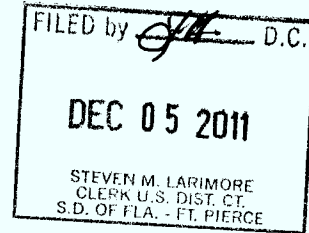


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-14052-CIV-MARTINEZ-LYNCH

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.)
_____)



**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS
THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, INC.,
NETWORK SOLUTIONS, LLC., AND NAMEJET, LLC.
AND MEMORANDUM OF LAW IN SUPPORT**

Plaintiff John Zuccarini ("Zuccarini"), pursuant to Fed. R. Civ. P. 56 and S.D. Fla. L.R. 7.5, moves for summary judgment against Defendants, Network Solutions, LLC ("Network Solutions"), Name Jet, LLC ("NameJet") and the Internet Corporation for Assigned Names and Numbers, Inc. ("ICANN").

INTRODUCTION

This lawsuit has been brought as the Defendant, the domain name registrar, Network Solutions was grossly negligent for ignoring it's Domain Name Deletion Policy which states that a domain name that is the subject of "*extenuating circumstances*" will not be canceled and

deleted from a registrants account at Network Solutions. The phrase "*extenuating circumstances*" is defined within the Domain Name Deletion Policy of domain name registry ICANN, among other things as a "*domain name subject to litigation in a court of competent jurisdiction.*" Network Solutions through it's Regsitry-Registrar Agreement with ICANN is required to adhere to the ICANN Domain Name Deletion Policy. Network Solutions was also grossly negligent for not having in place oversight to ensure their Domain Name Deletion Policy was enforced.

The result of this negligence was the cancellation, deletion and ultimate auction by NameJet, of the subject fourteen domain names from a Federal Court Appointed Receiver's account at Network Solutions, resulting in a loss of between \$60,000 and \$90,000 to the beneficiaries of a California receivership, Zuccarini and his creditors. The Internal Revenue Service ("IRS") as one of those creditors, and the holding the largest claim to any amounts acquired by the receivership.

The auctioneer of the domain names, NameJet, was also grossly negligent for not having in place a policy that would protect a domain name "*subject of litigation in a court of competent jurisdiction*" from being placed in auction. A simple policy and procedure, such as requiring any domain name registrar, as is Network Solutions, to advise NameJet of any domain name that is subject to orders of a court would have alerted NameJet to the fact the fourteen domain names they ultimately auctioned were ordered to be held by a Federal District Court in receivership for the benefit of Zuccarini and his creditors.

ICANN, the domain name registry whom accredits and approves domain name registrars, such as Network Solutions to establish and continue operating their domain name registrar business, was grossly negligent for not conducting the proper oversight of Network Solutions

business activities which could have revealed the lack of due diligence on the part Network Solutions in their business decisions as it relates directly to the issues of this instant action. The lack of oversight of Network Solutions by ICANN is especially critical as Network Solutions is known to have had a number well publicized failings concerning the unauthorized transfer of domain names that were registered with Network Solutions.

At the time the amended complaint for this instant action was filed on February 14, 2011, Zuccarini was not aware that ICANN had a Domain Name Deletion Policy that allowed all domain name registrars it accredited, such as Network Solutions to protect from cancellation and deletion any “*domain name subject to litigation in a court of competent jurisdiction.*”

Zuccarini was also not aware at the the time the amended complaint was filed that Network Solutions also had a Domain Name Deletion Policy that stated any domain name subject to “*extenuating circumstances*” would not be canceled and deleted from a registrants account. Counsel for Network Solutions was aware as early as June of 2007 that the fourteen domain names of this instant action were the subject litigation in Federal Court in the Northern District of California, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007.

The reason for and purpose of ICANN and Network Solutions having a Domain Name Deletion Policy as it relates to the issues of this case, are to protect a domain name from cancellation and deletion to insure the orders of a court are enforced.

Through an argument which ignores both ICANN's and Network Solutions policies to protect domain names that are subject to litigation in the courts from cancellation and deletion, Network Solutions and NameJet have claimed and now hold between \$60,000 to \$90,000 obtained from the NameJet auctions, funds that the Federal District Court for the Northern

District of California intended to be awarded to Zuccarini and his creditors, not to Network Solutions and NameJet.

The facts in this case are quite straight forward, and the pleadings and evidence obtained by Zuccarini will show the negligence of all the Defendants. Zuccarini asks the Court to find for summary judgment against all the Defendants and award compensatory and punitive damages the Court finds appropriate.

