

**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' RESPONSE TO ORDER TO SHOW CAUSE**

**I. EXECUTIVE SUMMARY**

On November 28, 2011, this Court issued its Order Granting The Receiver's Emergency Motion To Enforce Stay, and ordered that "ICANN shall immediately stay and abate the UDRP Proceeding On www.funnygames.com . . . ." (Dkt. # 724 ("Order").) ICANN, which is not a party to this case, learned of the Court's Order and subsequent December 2, 2011 Order To Show Cause (Dkt. # 726) via e-mail sent by The Receiver's counsel. ICANN was never served with or otherwise provided proper notice of The Receiver's Verified Emergency Motion To Enforce Stay (Dkt. # 722 ("The Receiver's Motion")), which motion gives rise to the Court's Orders. ICANN asks that the Court's Orders on The Receiver's Motion be vacated for two reasons.

First, ICANN does not have authority to "stay or abate" UDRP (Uniform Domain Name Dispute Resolution Policy) proceedings or otherwise instruct the World Intellectual Property Organization ("WIPO") to do so. WIPO is one of four approved dispute resolution providers that

can hear disputes concerning an alleged abusive registration of a domain name under the UDRP.<sup>1</sup> The participants in any WIPO (or any other provider) proceeding commenced under the UDRP are: (1) a domain name registrant; and (2) a third party alleging abusive registration and use of that domain name.<sup>2</sup> As ICANN has repeatedly explained to The Receiver, ICANN is not a party to any UDRP proceeding (including the UDRP proceeding on [www.funnygames.com](http://www.funnygames.com)), whether before WIPO or one of the three other dispute resolution providers. Nor does ICANN play any role in administering, governing or otherwise overseeing WIPO proceedings under the UDRP. Thus, ICANN has no basis or ability to effectuate the relief the Court has ordered ICANN to effectuate. While ICANN has forwarded the Court's Order to WIPO for its information, ICANN does not have the authority to undertake any further action in an attempt to comply with the Court's Order.

Second, respectfully, 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. In particular, ICANN does not have sufficient contacts with Texas that would render it subject to jurisdiction here. ICANN is specially appearing here for the sole purpose of complying with and responding to the Court's Order To Show Cause. ICANN's compliance with this Court's Order To Show Cause in no way constitutes a waiver of ICANN's jurisdictional objections and defenses, which objections and defenses ICANN expressly preserves and asserts here in its Response to the Court's Order To Show Cause. Should the Court issue further orders requiring ICANN to undertake specific action, ICANN requests that it be permitted to fully brief its jurisdictional defenses.

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<sup>1</sup> For the complete list of providers *see* <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.

<sup>2</sup> *See* <http://www.wipo.int/amc/en/domains/guide/index.html#al>.

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 immediately stay and abate the UDRP Proceeding On [www.funnygames.com](http://www.funnygames.com).

## II. BACKGROUND ON ICANN AND THE UDRP

ICANN is a California non-profit public benefit corporation with its principal place of business in Marina del Rey, California. *See* <http://www.icann.org/en/general/articles.htm>. ICANN does not engage in commercial business, but rather 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. *See id.*; <http://www.icann.org/en/general/bylaws.htm#I> (ICANN's mission is to protect the stability, integrity, security, and utility of the DNS).<sup>3</sup>

ICANN's coordination role is fulfilled in certain ways. For example, and relevant to the Court's Orders relating to ICANN here, consumers (known as "registrants") may obtain the right to use second-level domain names (such as [funnygames.com](http://www.funnygames.com) or [uscourts.gov](http://www.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 approved the Uniform Domain Name Dispute Resolution Policy or UDRP, which was created through a community-driven policy development process, as a uniform policy applicable to all generic Top Level Domain ("gTLD") domain name registrations. The purpose of the UDRP is to "set[] forth the terms and conditions in connection with a dispute between

<sup>3</sup> To reach another person on the Internet, one types an address into one's computer—a unique name or number. ICANN coordinates these unique identifiers across the world; the system is known as the DNS. *See id.* Without that coordination, we would not have one global Internet.

[the registrant] and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you [, the registrant]." *See* <http://www.icann.org/en/dndr/udrp/policy.htm>, at ¶ 1.

WIPO is one of four 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. ICANN is not a party to any UDRP proceeding (including the UDRP proceeding on [www.funnygames.com](http://www.funnygames.com)), whether before WIPO or one of the three other dispute resolution providers. *See id.*; *see also* <http://www.icann.org/en/dndr/udrp/policy.htm> ("[t]he policy is between the registrar (or other registration authority in the case of a country-code top-level domain) and its customer (the domain-name holder or registrant)").

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

The Court's November 28, 2011 Order requiring ICANN to "immediately stay and abate the UDRP Proceeding On [www.funnygames.com](http://www.funnygames.com)" assumes, based on The Receiver's misleading and inaccurate representations in The Receiver's Motion, that ICANN has the authority to undertake such action. It does not.

