enters into what is called a "Registrar Accreditation Agreement" or "RAA" with ICANN-accredited registrars. *See* <http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm>.

Background on the Uniform Domain Name Dispute Resolution Policy

5. On August 26, 1999, the ICANN Board of Directors, on the recommendation of the then ICANN community policy making body, the Domain Names Supporting Organization, adopted a uniform domain name dispute resolution policy ("UDRP") for all accredited registrars in the .com, .net, and .org top-level domains.

6. The UDRP is – by its terms – a policy that dictates, in part, the rights and obligations between a registrar and its customer (i.e., a registrant). The UDRP is incorporated into the written registration agreements that all ICANN-accredited registrars must enter into with each of their customers.

7. The UDRP establishes a forum for dispute resolution proceedings arising from alleged abusive registrations of domain names (for example, cybersquatting). Generally, trademark holders initiate such dispute resolution proceedings.

8. WIPO is one of four ICANN-approved dispute resolution providers that can hear complaints under the UDRP. Each provider follows the Rules for the UDRP as well as its own supplemental rules. ICANN does not have authority to dictate a provider's supplemental rules.

9. ICANN is not a party to UDRP proceedings, including WIPO proceedings under the UDRP. The participants in a WIPO proceeding commenced under the UDRP are: (1) the

domain name registrant; and (2) a third party alleging abusive registration and use of that domain name. ICANN is not a participant in any fashion.

10. ICANN does not administer UDRP proceedings. Aside from receiving notice of the commencement of and final decision in a UDRP proceeding, ICANN is not party to any communications with the WIPO regarding ongoing UDRP proceedings and does not receive notice of filings submitted in connection with UDRP proceedings.

11. While ICANN approves dispute resolution providers, including WIPO, to administer UDRP proceedings, ICANN does not have the authority to require WIPO or any other provider to manage UDRP proceedings in any particular manner. The Rules for the UDRP can be found at <http://www.icann.org/en/dndr/udrp/uniform-rules.htm>. The section discussing the “General Powers of the Panel” (i.e., the Panel is a panel of arbitrators appointed by the dispute resolution provider) states that “[t]he Panel shall conduct the administrative proceeding in such manner *as it considers appropriate* in accordance with the Policy and these Rules.” *Id.* (emphasis added). The Rules do not authorize ICANN to mandate how the dispute resolution provider administers UDRP proceedings.

12. Nor does ICANN govern UDRP proceedings. While ICANN has approved WIPO, for instance, to administer UDRP proceedings, ICANN does not have the authority to require WIPO to do so in any particular fashion.

13. ICANN is an administrative body. It is within ICANN’s mandate to promulgate and approve the UDRP, but ICANN has no involvement in or authority over how the UDRP is administered or governed.

14. The only “enforcement” action that ICANN is authorized to undertake with respect to the UDRP comes *after* a decision is issued by WIPO (or whichever dispute resolution provider is hearing a complaint). The Registrar Accreditation Agreement that ICANN enters into with each ICANN-approved registrar requires the registrar to comply with the UDRP. *See* Form of Registrar Accreditation Agreement, available at <http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm>, at § 3.8 (“Registrar shall comply with the Uniform Domain Name

Dispute Resolution Policy identified on ICANN's website (www.icann.org/general/consensus-policies.htm.”). To the extent that a registrar fails to comply with the UDRP, ICANN may deem the registrar in breach of its agreement. But even then, ICANN does not have authority to force the registrar to comply with a UDRP decision.

15. In short, ICANN does not have the authority to stay or abate UDRP proceedings. There is nothing within the UDRP authorizing ICANN to undertake such action.

16. Nor does ICANN have authority to require WIPO to stay or abate UDRP proceedings. There is nothing within the UDRP authorizing ICANN to undertake such action.

ICANN's Lack of Connection to Texas

17. ICANN does not have any office or other company facilities Texas.

18. ICANN does not have any phone number or mailing address in Texas.

19. ICANN does not have any employee or staff member in Texas.

20. ICANN has not applied for any loan or opened any bank account in Texas.

21. ICANN has not owned any tangible personal property or real estate property or assets in Texas.

22. ICANN has not appointed any agent in Texas for service of process.

23. ICANN is not licensed to do business in Texas.

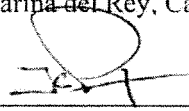
24. ICANN has never released any advertisement to the residents of Texas, nor has it released any advertisement in any magazine targeted at residents of Texas.

25. ICANN operates a few websites on the Internet that provide information regarding its Internet coordination activities, as well as publicly available information about domain name registrants, including the websites at <http://www.icann.org>, <http://www.iana.org>, and <http://www.internic.net>. These websites are not operated from web servers in Texas. The websites contain information about ICANN, about the people who work for ICANN, and about the projects that ICANN has undertaken in connection with the Internet. The website also contains “links” to other information that is related to ICANN’s activities. ICANN does not offer anything for sale on its website; in fact, ICANN does not sell anything.

