UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHN ZUCCARINI, Plaintiff, v. NETWORK SOLUTIONS, LLC, a Delaware limited liability company; NAMEJET, LLC, a Delaware limited liability company; INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, INC., a California non-profit corporation, Defendants.	CASE NO. 11-14052-CIV-MARTINEZ/LYNCH

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

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Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") hereby moves, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, for summary judgment that (1) this Court lacks personal jurisdiction over ICANN, or in the alternative (2) that ICANN does not owe and therefore did not breach any duty of care to Plaintiff John Zuccarini ("Plaintiff").

INTRODUCTION

Plaintiff John Zuccarini filed this action against Defendants Internet Corporation for Assigned Names and Numbers ("ICANN"), Network Solutions, LLC, and NameJet, LLC, alleging that each were in some way negligent in allowing fourteen domain names co-held by a California receiver and Network Solutions, LLC for the benefit of Plaintiff's creditors, to be transferred and placed in a series of Internet auctions.

ICANN previously moved – on March 22, 2011 – to dismiss this action for lack of jurisdiction, improper venue, and for failure to state a claim against ICANN. (Dkt. # 19). That motion is still pending resolution by the Court. ICANN has since continuously objected to personal jurisdiction. ICANN's subsequent litigation conduct has been solely limited to the service and filing of required documents pursuant to Court order, including initial disclosures and the parties' joint scheduling report. ICANN has not propounded any offensive discovery, and in fact objected to Plaintiff's discovery requests on jurisdictional grounds (among others) and moved the Court to stay discovery pending resolution of ICANN's motion to dismiss. Although ICANN's motion to dismiss is still pending resolution by the Court, ICANN is filing its motion for summary judgment as required by the Court's May 20, 2011 Order Setting Civil Trial Date And Pretrial Schedule Dkt. # 45.[1] ICANN's compliance with the Court's May 20, 2011 order in no way constitutes a waiver of ICANN's defenses of lack of personal jurisdiction and improper venue, defenses that ICANN expressly preserves and reiterates here in its motion for summary judgment. ICANN does, though, respectfully submit that the correct

[1] The Court's March 20, 2011 Order Setting Civil Trial Date And Pretrial Schedule requires that any dispositive motion be filed on or before December 5, 2011.

motion for the Court to adjudicate is ICANN's original motion to dismiss. Moreover, to the extent this case proceeds on the merits following resolution of ICANN's motion to dismiss, ICANN would request the opportunity to file a renewed motion for summary judgment based upon the facts and evidence in existence following merits-based discovery.

Nonetheless, the arguments posited by ICANN in its motion to dismiss apply with equal force today, as the undisputed material facts demonstrate two fatal defects that continue to doom Plaintiff's case, either of which alone entitles ICANN to summary judgment. *First*, Plaintiff improperly seeks to have this United States District Court in Florida exercise personal jurisdiction over ICANN (a California non-profit public benefit corporation), despite the fact that ICANN maintains no offices, facilities or other presence in Florida, has no assets in Florida, does not otherwise conduct any business in this State, and thus does not have sufficient contacts with Florida that would render it subject to suit here. Plaintiff, who bears the burden of establishing this Court's jurisdiction over ICANN, cannot prove that ICANN has the "minimum contacts" with Florida necessary for a Court to assert personal jurisdiction.

Second, Plaintiff, who admits that he has not entered into any contract or other agreement with ICANN, cannot establish that ICANN owed a duty of care to Plaintiff, which defeats Plaintiff's negligence claim.

FACTUAL BACKGROUND

Background on ICANN.

ICANN is a California non-profit public benefit corporation with its principal place of business in Marina del Rey, California. ICANN's Separate Statement of Undisputed Material Facts ("SOF"), ¶¶ 1, 2. It does not engage in commercial business, but rather administers the Internet's domain name system on behalf of the Internet community, pursuant to a series of agreements with the United States Department of Commerce. (SOF, ¶ 3). ICANN's coordination role is fulfilled in certain ways. For example, and relevant to Plaintiff's allegations, consumers may obtain the right to use second-level domain names (such as

google.com or uscourts.gov) through companies known as "registrars." (SOF, ¶ 4). ICANN operates the accreditation system that has produced a highly competitive registrar marketplace, with over 900 accredited registrars, including defendant Network Solutions, LLC.