THE STANDARD FOR GRANTING SUMMARY JUDGMENT

The Court should grant summary judgment if the moving party establishes there is no genuine issue of material fact, and therefore is entitled to judgment as a matter of law. *Carlin Communication, Inc. v. Southern Bell Tel. and Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986). Although the Court must view all evidence and inferences to be drawn from that evidence in a light most favorable to Theodule, the trial judge should enter summary judgment “if, under the governing law, there can be but one reasonable conclusion.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is ‘no genuine issue for trial’”).

In reviewing the evidence, the Court must determine whether the non-moving party has identified specific facts demonstrating there is a genuine issue of material fact for trial. Here the undisputed facts and the law set forth in this memorandum yield only one reasonable conclusion: Network Solutions was grossly negligent for ignoring policies they had in place that would have prevented the unauthorized auction of the fourteen domain names and that NameJet was grossly negligent for not having any policy that would have easily alerted them to the legal standing of the domain names, which would have prevented the auctions from taking place. ICANN was

grossly negligent for not exercising the necessary oversight to assure that Network Solutions was performing the due diligence necessary in their duties as a domain name registrar.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On November 21, 1998, ICANN issued its Revised Articles of Incorporation. Item 4. of the Articles of Incorporation states: *4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. (Exhibit A)*

2. Zuccarini is part of the Internet community and seeks to have the local laws of Florida and the United States applied in this instant action.

3. On September 21, 2004 ICANN adopted an Expired Domain Deletion Policy. Within this policy it is stated: *"The Expired Domain Deletion Policy is a revision to the domain registration expiration provisions in ICANN's Registrar Accreditation Agreement."* All of the fourteen domain names of this instant action expired from the California's Receiver's account at Network Solutions while this policy was in effect. ICANN revised this policy on May 11, 2010. All the relevant provisions of the revised policy to the issues of this instant action are identical to that of the original 2004 policy.

4. Within ICANN's Expired Domain Deletion Policy it is stated that a registrar if they choose, may renew a domain name subject to *"extenuating circumstances"* without the consent of the registrant of the domain name. One of the definitions of extenuating

circumstances is stated as a “*domain name subject to litigation in a court of competent jurisdiction.*” Below is the text of ICANN's Expired Domain Deletion Policy detailing these issues. (*Exhibit B*)

3.7.5 At the conclusion of the registration period, failure by or on behalf of the Registered Name Holder to consent that the registration be renewed within the time specified in a second notice or reminder shall, in the absence of extenuating circumstances, result in cancellation of the registration by the end of the autorenew grace period (although Registrar may choose to cancel the name earlier).

*3.7.5.1 Extenuating circumstances are defined as: UDRP action, valid court order, failure of a Registrar's renewal process (which does not include failure of a registrant to respond), the domain name is used by a nameserver that provides DNS service to third-parties (additional time may be required to migrate the records managed by the nameserver), the registrant is subject to bankruptcy proceedings, payment dispute (where a registrant claims to have paid for a renewal, or a discrepancy in the amount paid), billing dispute (where a registrant disputes the amount on a bill), **domain name subject to litigation in a court of competent jurisdiction**, or other circumstance as approved specifically by ICANN.*

3.7.5.2 Where Registrar chooses, under extenuating circumstances, to renew a domain name without the explicit consent of the registrant, the registrar must maintain a record of the extenuating circumstances associated with renewing that specific domain name for inspection by ICANN consistent with clauses 3.4.2 and 3.4.3 of this registrar accreditation agreement.

3.7.5.3 In the absence of extenuating circumstances (as defined in Section 3.7.5.1 above), a domain name must be deleted within 45 days of either the registrar or the registrant terminating a registration agreement.

5. The Federal District Court for the Northern District of California was a court of competent jurisdiction for, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007, the case from which the issues of this instant action are based.

6. Network Solutions is a domain name registrar accredited by ICANN who has entered into a Registrar Accreditation Agreement with ICANN. By entering into this agreement Network Solutions is bound to uphold the provisions within ICANN's Expired Domain Deletion Policy.

7. Network Solutions has a Domain Deletion Policy which states in the first sentence of paragraph three: "*If an expired domain name registration is not renewed as outlined above, absent extenuating circumstances, we will delete the domain name registration.*" (Exhibit C).

8. Extenuating circumstances existed for all of the subject fourteen domain names as they were "*subject to litigation in a court of competent jurisdiction*" in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007.