26. Attached as **Exhibit A** is a recent order (issued December 9, 2011) granting ICANN's motion to dismiss for lack of personal jurisdiction a complaint filed against ICANN in the United States District Court for the Southern District of Florida in the matter of *John Zuccarini v. Network Solutions, Inc., et al.*, Case No. 2:11-cv-14052-JEM. In dismissing ICANN from that case (which also related to a dispute over domain names with respect to registrar conduct), the Court relied on ICANN's client declaration that established that ICANN has no company facilities, assets or real estate in Florida, is not registered to do business in Florida, does not solicit business in Florida, does not have any phone number or mailing address in Florida, does not sell any goods or services in Florida, does not have a bank account in Florida, and does not have any employees in Florida.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

This declaration was signed on December 9⁹, 2011 at Marina del Rey, California.



Kurt Pritz

Exhibit A

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case Number: 11-14052-CIV-MARTINEZ/LYNCH

JOHN ZUCCARINI,

Plaintiff,

vs.

NETWORK SOLUTIONS, LLC, *et al.*,

Defendants.

**ORDER ON INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS'
MOTION TO DISMISS**

THIS CAUSE came before the Court upon Defendant Internet Corporation For Assigned Names and Numbers' ("ICANN") Motion to Dismiss Complaint (D.E. No. 19). Plaintiff John Zuccarini ("Zuccarini" or "Plaintiff") brought the above-captioned action alleging that ICANN was negligent in auctioning 14 domain names which resulted in damages to Plaintiff.

I. Background

Zuccarini filed his Amended Complaint "as a beneficiary of the receivership appointed by the California District Court in, *Office Depot, Inc. v. Zuccarini*." See (Am. Compl. ¶ 6). In *Office Depot, Inc. v. Zuccarini*, 621 F. Supp. 2d 773 (N.D. Cal. 2007), the Court entered an order requiring Network Solutions and other domain name registrars to transfer control of the Zuccarini domain names to Michael Blacksborg as receiver. *Id.* at 778. The receiver entered into a servicing agreement with a domain name registrar, Network Solutions. (Am. Compl. ¶¶ 35-36). Registration of 14 of the domain names were not renewed by the receiver and, pursuant to the servicing agreement with Network Solutions, these domain names were auctioned through

NameJet LLC's ("NameJet") auction platform and transferred to successful bidders. *Id.* at 35-40.

Zuccarini filed an action in the Southern District of Florida in July 2010 against NameJet, Network Solutions and other defendants. *See Zuccarini v. NameJet, Inc.*, 2:10-cv-14178-KMM. He alleged that during May 2010, the above-referenced 14 domain names were auctioned by NameJet in violation of California and Virginia statutes. He sought damages for auction of the 14 domain names based on breach of contract and conversion. *Id.* at (D.E. No. 20). He also sought declaratory and injunctive relief. *Id.* This Court transferred venue to the United States District Court for the Eastern District of Virginia. *See Zuccarini v. NameJet, Inc.*, 2:10-cv-14178-KMM, D.E. No. 57. The Eastern District of Virginia dismissed the action. *Id.* at (D.E. No. 13-2). In his subsequent motion for relief, Zuccarini attempted to argue a previously unasserted claim that the defendants were negligent. The Court denied the motion for relief and explained that even if those arguments had merit, they should have been raised during the litigation in the Northern District of California, or on direct appeal to the United States Court of Appeals for the Ninth Circuit. *Id.* at (D.E. No. 13-3).

II. Standard

ICANN brings its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. Personal jurisdiction over a non-resident defendant depends on: (1) "whether the exercise of jurisdiction is appropriate under the forum state's long-arm statute;" and (2) "whether exercising jurisdiction over the defendant would violate the Due Process Clause of the Fourteenth Amendment, which requires that the defendant have minimum contacts with the forum state and that the exercise of jurisdiction not offend 'traditional notions of fair play and substantial justice.'" *Sloss Indus. Corp. v. Eurisol*, 488 F. 3d 922, 925 (11th Cir.

2007) (quoting *Sculptchair, Inc. V. Century Arts, Ltd.*, 94 F. 3d 623, 626 (11th Cir. 1996)). The non-resident defendant must reasonably expect to be haled into the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

The plaintiff “has the burden of establishing a prima facie case of personal jurisdiction.” *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F. 3d 1357, 1360 (11th Cir. 2006). Where “the defendant submits affidavits contrary to the allegations in the complaint, the burden shifts back to the plaintiff to produce evidence supporting personal jurisdiction, unless the defendant’s affidavits contain only conclusory assertions that the defendant is not subject to jurisdiction.” *Id.*

III. Analysis

ICANN is a California non-profit corporation that conducts business in the State of Florida. (D.E. No. 7, Am. Compl. ¶¶ 14, 21; D.E. No. 19-1, Aff. of Akram J. Atallah, ¶ 2). The Amended Complaint alleges that ICANN “manages and coordinates the Internet Domain Name System, in addition to accrediting domain name registrars.” (D.E. No. 7, Am. Compl. ¶ 14). It further alleges that ICANN maintains a “Registrar Accreditation Agreement with Network Solutions” and that ICANN was negligent in not fulfilling its responsibilities in overseeing the actions of Network Solutions and in not requiring Network Solutions to “place on hold or lock status any domain name that [was] the subject of court proceedings.” *Id.* at ¶¶ 60-63. Zuccarini admits to filing the action as a “non-party to any agreement who has been harmed by ICANN’s negligent and reckless behavior.” *Id.* at ¶ 64.