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. (SOF, ¶¶ 16-20, 22-23, 27). The only plausible ICANN-Florida contact, Florida shares with the rest of the world. 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. (SOF, ¶ 26). None of these websites are operated from web servers physically located in Florida. *See, e.g., id*. (declaring that www.icann.org "is operated from web servers physically located in El Segundo, California and Reston, Virginia"). The websites contain a wealth of information about ICANN, about the people who work for ICANN, and about the projects that ICANN has undertaken in connection with the Internet. *Id*. The websites also contain "links" to other information that is related to ICANN's activities. ICANN does not offer anything for sale on its websites; in fact, ICANN does not sell anything. (SOF, ¶ 27).

Plaintiff's Amended Complaint.

Plaintiff alleges that he, beginning in 1998, registered a "certain number of domain names with the domain name registrar Network Solutions." (SOF, ¶ 5). In 2007, to satisfy a judgment obtained against Plaintiff, the United States District Court for the Northern District of California appointed a receiver, Michael Blacksburg, and ordered that Network Solutions transfer Plaintiff's domain name registrations to the receiver. (SOF, ¶ 6). Pursuant to the Court's order, Network Solutions transferred 90 domain name registrations from Plaintiff to Mr. Blacksburg. (SOF, ¶ 7).

In May of 2010, Mr. Blacksburg allegedly failed to renew the registrations for 14 of the 90 domain names, which needed to be done on a yearly basis in order for Mr. Blacksburg to maintain his status as the registered domain name holder. (SOF, ¶ 8). As a result of Mr. Blacksburg's alleged failure to renew the 14 domain name registrations, those domain names proceeded to an automated Internet auction process, as set forth through in an agreement between Network Solutions and defendant NameJet. (SOF, ¶ 9). Plaintiff alleges that the domain names proceeded to auction because of Mr. Blacksburg's non-renewal. Further, Plaintiff alleges, had Mr. Blacksburg followed certain post-auction processes (which it is alleged he did not), Mr. Blacksburg would have been entitled to up to 20 percent of the auctioned price, the proceeds of which would have gone toward the satisfaction of Plaintiff's debt. (SOF, ¶ 10).

Plaintiff claims that, because the 14 domain name registrations were part of the court-ordered receivership estate, Network Solutions was negligent in failing to place a "hold" status on the 14 domain name registrations and allowing those domain names to proceed to automatic auction. (SOF, ¶ 11). Plaintiff further claims that NameJet, in auctioning the 14 domain names "without any regard to their legal status," was "concurrent[ly] negligen[t] in aiding the loss of the domain names from the receiver Blacksburg, and in detriment to Zuccarini and his creditors." (SOF, ¶ 12).

Plaintiff's only allegations with respect to ICANN relate to the Registrar Accreditation Agreement that ICANN maintains with Network Solutions. (SOF, ¶ 13). Plaintiff is not a party to that agreement. (SOF, ¶ 14 (Plaintiff alleges that he is "a party who has ***not*** entered into any agreement with ICANN or Network Solutions.") (emphasis added)). Nonetheless, Plaintiff alleges that ICANN was negligent in "overseeing the actions of Network Solutions," and that ICANN was negligent in not requiring Network Solutions to "place on hold or lock status any domain name that is the subject of court proceedings." (SOF, ¶ 15).

It is on these allegations that Plaintiff sued ICANN in the Southern District of Florida.

SUMMARY JUDGMENT STANDARD

Summary judgment is authorized when there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). As confirmed by the Eleventh Circuit, a party moving for summary judgment may meet its burden "'by showing that the nonmoving plaintiff has failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Fickling v. United States*, 507 F.3d 1302, 1304 (11th Cir. 2007) (citation omitted). Once this burden is met, the nonmoving party must produce specific evidence to show that a reasonable jury could find in its favor. *Id*. Summary judgment may be granted if the non-movant fails to adduce evidence which, when viewed in a light most favorable to him, would support a jury finding in his favor. *Id*.

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE THIS COURT LACKS PERSONAL JURISDICTION OVER ICANN.