9. On June 25, 2007, Karl Kronenberger ("Kronenberger"), an attorney representing DS Holdings, LLC in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007, in a declaration to the California District Court stated that he was in communication with Michael Mauseth of the general counsels office of Network Solutions. Mr. Mauseth stated to Kronenberger that Network Solutions would transfer the subject fourteen domain names, among others, of which Zuccarini was at that time the registrant, to a court appointed receiver if there was court order directing them to do so. From that declaration, (Exhibit D): "*29. After DS Holdings obtained its Writ of Execution against Zuccarini, I initiated communications with the third party registrars at issue here, and in particular, with Michael Mauseth of the general counsel's office of Network Solutions. Mr. Mauseth made clear to me*

that Network Solutions would not change the WHOIS information or otherwise transfer any of Zuccarini's domain name to the United States Marshal or DS Holdings absent a court order directing them to do so or the appointment of the United States Marshal as a receiver for Zuccarini's domain names.

10. On November 14, 2007 in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007, the Court ordered Network Solutions and other domain name registrars to transfer the subject fourteen domain names, among others then registered to Zuccarini to the court appointed receiver, Michael Blacksburg ("Blacksburg"). The domain names were then registered to Blacksburg in his account at Network Solutions. (*Exhibit E*).

11. Network Solutions did not take any action at the time the subject fourteen domain names were transferred to Blacksburg's account at Network Solutions in 2007, up until the dates of the auctions of the fourteen domain names in May of 2010, that would have prevented the registration of the domain names from being canceled and deleted from Blacksburg's account.

12. During a four day period from April 13 to April 16 of 2010, the registration of the subject fourteen domain names expired and were canceled from the account of the receiver Blacksburg's at Network Solutions. During the following month of May 2010, all of the fourteen domain names proceeded to a series of automated Internet auctions conducted by NameJet. Network Solutions maintains an agreement with NameJet by which the registration of domain names that are canceled and deleted from registrants accounts at Network Solutions will be auctioned by NameJet.

13. The auctions conducted by NameJet brought a total amount of winning bids of approximately between \$85,000 to \$100,000. The actual correct amount of the winning bids has not yet been determined as NameJet has objected to answering Interrogatories directed to them

for this information.

14. Network Solutions has a policy that allows the last registrant of a domain name after it is canceled from their account at Network Solutions and auctioned by a third party to receive either 15 percent (15%) or 20 percent (20%) of the amount Network Solutions receives from the third party auctioneer of the domain names. NameJet was the third party auctioneer for the fourteen domain names.

15. This policy is detailed in Network Solutions motion to dismiss on page 7, Network Solutions cites Schedule A of the Service Agreements entered into by blacksburg with Network Solutions. It states as follows: *“Additionally, you will be eligible to receive a portion of the funds received by us as a result of a Direct Transfer of the domain name, as follows: (i) if you registered the domain name with Network Solutions directly through our Website, you will be eligible to receive twenty percent (20%) of the Net Proceeds received by us from our third party vendor as a result of a Direct Transfer; and (ii) if you registered the domain name with Network Solutions through a third party agent (such as your ISP, for example), you will be eligible to receive fifteen percent (15%) of the Net Proceeds received by us from our third party vendor as a result of a Direct Transfer.”*

16. On October 31, 2011, the receiver Blacksburg sent by email to Zuccarini a copy of a check made out to Blacksburg from Network Solutions in the amount of \$2,421.08. This check was to cover the amounts due to Blacksburg as the last registered holder of ten (10), of the fourteen domain names after their auction by NameJet. (*Exhibit F*).

17. Blacksburg also sent to Zuccarini on October 31, 2011 a copy of four (4) payment confirmations sent to blacksburg from Network Solutions in the amount of \$12,032.65. These payment confirmations were to inform Blacksburg he would soon be receiving an

additional check for the four remaining auctioned domain names in the amount of \$12,032.65. *(Exhibit G)*.

18. The totals of the check for \$2,421.08, and the payment confirmations sent to blacksburg in the amount of \$12,032.65 comes to \$14,453.73. The \$14,453.73 is the total amount received by Blacksburg for the auction of the fourteen domain names. The remainder of the funds obtained by the auctions were retained by Network Solutions and NameJet.

19. By taking the percentages of fifteen percent (15%) and twenty percent (20%) that Network Solutions stated would be received by the last registrant of a domain name following the auctions and applying those percentages to the total amount received by blacksburg of the \$14,453.73, a range of the actual amounts received by Network Solutions from NameJet as Network Solutions share from the auctions for the fourteen domain names can be determined.