As noted, ICANN is not a party to UDRP proceedings. *See* <http://www.icann.org/en/dndr/udrp/policy.htm>. ICANN does not play any role in administering or governing proceedings under the UDRP; 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. *See* <http://www.icann.org/en/dndr/udrp/uniform-rules.htm>.

Indeed, 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. See <http://www.wipo.int/amc/en/domains/guide/index.html#al>. ICANN is not a participant in any fashion.

In addition to not participating in any UDRP proceedings in any way, ICANN does not govern or otherwise oversee UDRP proceedings. Even assuming this Court could exercise proper jurisdiction over ICANN (it cannot, as explained below), ICANN simply does not have the authority to stay or abate UDRP proceedings; and nor does ICANN have authority to instruct WIPO to do so. ICANN has forwarded the Court's Order to WIPO for its information, but ICANN does not have the authority to undertake any further action at this time. 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.**

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. In particular, ICANN has no employees, assets, bank accounts, real property, personal property, offices, or other facilities in Texas. 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. ICANN does not sell or offer anything for sale in Texas or anywhere else. Based on ICANN's lack of minimum contacts with Texas, ICANN could not reasonably anticipate being haled into court in Texas, and to do so would offend the traditional notions of fair play and substantial justice. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); *Int'l Shoe Co. v. Washington*, 326 U.S. 310,

316, 66 S. Ct. 154, 90 L.Ed. 95 (1945). As a matter of constitutional due process, this Court lacks jurisdiction to issue orders with respect to ICANN. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("[w]ithout proper jurisdiction, a court cannot proceed at all in any cause").<sup>4</sup>

Indeed, several other courts throughout the country have entered orders to the effect that they also lack jurisdiction over ICANN. *See, e.g.*, Memorandum Opinion entered in the matter of *Moore, et al. v. Enom Inc., et al.* (N.D. Ala. Nov. 9, 2007) (Case No. 07-CV-1153-RDP), available at: <http://www.icann.org/en/legal/moore-v-icann/moore-v-icann-dismissal.pdf>.

Given the Court's lack of jurisdiction over ICANN, ICANN requests that the Court's November 28, 2011 Order and December 2, 2011 Order To Show Cause be vacated as to ICANN.

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<sup>4</sup> The Receiver may attempt to argue that personal jurisdiction over ICANN – a California non-profit public benefit corporation – is appropriate under 28 U.S.C. § 754, which vests a receiver with jurisdiction and control over receivership assets located in different districts under certain specified circumstances. To invoke 28 U.S.C. § 754, however, the receiver must, within 10 days of his appointment (or in this case, by December 4, 2010), "file copies of the complaint and such order of appointment in the district court for each district in which property is located." 28 U.S.C. § 754. Even assuming receivership assets in this case are located in California (ICANN, a non-party here, is unaware of any), there is no evidence that The Receiver has filed any such required documents in California, where ICANN is located. The Receiver's "failure to provide such copies in [California] shall divest the receiver of jurisdiction and control over all such property in [California]." *Id.*

ICANN further notes that ICANN was never served with The Receiver's Verified Emergency Motion To Enforce Stay (filed on November 21, 2011 (Dkt. # 722), as required by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 4. As ICANN, a non-party, was never served with the Receiver's Emergency Motion – indeed, The Receiver merely e-mailed ICANN a copy of the Court's November 28, 2011 Order after it was entered – ICANN did not have notice of The Receiver's Motion in violation of its Constitutional right to due process. Therefore, the Court's Order on such motion is invalid and void as to ICANN. *See Shaw v. 500516 N.B. Ltd.*, 668 F. Supp. 2d 237 (D. Me. 2009) (holding invalid a default judgment that was entered following defective service of complaint). Furthermore, given that ICANN was not properly served with the moving papers or subsequent orders pursuant to Rule 4, any argument that jurisdiction would be appropriate under 28 U.S.C. § 1692, which in receivership proceedings authorizes service of process beyond the territorial limits of the state in which the district court sits, likewise fails. 28 U.S.C. § 1692.

**V. CONCLUSION**

ICANN is not a party to or otherwise involved in UDRP proceedings and ICANN has no authority to "stay and abate the UDRP Proceeding On www.funnygames.com." Furthermore, as a matter of constitutional due process, this Court lacks jurisdiction to issue orders with respect to ICANN. For these reasons and those described more fully above, ICANN respectfully requests that the Court vacate its November 28, 2011 Order requiring ICANN to "immediately stay and abate the UDRP Proceeding On www.funnygames.com" and December 2, 2011 Order To Show Cause.

Dated: December 5, 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 5, 2011, I electronically filed the foregoing Non-Party ICANN's 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