Determining whether personal jurisdiction can be exercised over a non-resident defendant like ICANN involves a two-part inquiry: (1) whether the exercise of jurisdiction is appropriate pursuant to Florida's long-arm statute, *see Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007); and (2) whether exercising jurisdiction would violate the Due Process Clause of the Fourteenth Amendment. *See id*. The second part of the inquiry asks 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, 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). 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).

It is Plaintiff's burden to "[establish] a prima facie case of personal jurisdiction." *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006). Even if such a prima facie case is made, "[w]here, as here, Defendant submits affidavits to the

contrary, the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction." *Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1269 (11th Cir. 2002).

Here, Plaintiff cannot meet his burden of proving facts sufficient to support personal jurisdiction over ICANN in Florida, under either the long-arm statute or the Due Process Clause. Summary judgment should be granted in ICANN's favor.[2]

A. Plaintiff Cannot Prove That ICANN Is Subject To Jurisdiction In Florida Under Florida's Long-Arm Statute.

From Plaintiff's opposition to ICANN's motion to dismiss, it is clear that Plaintiff's only argument for why this Court should exercise jurisdiction over ICANN is based on Section 1(a) of Florida's long arm statute, which subjects a defendant to jurisdiction for any cause of action arising from the defendant's operation of a business in Florida.[3] (Pls.' Opp'n to ICANN's Mot. to Dismiss ("Opp'n"), at 3-5 (Dkt. # 32.)); Fla. Stat. § 48.193(1)(a).

Specifically, Plaintiff argues that ICANN should be subject to jurisdiction in Florida under Section 1(a) because: (i) ICANN maintains contracts with third parties, where those third parties themselves reside and do business in Florida; and (ii) ICANN participated in a news conference held in Florida on February 3, 2011. None of these alleged contacts, however, relate in any way – much less give rise – to Plaintiff's action. And even if they did, they still would not be sufficient to confer jurisdiction over ICANN.

First, personal jurisdiction cannot be premised solely on a foreign defendant's contracts with a resident corporation or individual. *Wallack v. Worldwide Machinery Sales, Inc.*, 278 F. Supp. 2d 1358, 1366 (M.D. Fla. 2003). Yet Plaintiff's argument that ICANN should be subject

[2] Determination of personal jurisdiction must be made prior to reaching the merits. *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").

[3] In its motion to dismiss, ICANN demonstrated how the activities alleged in Plaintiff's Amended Complaint also failed to satisfy other arguably relevant provisions of Florida's long-arm statute, including the provisions of the long-arm statute that may subject a nonresident defendant to Florida jurisdiction if the plaintiff's cause of action arises from the defendant's: (1) tortious acts within the state; or (2) causing of injury to person or property within the state. Fla. Stat. § 48.193(1) (b) & (f). In his opposition, Plaintiff did not argue that these provisions are relevant to the analysis here.

In addition, Plaintiff did not seek jurisdictional discovery, so Plaintiff's opposition to ICANN's motion to dismiss provides Plaintiff's only basis for why he believes jurisdiction over ICANN is appropriate.

to jurisdiction in Florida because it entered into two contracts with Florida businesses – Moniker Online Services, LLC ("Moniker") and ICM Registry, LLC ("ICM") – relies solely on the existence of these contracts. Plaintiff's argument fails. In *Wallack*, for example, a Mississippi corporation contracted with a Florida corporation, and was later sued by that Florida corporation in a Florida court for breach of contract. The court held there was no basis for personal jurisdiction under Section 1(a) of the long arm statute because the only contact the Mississippi corporation had with the state of Florida was its contract with the plaintiff Florida corporation. *Id*. The court ruled that "[t]he fact that a foreign defendant contracts with a Florida resident is not enough to establish personal jurisdiction over the foreign defendant." *Id*. The defendant did not have an office or an agent in Florida, and did not otherwise operate or conduct business in Florida, and thus, did not fall within the meaning of Section 1(a). *Id*; *see also Travel Opportunities of Fort Lauderdale, Inc. v. Walter Karl List Mgmt. Inc.*, 726 So. 2d 313, 313-14 (Fla. Dist. Ct. App. 1998) (no personal jurisdiction over defendant pursuant to Section 1(a) even though the defendant contracted with a Florida corporation because the defendant had no offices, no post office box, no telephone, no employees, no bank accounts, or any other property in Florida).