20. If Network Solutions gave blacksburg 15 percent (15%) of their share of the NameJet auctions, that share being the \$14,453.73, then Network Solutions would have received \$96,358.20 from NameJet.

21. If Network Solutions gave blacksburg 20 percent (20%) of their share from the NameJet auctions, that share being the \$14,453.73, then Network Solutions would have received \$72,268.65 from NameJet.

22. The total amounts kept by NameJet as their fee as the auctioneer of the domain names can not be determined at this time. A usual rate auction houses charge for property they auction is in the area of ten percent (10%).

23. The end result of these calculations is that, depending on NameJet's fee, whether it is higher or lower than ten percent (10%), is that the domain names sold for a total amount of between \$85,000 and \$100,000, with Zuccarini and his creditors receiving only \$14,453.73 from

the auctions of the fourteen domain names.

24. If the amount of the total winnings bids for the fourteen domain names was \$85,000, then subtracting the \$14,453.73 as the receiver's share, Network Solutions and NameJet would now be holding \$70,546.27 from the auctions.

25. If the amount of the total winnings bids for the fourteen domain names was \$100,000, then subtracting the \$14,453.73 as the receiver's share, Network Solutions and NameJet would now be holding \$85,546.27 from the auctions.

MEMORANDUM OF LAW

A. Florida Law

Florida Statute 768.81 defines economic damages: *(b) "Economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss that would not have occurred but for the injury giving rise to the cause of action.*

Florida Statute 768.81 defines negligence action: *(c) "Negligence action" means, without limitation, a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. The substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.*

Florida Statute 768.72 - Pleading in civil actions; claim for punitive damages: cites and defines reasons an entity can be held liable for punitive damages: *(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence,*

finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or

(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

All of the Defendants actions in this case constituted negligence, intentional misconduct and gross negligence as defined by Florida law in ignoring the obligations and duties they had to protect the subject fourteen domain names from being canceled and deleted from the Federal Court Appointed Receiver's account at Network Solutions and proceeding to a series of

automated Internet auction conducted by NameJet. Auctions from which Zuccarini and his creditors received only a small portion of the funds, which the Court for the Northern District of California in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007, had indented to go entirely to Zuccarini and his creditors, not to Network Solutions and NameJet.

In consideration of the Defendants actions, Zuccarini is entitled to compensatory and punitive damages. Punitive damages as all the Defendants behavior can be considered that of both of intentional misconduct and grossly negligent in not taking any actions to have protected the fourteen domain names from being lost from the receiver's account at Network Solutions.

B. Memorandum of Law as it Relates to Network Solutions

Network Solutions Domain Deletion Policy states: *"If an expired domain name registration is not renewed as outlined above, absent extenuating circumstances, we will delete the domain name registration."*

As defined by ICANN's Domain Name Deletion Policy *"extenuating circumstances"* are among other circumstances, described as *"domain name subject to litigation in a court of competent jurisdiction."*

Network Solutions failed to carry out the stated policies in their Domain Deletion Policy which allowed the subject fourteen domain names to be canceled and deleted from the account of the receiver michael blacksborg. Counsel for Network Solutions was aware in June of 2007 that the fourteen domain names of this instant action were the subject litigation in Federal Court in the Northern District of California in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007.

Network Solutions failure to protect the subject fourteen domain names constituted

negligence, intentional misconduct and gross negligence as defined by Florida law, as their Domain Deletion Policy was well established at the time the issues concerning this instant action occurred and they did not act upon it.

C. Network Solutions Defenses Fail as a Matter of Law

Network Solutions has stated a number of affirmative defenses in their motion to dismiss that ignore their failure to protect the fourteen domain names from cancellation and deletion from the receiver's account at Network Solutions.

Network Solutions first affirmative defense states that a forum selection clause should be acknowledged and this case transferred to Virginia. Zuccarini had no contract with Network Solutions in this action and therefore that defense is not valid.

Network Solutions second affirmative defense states there has been a failure to state a claim. Zuccarini has stated a claim that Network Solutions failure to protect the domain names from cancellation and deletion constituted negligence, intentional misconduct and gross negligence as defined by Florida law.

Network Solutions third affirmative defense states that splitting causes of action is not allowed. Network Solutions states this claim was previously litigated and decided in a different court. Zuccarini disagrees with that assertion as the related action in Virginia was filed by Zuccarini as customer of Network Solutions who claimed Network Solutions illegally transferred his domain names to the California receiver, relevant to California law.