A. Florida’s Long-Arm Statute

Because ICANN is a non-resident defendant, we first look to Florida’s long-arm statute to

determine if this Court may properly exercise jurisdiction. *Sloss Indus. Corp.*, 488 F. 3d at 925.

Plaintiff contends that personal jurisdiction is properly exercised pursuant to Florida's long-arm statute, Section 48.193(1)(a), which provides:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

Fla. Stat. § 48.193(1)(a); (D.E. No. 32 at 3-5).

1. ICANN's Affidavit Supporting its Motion to Dismiss

In support of its Motion to Dismiss, ICANN submitted the affidavit of its Chief Operating Officer, Akram J. Atallah. (D.E. No. 19-1). The Affidavit establishes that ICANN:

1. Does not have any office or other company facilities in Florida.
2. Does not have any phone number or mailing address in Florida.
3. Does not have any employee or staff member in Florida.
4. Has not applied for any loan or opened any bank account in Florida.
5. Has not owned any tangible personal property or real estate property or assets in Florida.
6. Has not appointed any agent in Florida for service of process.
7. Is not licensed to do business in Florida.
8. Has never released any advertisement to the residents of Florida, nor has it released any advertisement in any magazine

targeted at residents of Florida.

9. To the extent ICANN has witnesses who have knowledge of the facts alleged in the Amended Complaint, none of those witnesses are in Florida.

10. ICANN maintains a website that is operated from web servers physically located in El Segundo, California and Reston, Virginia.

(D.E. No. 19-1).

2. Plaintiff's Allegations Regarding ICANN's Activities Within Florida

Because ICANN submitted an affidavit challenging Plaintiff's jurisdictional allegations, the burden shifts back to plaintiff to produce evidence supporting jurisdiction. *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F. 3d 1249, 1258 (11th Cir. 2010); *see also Walack v. Worldwide Machinery Sales, Inc.*, 278 F. Supp. 2d 1358, 1365 (M.D. Fla. 2003). In his response to Defendant's Motion to Dismiss, Plaintiff states that Florida Statute Section 48.193(1)(a) is properly applied to ICANN because:

1. ICANN maintains on its website "a list of domain name registrars that ICANN has accredited and with whom ICANN has signed a 2009 Registrar Accreditation Agreement." (D.E. No. 32 at 3). The list of domain name registrars with which ICANN conducts business includes Moniker Online ("Moniker") whose place of business and mailing address is in Pompano Beach, Florida. *Id.* at 4.
2. According to its website, in July of 2000, ICM Registry, LLC ("ICM"), whose mailing address is in Palm Beach Gardens, Florida, submitted a proposal to ICANN in response to its request for proposals regarding acquiring the rights to certain domains. *Id.* On March 30, 2011, ICANN and ICM entered an agreement that designates ICM as the "Registry Operator" of certain domains. *Id.*
3. On February 3, 2011, ICANN, along with other organizations, held a news conference in Miami, Florida. *Id.* at 5.

3. No Jurisdiction Under Florida's Long-Arm Statute

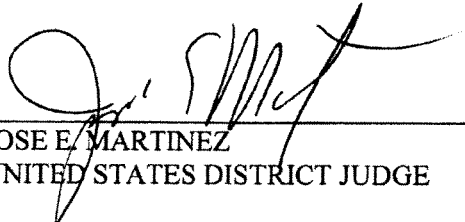
"The fact that a foreign defendant contracts with a Florida resident is not enough to establish personal jurisdiction over the foreign defendant." *Walack*, 278 F. Supp. 2d at 1366 (finding no personal jurisdiction over defendants pursuant to Florida Statute Section 48.193(1)(a) because alleged facts did not support that defendants operated or conducted a business or business venture in Florida and did not have an office or agent in Florida). As such, even if ICANN entered into contracts with Moniker and ICM, this is not enough to establish personal jurisdiction. Additionally, attendance at a press conference held in Florida is not sufficient to establish that ICANN conducted business within Florida.

Because there is no basis for assertion of personal jurisdiction under Florida's long-arm statute, we need not address the due process implications or the remaining arguments asserted in the motion to dismiss. Accordingly, after careful consideration, it is hereby:

ORDERED AND ADJUDGED that

1. Defendant ICANN's Motion to Dismiss Complaint (D.E. No. 19) is **GRANTED**.
2. This case is **CLOSED** and all pending motions are **DENIED as moot**.

DONE AND ORDERED in Chambers at Miami, Florida, this 7 day of December, 2011.



JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Lynch
All Counsel of Record