ICANN's February 2011 attendance at and participation in a Florida press conference with three international non-profit groups that collaboratively work with ICANN to coordinate the world's Internet addressing system and its technical standards is also not sufficient to establish business conduct under Florida's long-arm statute. *See Airplay Am., LLC v. Cartagine*, No. 08-81224-CIV, 2009 WL 909521 at * 2 (S.D. Fla. April 2, 2009) (no personal jurisdiction pursuant to Section (1)(a) where defendant's only contacts with Florida were five board meetings and communications with Floridians where the board meetings and communications did not give rise to plaintiff's cause of action). Moreover, Florida courts are clear that attendance at a conference or meeting in Florida is not enough to confer jurisdiction under Florida's long arm statute. *See, e.g., Musiker v. Projectavision, Inc.*, 960 F. Supp. 292, 295 (S.D. Fla. 1997) (no

jurisdiction under Section 1(a) based on defendant's telephone calls and mailing of information to Florida, and attending a meeting in Florida).

In addition, Plaintiff cannot prove that the cause of action against ICANN "arises" from any of ICANN's alleged contacts with the state. *See* Fla. Stat. § 48.193(1)(a). Plaintiff has wholly ignored the need to demonstrate any nexus between ICANN's alleged contacts with Florida and his cause of action against ICANN.

The long-arm statute requires the existence of "a direct affiliation, nexus, or substantial connection . . . between the basis for the cause of action and the business activity." *Golant v. German Shepherd Dog Club of Am., Inc.*, 26 So. 3d 60, 62 (Fla. Dist. Ct. App. 2010); *see also Fraser v. Smith*, 594 F.3d 842, 848 (11th Cir. 2010) (no personal jurisdiction under Section 1(a) where plaintiff did not allege that defendant's solicitation activities in Florida caused the plaintiff to charter defendant's boat, which gave rise to the cause of action). ICANN has no employees, offices or agents in Florida, does not hold a business license in Florida, and does not offer anything for sale in Florida. (SOF, ¶¶ 16, 18, 22, 27). Under these circumstances, the mere fact that ICANN has a contract with a Florida company is not sufficient to confer jurisdiction under Section 1(a). *Wallack*, 278 F. Supp. 2d at 1366. Moreover, even if one of the parties to this case was a Florida-based company with which ICANN holds an agreement, Florida jurisdiction over ICANN would still be improper. *See Vaughn v. AAA Employment, Inc.*, 511 So. 2d 1045, 1046 (Fla. Dist. Ct. App. 1987) (no jurisdiction under Florida's long arm statute based on defendant's contract with a Florida corporation, even though cause of action arose out of the contract).

Plaintiff cannot refute the material evidence submitted with ICANN's motion to dismiss, nor did he in opposition to that motion. That evidence establishes 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. (SOF, ¶¶ 16-20, 22-23, 27). Under similar circumstances, the Eleventh Circuit found personal jurisdiction lacking. *Sculptchair Inc. v. Century Arts, Ltd.*, 94

F.3d 623 (11th Cir. 1996) (no personal jurisdiction over a group of defendants under Florida's long arm statute because the defendants did not manufacture, sell or solicit orders for products in Florida and they did not maintain offices or agents in the state); *see also Bernardele v. Bonorino*, 608 F. Supp. 2d 1313, 1322-23 (S.D. Fla. 2009) (two meetings in Florida and email communication with Florida residents "cannot be found to constitute a general course of business activity in Florida" for purposes of Florida's long arm statute). The result should be no different here. Plaintiff cannot meet his burden and summary judgment should be granted.

B. Plaintiff Cannot Prove That ICANN Is Subject To Jurisdiction In Florida Under The Due Process Clause.

If the Court finds it necessary to go beyond analysis of Florida's long-arm statute, the Due Process Clause of the Fourteenth Amendment provides further justification to grant summary judgment in ICANN's favor. Plaintiff cannot establish that Florida jurisdiction over ICANN comports with due process.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp.*, 471 U.S. at 471-72. Due process requires two elements be established: (1) the defendant must have certain "minimum contacts" with the forum state; and (2) the maintenance of the suit must not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316.