Network Solutions fourth affirmative defense states Zuccarini did not State a Cause of Action for Unjust Enrichment. The Federal District Court for the Northern District of California designated Zuccarini and his creditors as beneficiaries of the California Receivership the Court created in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND

California 2007. As such Network Solutions acquired a substantial amount of money from the auctions of the domain names the California District Court did not intend for Network Solutions to acquire. It was the intentions of the California District Court that Zuccarini and his creditors become the beneficiaries of the receivership, not Network Solutions.

Network Solutions fifth affirmative defense states Zuccarini's claims are barred by the Economic Loss Rule because Florida law loss rule prohibits tort recovery for purely economic losses arising out of contractual relationships. Zuccarini was not in a contractual relationship with Network Solutions, therefore this defense is not valid.

D. Memorandum of Law as it Relates to NameJet

NameJet is an extended entity in the Internet domain name system and as any business that deals in domain names, NameJet is reliant on the policies of ICANN to exist and function as a company, as ICANN entered into an agreement with the United States government to coordinate and operate the Internet Assigned Numbers Authority (IANA) from which unique numerical Internet addresses and their corresponding domain names are created.

In consideration of this circumstance it should have been incumbent upon NameJet to have considered all the policies that ICANN requires the registrars it accredits to enter into and have incorporated any of those policies that would be applicable to NameJets business into their own. In this case an important policy, such as the one as it relates to the deletion of domain names, as NameJet's entire business model is framed around the deletion of domain names and the subsequent auctioning of them.

As a matter of law in area of negligence it is considered that person acts negligently when his behavior departs from the conduct ordinarily expected of a reasonably prudent person under the circumstances. Considering that ICANN and Network Solutions both have Domain Name

Deletion Policies, that if correctly applied would protect domain names from cancellation and deletion from a registrants account, it would be more than reasonable to expect NameJet to also have a Domain Name Deletion Policy that would guard against the auctioning of domain names that are the subject of litigation, as there entire business is built around the auctioning of deleted domain names.

By not having a policy in place that would protect domain names that are the subject to litigation in a court of competent jurisdiction, NameJet is as negligent as ICANN and Network Solutions in allowing the fourteen domain names to be auctioned.

E. NameJet Defenses Fail as a Matter of Law

NameJet has stated a number of affirmative defenses in their motion to dismiss that ignore their failure to adopt and act upon a policy that would have alerted them to the fact that the auctioned fourteen domain names were the subject of litigation in a court of competent jurisdiction. Had NameJet instituted a reasonable policy such as this the auctions of the domain names could have been prevented.

NameJet's first affirmative defense states there has been a failure to state a claim. Zuccarini has stated a claim that NameJet's failure to adopt a policy that would notify them of any domain name which is the subject of litigation constituted negligence, intentional misconduct and gross negligence as defined by Florida law.

NameJet's second affirmative defense states that splitting causes of action is not allowed. NameJet states this claim was previously litigated and decided in a different court. Zuccarini disagrees with that assertion as the related action in Virginia was filed by Zuccarini as a customer of Network Solutions who claimed Network Solutions illegally transferred his domain names to the California receiver, relevant to California law with NameJet acting as an

agent of Network Solutions then auctioning the domain names.

NameJet's third affirmative defense states Zuccarini did not State a Cause of Action for Unjust Enrichment. The Federal District Court for the Northern District of California designated Zuccarini and his creditors as beneficiaries of the California Receivership the Court created in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007. NameJet acquired a substantial amount of money from the auctions of the domain names the California District Court did not intend for NameJet to receive. It was the intentions of the California District Court that Zuccarini and his creditors become the beneficiaries of the receivership, not NameJet.

NameJet's fifth affirmative defense states Zuccarini's claims are barred by the Economic Loss Rule because Florida law loss rule prohibits tort recovery for purely economic losses arising out of contractual relationships. Zuccarini was not in a contractual relationship with Network Solutions or NameJet therefore this defense is not valid.

F. Memorandum of Law as it Relates to ICANN

ICANN's failure to apply any oversight to Network Solutions business activities is a direct cause of the lack of due diligence Network Solutions exhibited in allowing the subject fourteen domain names to be canceled and deleted from the Court Appointed Receivers Account at Network Solutions. Network Solutions has a well known history of mishandling transfers of domain names and becoming involved legal controversies related to domain name issues.

Considering these circumstances it should have been incumbent upon ICANN to have taken some steps to assure Network Solutions was more diligent in the decisions and actions they make in the handling of those transfers and in legal matters directly related to specific domain names.

In 1995, the domain name sex.com was hijacked by Stephen M. Cohen through a lapse in Network Solutions security. A protracted and expensive lawsuit resulted as the legitimate owner worked to regain control, see *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003).

In 1999, MBA student John McLanahan purchased the domain "races.com" for thousands of dollars. Network Solutions mishandled the transfer, accidentally placing it back into the pool of available domain names. A domain name speculator was able to obtain it, and demanded \$500,000 for its return. Network Solutions refused to help, stating that since McLanahan was not yet officially their customer, they had no responsibility.

Both ICANN and Network Solutions were named as Defendants in the United States District Court for the Northern District of California in, *McElroy v. Network Solutions LLC, et. al*, Case No. CV 08-01247 PSG (VBKx).

In this class action suit McElroy contended that Network Solutions engaged in what is known as front-running in the domain name industry. That is when an individual would go to the Network Solutions web site and search for the availability of a certain domain name to register, and upon the completion of that search it was alleged that Network Solutions would immediately register the just searched for domain name for itself, and offer to sell the domain name at an inflated price to the consumer who had searched for the domain names availability.

Among other things McElroy alleged: *"This action arises from the fraudulent and deceptive business practices that Network Solutions employs to effectively trap consumers into paying its grossly inflated domain name registration fees. Unbeknownst to consumers, Network Solutions immediately registers for itself any domain name that consumers provide to Network Solutions in order to determine whether the domain name is available. Network Solutions never informs consumers that it has registered the domain name for itself; instead, Network Solutions*

tells consumers that their domain name is "available" and offers to register the domain. It is only at this point - after it has secretly registered the domain for itself - that Network Solutions finally reveals what it will charge.

Consumers cannot register their domain name through any of Network Solutions' less expensive competitors because their chosen domain is unavailable through any other service - which (unbeknownst to the consumer) is now held exclusively by Network Solutions - who is now offering to sell the domain name to anyone willing to pay its grossly inflated registration fee. Consumers, therefore, are held hostage: they can either pay what Network Solutions demands or risk that someone else will and steal their domain name.

It is through the above practices, that Network Solutions is able to continue charging a substantially higher price for the registration of domain names than its competitors."

McElroy also claimed in the suit that ICANN's status as a defendant was justified due to its "acquiescence, tacit approval and participation" in allowing domain registrars such as Network Solutions to register names without having to pay a fee to ICANN.

McElroy alleged, "*Network Solutions is able to perpetuate this course of misconduct only through the acquiescence, tacit approval and participation of ICANN. The agreement between ICANN and the domain name registrars includes provisions for an Add Grace Period (AGP). The AGP allows a domain name registrar to avoid paying a registration fee for domain names canceled within five days of registration.*

By using the AGP, Network Solutions is able to register, risk free, the domain names searched on its website, thereby forcing consumers to register the domain names through Network Solutions.

ICANN was, and is, aware of Network Solutions' actions and continued to permit

Network Solutions fraudulent abuse of the AGP for its own gain and to the detriment of consumers.”

On June 18, 2008 ICANN and Network Solutions both agreed to enter into settlement negotiations with McElroy and others, and on March 10, 2009 a settlement was reached by all parties to the case.

As a result of this suit ICANN has put in place a new rule which it claims has effectively ended the practice of front-running. In addition Network Solutions agreed to pay a certain amount to McElroy and the other class action plaintiffs.

The circumstances of Zuccarini's claims and those of McElroy against ICANN and Network Solutions are similar. Both Zuccarini and McElroy are parties who have no contract with either ICANN or Network Solutions, but have been injured by the actions of Network Solutions and the lack of action of ICANN.

In McElroy's case, ICANN knew of Network Solutions practice of front running hurt consumers such as McElroy, but did nothing to stop those practices.

In Zuccarini's case, ICANN knew for a number of years Network Solutions history in it's the lack of due diligence in their transferring of domain names and the circumstances surrounding them, but had done nothing to take any steps which would have corrected that lack of due diligence.

As Florida negligence law recognizes foreseeability as duty, it is ICANN's lack of action in this case in not reviewing the policies of Network Solutions handling of business and legal matters, especially in the area of transferring domain names from one party to another, such as in this case that show ICANN should have been able to foresee the possibility of future actions by Network Solutions would cause harm to someone.