"Minimum Contacts within the forum may give rise to two types of personal jurisdiction: specific or general jurisdiction." *Response Reward Sys L.C. v. Meijer, Inc.*, 189 F. Supp. 2d 1332, 1338 (M.D. Fla. 2002); *see Helicopteros Nacionales de Colombia, S.A*, 466 U.S. at 414-15. Here, Plaintiff has not and cannot establish either.

1. The Court Does Not Have General Jurisdiction Over ICANN.

To assert general jurisdiction, Plaintiff must establish that ICANN has "continuous and systematic" contacts with Florida. *Fraser*, 594 F.3d at 846. None of the contacts relied on by

Plaintiff satisfy this due process standard. As courts within the Eleventh Circuit have repeatedly found: "The existence of a contractual relationship between a nonresident defendant and a Florida resident is not sufficient in itself to meet the requirements of due process. . . . [C]ontacts produced through the unilateral activity of a third person are insufficient to reasonably indicate to the defendant that he should anticipate being subject to personal jurisdiction of the forum state's courts." *Jet Charter Serv., Inc. v. Koeck*, 907 F.2d 1110, 1113 (11th Cir. 1990); *see also Cauff Lippman & Co. v. Apogee Fin. Grp., Inc*., 745 F. Supp. 678, 682 (S.D. Fla. 1990) (due process not satisfied where defendant's contacts consisted of one preliminary meeting in Florida and telephone calls and telecopies to Florida).

To be sure, factors that weigh against general jurisdiction include a lack of business or a business license in the forum, *Helicopteros Nacionales de Colombia, S.A*, 466 U.S. at 416, a lack of property ownership in the forum, *Nat'l Enquirer, Inc. v. News Group News, Ltd.*, 670 F. Supp. 962, 966-67 (S.D. Fla. 1987), or a lack of any bank accounts, telephone listings, or mailing addresses in the forum. *Id*. at 966. General jurisdiction does not arise because a party maintains a website or otherwise offers information nationwide. *Miller v. Berman*, 289 F. Supp. 2d 1327, 1336 (M.D. Fla. 2003) ("[T]he exercise of [general] jurisdiction over Defendants in the State of Florida is not proper because placing an informational website on the Internet does not amount to sufficient contacts with the forum."); *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"). Nor can general jurisdiction be premised on a "stream of commerce" theory; *i.e.*, that a defendant has contacts with third parties who then do business in the forum state. *See, e.g., Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 778 (7th Cir. 2003); *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 216 (5th Cir. 2000).

ICANN is not subject to general jurisdiction in Florida. Again, ICANN has no employees, assets, bank accounts, real property, personal property, offices, or other facilities in Florida. (SOF, ¶¶ 16, 18-20). ICANN is not licensed to do business in Florida, does not have a

registered agent for service of process in Florida, and has no phone numbers or mailing addresses in Florida. (*Id*. at ¶¶ 17, 21, 22). ICANN does not collect fees directly from domain name registrants, such as Mr. Zuccarini, and has no contracts with Mr. Zuccarini. (*Id*. at ¶¶ 4, 25). Finally, ICANN's website, which is operated from web servers physically located in Southern California and Virginia, does not offer anything for sale. (*Id*. at ¶¶ 26, 27).

ICANN thus has none of the contacts with Florida that are relevant to the general jurisdiction inquiry. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 416; *Nat'l Enquirer, Inc.*, 670 F. Supp. at 967.