G. ICANN's Defenses Fail as a Matter of Law

ICANN has stated a number of affirmative defenses in their motion to dismiss that ignore the failure of ICANN to provide any oversight to the business activities of Network Solutions.

ICANN's first affirmative defense states there is lack of personal jurisdiction. Zuccarini contends as this is a diversity action involving three Defendants from three different states, and the harm to Zuccarini occurred in the Southern District of Florida, it is reasonable for this instant action to heard in the Southern District of Florida, rather than three separate jurisdictions.

ICANN also conducts business in the state of Florida through there newly signed Agreement with ICM Registry, LLC ("ICM") as the "Registry Operator" of the .XXX Top-Level Domain Registry. Within the "Sponsored TLD Registry Agreement" the ICM business address is stated as, ICM Registry, LLC, PO Box 30129, Palm Beach Gardens, Florida 33420.

In addition, ICANN maintains a Registry-Registry Agreement with Moniker Online Services, LLC ("Moniker") located at LLC, 20 SW 27th Ave., Suite 201, Pompano Beach, FL 33069.

ICANN's second affirmative defense states that ICANN has not committed a tort and has not caused injury to persons or property within Florida. As the tort, the injury and the loss of value of property to Zuccarini occurred in Florida, all have occurred in the State of Florida.

ICANN's third affirmative defense states Plaintiff has not satisfied the due process clause. Zuccarini believes ICANN's before stated contacts within the state of Florida and Zuccarini's residence in the Florida demonstrate due process has been satisfied.

ICANN's fourth affirmative defense states the Court does not have general jurisdiction over ICANN. Zuccarini believes ICANN's before stated contacts within the state of Florida and Zuccarini's residence in the Florida demonstrate general jurisdiction has been established.

ICANN's fifth affirmative defense states improper venue exists. Zuccarini believes as previously cited, ICANN does do business in the state of Florida and venue is proper.

ICANN's sixth affirmative defense states that Zuccarini has stated a claim against ICANN. Zuccarini has stated a claim against ICANN, that being when person acts negligently when his behavior departs from the conduct ordinarily expected of a reasonably prudent person under the circumstances. Considering the history of missteps Network Solutions in their handling of business and legal matters it would have been reasonable for ICANN to have more closely monitored the business and legal matters of Network Solutions.

H. Compensatory Damages are Justified

Considering the loss of value of the domain names in the auctions conducted by NameJet compensatory damages are justified. Based upon the calculations in the Statement of Undisputed Material Facts of the total amounts retained by Network Solutions and NameJet, Zuccarini respectfully asks that the Court award a total of \$85,546.27 to Zuccarini plus allowable interest from June 2010 till December of 2011, or an appropriate date to be determined by the Court.

I. Punitive Damages are Justified Against all Defendants

Based on the actions and lack of action from all the Defendants previously cited in this Motion for Summary Judgment punitive damages are justified in this case to deter and prevent the harm that occurred to Zuccarini from happening to others.

The method for determining the amount of punitive damages to be awarded in a civil case such the one before the Court would be one of referencing the The Reprehensibility Guidepost set forth by the Supreme Court decisions of, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

The Reprehensibility Guidepost. In *Gore and State Farm*, the Supreme Court identified

three guideposts that courts reviewing punitive, damages awards must consider: (1) the degree or reprehensibility of the defendant's misconduct; (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See Gore, 517 U.S. at 574-75; State Farm, 538 U.S. at 418.*

State Farm noted that the most important indicator of reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. *See State Farm, 538 U.S. at 419.* State Farm then explained that a determination of reprehensibility should be based on the following five factors: (1) whether the harm was physical or economic; (2) whether the conduct demonstrated indifference to or reckless disregard of the health or safety of others; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct involved repeated actions; and (5) whether the harm resulted from intentional malice, trickery, or deceit.

J. Accessing Specific Conditions That Would Warrant Punitive Damages

In addressing the issue of reprehensibility in all of the Defendant's conduct as it relates to the harm caused as outlined in, *State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003)*. Zuccarini finds three of the factors apply in this case.

While factors (1) and (2) would not be relevant in this instant action, as no physical harm was caused nor was the physical health and safety of Zuccarini threatened, factors (3), (4), and (5) are all present.