2. The Court Lacks Specific Jurisdiction Over Plaintiff's Claim.

"Specific" jurisdiction arises "out of a party's activities in the forum state that are related to the cause of action alleged in the complaint." *Sloss Indus. Corp.*, 488 F.3d at 925 (quotation marks and citation omitted). The Eleventh Circuit employs a three-part test for determining whether minimum contacts sufficient to support specific personal jurisdiction exist: (1) the defendant's contacts with Florida must involve some act by which the defendant purposefully avails itself of the privilege of conducting activities within the State; (2) the defendant's contacts with the State must give rise to the plaintiff's cause of action; and (3) the defendant's contacts with the State must be such that the defendant should reasonably anticipate being haled into court there. *See Future Technology Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1250-51 (11th Cir. 2000); *Miami Breakers Soccer Club, Inc. v. Women's United Soccer Ass'n*, 140 F. Supp. 2d 1325, 1330 (S.D. Fla. 2001). "The touchstone of sufficient contacts is that the defendant 'purposefully directed' its activities at residents of the forum-state." *JB Oxford Holdings, Inc. v. Net Trade, Inc.*, 76 F. Supp. 2d 1363, 1366 (M.D. Fla. 1999); *see Burger King*, 471 U.S. at 472-73, *Response Reward Sys.*, 189 F. Supp. 2d at 1338 (finding no specific personal jurisdiction because the defendant's activities could not be considered to be "purposefully directed to the State of Florida").

Plaintiff cannot prove that his claims against ICANN arise out of any purported ICANN-Florida contacts.[4] Specific personal jurisdiction is therefore absent here. *Fraser*, 594 F.3d at 850 ("'[A] fundamental element of the specific jurisdiction calculus is that plaintiff's claim must 'arise out of or relate to' at least one of defendant's contacts with the forum.'") (citation omitted). Summary judgment should be granted for this reason alone.

Specific personal jurisdiction is also lacking because ICANN did nothing to "purposefully avail[] itself of the privilege of conducting activities" in Florida, and could not "reasonably anticipate being haled into [this] court." *Sloss Indus. Corp.*, 488 F.3d at 925 (quotation marks and citation omitted).[5] (*See also* SOF ¶¶ 16-27).

In short, Plaintiff cannot prove any facts sufficient to satisfy the Due Process Clause. ICANN has established that it has no meaningful contacts with Florida and that the exercise of Florida jurisdiction over ICANN would be unreasonable. Summary judgment is therefore proper for want of personal jurisdiction under the Due Process Clause.

II. PLAINTIFF CANNOT PROVE THE ESSENTIAL ELEMENTS OF HIS NEGLIGENCE CLAIM.

Plaintiff asserts a single cause of action for negligence against ICANN. The elements of a cause of action for negligence are well-established in Florida: (1) defendant owed a duty of care; (2) defendant breached that duty of care; (3) the breach of duty both actually and

[4] As noted, ICANN does no business in Florida and is not party to any contracts with Plaintiff. (SOF, ¶ 16-23, 25-27).

[5] Plaintiff alleges that "ICANN in approving the Uniform Name Dispute Resolution Policy ("UDRP") in October 24, 1999, recognized that third parties had rights to contest the ownership of domain names and that those rights should be protected." (Am. Compl. at ¶ 65). The mere fact that ICANN—through the community-driven policy development process—created a uniform policy applicable to all gTLD domain name registrations does not subject ICANN to jurisdiction every time a registrar enters into a separate contract with a domain name registrant that incorporates that policy. ICANN did not contract with Plaintiff, (SOF, ¶ 25), and had no control where, or with whom, registrars would choose to do business. ICANN did not "purposefully avail" itself of the privilege of doing business in Florida simply because a third-party registrar did business there. *See Rank v. Hamm*, No. 2:04-0997, 2007 WL 894565, at * 12 (S.D. W. Va. Mar. 21, 2007) (holding that "adoption of a nationwide policy does not of itself result in [the policy creator's] purposefully directing personal activities toward West Virginia," where that policy was implemented by third-parties within the State).

In any event, even if the application of the UDRP policy could somehow be considered a "contact" by ICANN with Florida, this suit does not arise under the UDRP and it not related to it. By the terms of the UDRP, ICANN is not a party to UDRP proceedings.

proximately caused plaintiff's injuries; and (4) plaintiff suffered damages as a result of the breach. *Williams v. Davis*, 974 So. 2d 1052, 1056 (Fla. 2007). While issues of breach, causation and damages are typically questions to be resolved by the finder of fact, the determination of duty is generally a matter of law for the court. *See, e.g., Fla. Dep't of Corr. v. Abril*, 969 So. 2d 201, 205 (Fla. 2007); *McCain v. Florida Power Corp*., 593 So. 2d 500, 502 (Fla. 1992) (whether a duty of care existed is a question of law to be determined by the Court).

With respect to the duty requirement, the Florida Supreme Court has held that for a Plaintiff "to bring a common law action for negligence in Florida, the 'minimal threshold *legal* requirement for opening the courthouse doors' is finding that a defendant's alleged actions created a foreseeable 'zone of risk' of harming others." *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1202 (Fla. 1997) (quoting *McCain*, 593 So. 2d at 502). In *McCain*, the Florida Supreme Court explained that:

> Florida . . . recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. . . . 'Where a defendant's conduct creates a *foreseeable zone* of risk, the law generally will recognize a duty placed upon [the] defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.'
>
> [. . .]
>
> [E]ach defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element.

McCain, 593 So. 2d at 503 (quoting *Kaisner v. Kolb*, 543 So. 2d 732, 735 (Fla. 1989) (footnotes omitted)). In applying the foreseeable "zone of risk" test, courts focus on the likelihood that a defendant's conduct will result in the *type* of injury suffered by the plaintiff. *Palm Beach-Broward Med. Imaging Ctr., Inc. v. Cont'l Grain Co.*, 715 So. 2d 343, 345 (Fla. Ct. App. 1998). Significantly, "[t]he absence of a foreseeable zone of risk means that the law imposes no legal

duty on a defendant, and therefore defeats a negligence claim." *Biglen v. Fla. Power & Light Co.*, 910 So. 2d 405, 408 (Fla. Ct. App. 2005).

Based upon Plaintiff's opposition to ICANN's motion to dismiss, read in conjunction with his Amended Complaint, the basis for the negligence claim is as follows: A court ordered Network Solutions to transfer 90 domain name registrations from the Plaintiff to a receiver; Network Solutions complied with the court order. A couple of years later, the receiver let 14 of the registrations expire. Those 14 domain names went to auction pursuant to a Network Solutions/NameJet process. Plaintiff further complains that had Network Solutions locked the names simply because they were previously subject to a transfer order, the receiver may have earned more money to pay off Plaintiff's creditors by selling the registrations itself rather than being auctioned off. There is no allegation, however, that the court order required the names to be locked (it did not).

Based on the above, Plaintiff argues that ICANN was negligent in not performing a "review and inquiry" of Network Solutions to ensure that Network Solutions locked the domain names, which would have kept them from expiring. Plaintiff further suggests that ICANN should have performed this "review and inquiry" simply because Network Solutions was a party to two prior lawsuits (one nearly a decade old), neither of which has anything to do with the rights of third parties in receivership proceedings. (Opp'n at 7-10). In sum, Plaintiff seems to be arguing that ICANN should have watched Network Solutions carefully and require it to lock names (in other words, breach its contract) – when Network Solutions had no authority to do so. *See* Form of Registrar Accreditation Agreement, *available at* http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm (the Registrar Accreditation Agreement does not empower registrars to select names to apply "lock" statuses to outside the community-driven UDRP). This is not and cannot be the grounds for a negligence claim, and ICANN is entitled to summary judgment.

At the motion to dismiss stage, instead of relying on facts, Plaintiff presented this Court with pages of inapposite argument (and, as explained in ICANN's motion to dismiss, allegations

not supported within the Amended Complaint). Plaintiff told this Court of a high-profile fraudulent transfer issue from 2003, a case that ICANN was not a party to and based upon facts unrelated to Plaintiff's action. Plaintiff also told this Court of a 2008 lawsuit involving Network Solutions and discussing Network Solutions' conduct when a person searched for available domain name registrations through Network Solutions and did not immediately register those names. (Opp'n at 7).[6] Neither of these situations has anything to do with the rights of third parties in receivership proceedings that ICANN understands Plaintiff's Amended Complaint to put at issue.

Plaintiff has not – and cannot – state any facts to show that ICANN created a foreseeable risk of harm to Plaintiff arising from the actions of the receiver, Network Solutions and/or NameJet. *See Kitchen*, 697 So. 2d at 1202 ("a defendant's alleged actions [must create] a foreseeable 'zone of risk' of harming others."). Plaintiff concedes that he is not party to any contract with ICANN and that he does not have any direct relationship with ICANN. (*See* SOF, ¶¶ 13, 14). Plaintiff cannot prove that ICANN had any relationship with Plaintiff that could conceivably create a foreseeable risk to Plaintiff.