Applying factor (3), whether the target of the conduct had financial vulnerability, is most definitely a major issue in this case as the Court for the Northern District of California in, *Office Depot, Inc. v. Zuccarini, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007*, intended that the IRS to be the creditor first in line to receive any benefit from the funds acquired

by the California receivership. The IRS was also the creditor with the largest claim towards the amounts obtained by the receivership.

Zuccarini owed and still does a substantial amount in back taxes to the IRS. As of November 7, 2011 Zuccarini owed an amount of \$262,396.45 to the IRS. That would be for the year 2002, \$84,695.31, for the year 2003 \$148,825.65, and for the year 2006 \$28,875.49. (*Exhibit H*).

By Network Solutions and NameJet retaining the amount of between \$80,000 and \$110,000 that had been intended to go towards the amounts Zuccarini owed to the IRS, Zuccarini has been significantly harmed by the actions of Network Solutions and NameJet.

Applying factor (4), whether the conduct involved repeated actions. The conduct of all the Defendants cited previously is relevant to factor (4). ICANN in knowing over a period of years that Network Solutions was responsible for the mishandling of a number of domain name transfers and also for being involved in questionable business practices as it relates to the specifically cited action of, *McElroy v. Network Solutions LLC, et. al, Case No. CV 08-01247 PSG (VBKx)*, and subsequently taking no steps to oversee Network Solution's business activities.

Network Solutions in their history of mishandling of domain name transfers and questionable business practices as it relates to the specifically cited action of, *McElroy v. Network Solutions LLC, et. al, Case No. CV 08-01247 PSG (VBKx)*.

In the case of NameJet, without even having a policy that would have prevented the domain names which were “*subject of litigation in a court of competent jurisdiction,*” from being placed in auction. NameJet's behavior could be considered the most egregious of all the Defendants. At least Network Solutions had a Domain Name Deletion Policy that should have prevented the domain names from being canceled and deleted from the receiver's account at

Network Solutions, though they just simply ignored it.

Applying factor (5), whether the harm resulted from intentional malice, trickery, or deceit. It appears this factor would apply to all the Defendants. How else could the lack of actions of all the Defendants be interpreted.

ICANN most certainly was aware of Network Solutions short comings in their business activities and apparently took not steps that would have corrected it.

Network Solutions while having a Domain Name Deletion Policy, did nothing to implement the terms of that policy which would have protected the subject fourteen domain names in the receiver's account from being canceled and deleted.

NameJet in not even having a policy that would protect domain names that are subject to litigation from being placed in auction, displays a most certain attitude of, "the less we know the better off we are." NameJet must be aware such a stance could only be interpreted as a deliberate attempt to avoid taking any responsibility in a mistaken or unauthorized auction conducted by them. This type of behavior can only be seen as one of intentional malice, trickery, or deceit.

K. Accessing Defendants Ability to Pay Punitive Damages

ICANN, while a non-profit corporation is one of substantial holdings that pays it's officers large salaries and would appear to have the ability to pay punitive damages if awarded.

As reported on the ICANN website at <http://blog.icann.org/2010/07/icanns-finances-at-a-glance/>, ICANN's operating budget for year 2010 was \$58 million, in addition to having a reserve fund of over \$46 million.

As reported on the ICANN website at, <http://www.icann.org/en/financials/compensation-practices-31jan10-en.pdf>, Rod Beckstrom, ICANN's President and Chief Executive Officer is paid a base salary of \$750,000 per year, additional at risk compensation of up to \$195,000 per

year, and coverage under vacation, health and welfare plans including medical, dental, vision, life insurance and a 401(k) retirement. Mr. Doug Brent, the Chief Operating Officer receives a base salary of \$270,000 per year, and additional compensation.

Network Solutions, while a private company and it's financial profile is not available was recently acquired by Web.com in 2011 for \$560 million in cash and stock, which would indicate it is company with substantial holdings.

NameJet is also private a company formed through a partnership of Network Solutions and Enom Inc., also a domain name registrar, and appears to have the financial backing of those two companies.

CONCLUSION

For all the reasons set forth in this motion and memorandum of law and the Undisputed Facts, Zuccarini asks the Court to: (1) grant summary judgment against all the Defendants; (2) award compensatory damages in the amount of \$85,546.27 plus applicable interest; (3) award punitive damages as the Court deems appropriate.

Respectfully Submitted, this 5th day of December, 2011.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiff John Zuccarini's Motion for Summary Judgment and Memorandum of Law, was served by first class mail, postage prepaid, on December 5, 2011, on all counsel or parties of record on the service list and by email to their respective addresses.


John Zuccarini

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