In opposition to ICANN's motion to dismiss, Plaintiff argued that a foreseeable risk of harm to Plaintiff exists because ICANN knew that Network Solutions had a history of improperly transferring domain names. (Opp'n at 11). But Plaintiff has not alleged any facts that suggest that Network Solutions improperly transferred the domain name registrations at issue here (it did not) or that Network Solutions breached its Registrar Accreditation Agreement with ICANN. (*See* ICANN's Mot. to Dismiss, Dkt. # 19, at 17). Nor can Plaintiff prove any facts that would demonstrate that Network Solutions took any act in relation to the 14 domain name registrations at issue that would support a determination that Network Solutions was in

[6] Plaintiff admitted that much of his Opposition discussed matters that are "not part of this Complaint." (Opp'n at 7). Plaintiff dedicated over two pages of his opposition brief to the matter of *Chris McElroy v. Network Solutions, LLC, et al.*, Case No. 2:08-cv-01247-PSG-VBK, which was filed in the United State District Court for the Central District of California and which was closed in October 2009. Plaintiff failed to mention, however, that the plaintiff in that case voluntarily dismissed ICANN with prejudice on March 4, 2009. ICANN never settled the matter, never admitted liability in that action and, in fact, was dismissed before it answered the complaint.

violation of the Registrar Accreditation Agreement or move ICANN to initiate the contractual compliance review Plaintiff wishes were required.

In applying the foreseeable "zone of risk" test, courts focus on the likelihood that a defendant's conduct will result in the type of injury suffered by the plaintiff. *Palm Beach-Broward Med. Imaging Ctr., Inc.*, 715 So. 2d at 345. Here, Plaintiff was allegedly injured when a court-appointed receiver neglected to timely renew 14 domain name registrations with a domain name registrar. (SOF, ¶¶ 9, 10). Based on the receiver's inaction, the domain name registrations were automatically auctioned off – through a process that had nothing to do with ICANN – which allegedly caused the receiver to lose assets held for the benefit of Plaintiff's creditors. (*Id.*). That ICANN's administration of the domain name system somehow renders this type of injury to Plaintiff foreseeable is nonsensical. Indeed, to state Plaintiff's implication—that ICANN's administration of the domain name system led to the foreseeable risk that a court-appointed receiver, unknown to ICANN, somewhere in the world, after nearly three years of administering the estate, could fail to timely renew domain name registrations with a domain name registrar, resulting in that registrar auctioning off such domain names, and fail to avail himself of post-auction processes thereby causing the receiver to lose assets held for the benefit of Plaintiff's creditors—is to prove its absurdity.

It is neither likely nor foreseeable that ICANN's conduct in executing a Registrar Accreditation Agreement with Network Solutions would result in the type of injury alleged by Plaintiff here. ICANN is entitled to summary judgment on Plaintiff's negligence claim. *Biglen*, 910 So. 2d at 409 (affirming grant of summary judgment where it was not foreseeable that defendant power company's operation of power lines would result in the type of injury suffered by plaintiff and thus defendant owed no duty of care toward plaintiff); *Kelley v. Beverly Hills Club Apartments*, 68 So. 3d 954 (Fla. Ct. App. 2011) (affirming grant of summary judgment based on lack of duty of care where it was not foreseeable that defendant apartment complex's failure to install safety precautions would cause type of injury suffered by plaintiff).

III. CONCLUSION

Summary judgment is appropriate for several reasons. Principally, however, Plaintiff has sued the wrong defendant in the wrong court—ICANN has no meaningful or relevant contacts with Florida and there is no link between ICANN and Plaintiff's alleged injuries. For these reasons, and given Plaintiff's inability to establish that ICANN owed Plaintiff a duty of care, which is an essential element of Plaintiff's negligence claim, summary judgment should be granted in ICANN's favor.

Dated: December 5, 2011

Respectfully submitted,

/s/ Maria Ruiz

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Attorneys for Defendant Internet Corporation for Assigned Names and Numbers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record, and mailed a copy of the foregoing to Plaintiff at the address listed below.

John Zuccarini
190 SW Kanner Highway
Stuart, FL 34997

/s/ Maria H. Ruiz
Maria H. Ruiz