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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

MICHAEL MOORE & RONALD P. GENTRY,	)	
Plaintiffs,	)	
v.	)	
	)	**CIVIL ACTION NO. CV-07-P-1153-W**
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, ENOM, INC., & REGISTERFLY.COM, INC.,	)	
Defendants.	)	

DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(2) AND 12(b)(6)

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MISCELLANEOUS

ICANN is a California non-profit public benefit corporation with its principal place of business in Marina del Rey, California. 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.

ICANN's duties include designating entities to be domain name registry operators, such as VeriSign, Inc. ("VeriSign"), which operates the ".com" registry. ICANN also "accredits domain name registrars" to sell domain name subscriptions directly to consumers and to coordinate with the registry operators to effect those registrations. Defendant eNom, Inc. ("eNom") is a domain name registrar. ICANN does not collect fees from consumers.

This case is really a contract dispute between plaintiffs and RegisterFly.com, Inc. ("RegisterFly"), a reseller of eNom's DNS services and formerly an ICANN-accredited registrar. ICANN is not a party to that contract between plaintiffs and RegisterFly; in fact, ICANN is not a party to any contract with plaintiffs. ICANN has terminated RegisterFly's accreditation and filed suit against it for breach of its registrar agreement, which has resulted in a permanent injunction preventing RegisterFly from operating as a registrar. *See Internet Corp. for Assigned Names & Numbers v. RegisterFly.Com, Inc.*, No. 2:07-cv-02089 (C.D. Cal. filed Mar. 29, 2007).

Because this suit is based entirely on a dispute between plaintiffs and RegisterFly, plaintiffs' efforts to bring ICANN into the litigation are baseless. First, there is no doubt that this Court lacks personal jurisdiction over ICANN, which has no presence in Alabama, does no business here, and has had no purposeful contacts with this State. Second, and in any event, plaintiffs have no valid claims against ICANN.

BACKGROUND

Each computer connected to the Internet has an IP address—a unique set of numbers—that identifies it and allows it to "talk" to other computers. (*See* Am. Compl. ¶¶ 17-18.) The

"Domain Name System" or "DNS" correlates unique letters or words to specific IP addresses for ease of reference. (*Id.* ¶¶ 16-18.) For example, the DNS allows an Internet user to reach this Court's website by typing "alnd.uscourts.gov" instead of the numerical IP address 207.41.17.30.

The DNS is organized hierarchically. The "top level domains" ("TLDs") appear as the suffixes to Internet addresses, and include generic TLDs such as ".com," and ".gov," (*id.* ¶ 16) as well as country-specific TLDs such as ".uk" and ".us." The IP addresses for each TLD, contained in a "root zone file," are maintained on 13 computers called "root servers," including the "A" root server." (*See id.*)[1] "Second-level domain names" are more commonly known, such as *google*.com or *uscourts*.gov.

Each TLD, in turn, is served by a registry operator. That registry operator maintains the definitive list of IP addresses for each second-level domain with that TLD. For example, VeriSign operates the ".com" registry;[2] while the ".gov" TLD is operated by the GSA.[3]

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[1] Although irrelevant for purposes of this motion to dismiss, ICANN wishes to correct two inaccuracies in plaintiffs' complaint. First, plaintiffs allege that ICANN operates the A-root server, (Am. Compl. ¶ 19) when it is, in fact, VeriSign that operates it. *See* Amendment 11 to Cooperative Agreement Between DOC and Network Solutions, Inc. at 6 (Oct. 7, 1998) ("NSI agrees to continue to function as the administrator for the primary root server for the root server system and as a root zone administrator"); Amendment 24 at ¶ 1 (May 25, 2001) ("'NSI' . . . [is] a wholly owned subsidiary of VeriSign, Inc."). These documents are available at the DOC's website at http://www.ntia.doc.gov/ntiahome/domainname/nsi.htm. Second, plaintiffs also allege that the "A root" is the principal name server "from which every other root synchronizes their data." (Am. Compl. ¶ 16.) In fact, all of the public roots, including the A root, synchronize their data with a non-public "hidden master" root server, again operated by VeriSign.

While these facts generally come from "government documents available from reliable sources on the Internet" and are thus judicially noticeable, *see, e.g.*, *United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003), *aff'd*, 388 F.3d 209 (6th Cir. 2004); *accord Denius v. Dunlap,* 330 F.3d 919, 926 (7th Cir. 2003), ICANN's Motion to Dismiss does not rely on them, and the complaint should be dismissed as to ICANN even assuming that all of plaintiff's allegations are true for purposes of this motion.

[2] *See* Amendment 30 to the DOC/VeriSign Cooperative Agreement (Nov. 29, 2005), available at http://www.ntia.doc.gov/ntiahome/domainname/nsi.htm.

[3] *See* http://www.dotgov.gov (noting that GSA has managed .gov since 1997).

ICANN, through an amended Memorandum of Understanding ("MOU"), and later a Joint Project Agreement ("JPA") with the United States Department of Commerce ("DOC"), coordinates certain aspects of the DNS. For example, ICANN enters into agreements with the registry operators for TLDs and also facilitates policy development for the Internet, including policy regarding the creation of new TLDs.[4] Changes to the root zone file occur only after a collaborative effort by ICANN, VeriSign, and the DOC.[5]

Consumers may obtain the right to use second-level domain names through companies known as "registrars." ICANN operates the accreditation system that has produced a highly competitive registrar marketplace, with over 800 accredited registrars, including defendant eNom. RegisterFly was an accredited registrar before ICANN cancelled its accreditation earlier this year.

Plaintiff Michael Moore alleges that he registered 109 Internet domain names with RegisterFly in 2005. (Am. Compl. ¶ 33.) Plaintiff Ronald Gentry paid for those domain names. (*Id.* ¶ 35.) Plaintiffs claim that RegisterFly improperly charged Mr. Gentry's credit card for certain costs and that Mr. Moore reversed those charges and requested that RegisterFly not charge the credit card again. (*Id.* ¶¶ 36-39.) RegisterFly eventually suspended Mr. Moore's account and requested nearly $1,300 in past-due payments. (*Id.* ¶¶ 40-41.) Plaintiffs claim they sent RegisterFly the requested funds via certified check, but that only 80 domain names were reactivated. (*Id.* ¶¶ 42, 45, 52.)

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[4] Memorandum of Understanding Between the U.S. Department of Commerce and ICANN Joint Project Agreement at Annex A ¶¶ 4-5 (Sept. 29, 2006), *available at* http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/signedmou290906.pdf. The JPA is an extension of the Memorandum of Understanding.

[5] See Amendment 11 to DOC/NSI Cooperative Agreement, *supra*, at 6 ("NSI . . . shall request written direction from an authorized [U.S. government] official before making or rejecting any modifications, additions or deletions to the root zone file.").

Plaintiffs' only alleged contact with ICANN consisted of e-mails sent to ICANN personnel, followed by a single response from ICANN. In its entirety, ICANN's email to Mr. Moore is alleged to have read as follows:

> Dear Mr. Moore,
>
> I have been forwarded several copies of this inquiry that you have sent to numerous people at ICANN and will take this opportunity to respond. Please understand that ICANN's role is limited. ICANN is a non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions to preserve the operational stability of the Internet. ICANN does not have direct responsibility for the actions of resellers, but we do contract with registrars (through which resellers do business). ICANN's authority with regard to registrars is limited to a contractual relationship governing the registration of domain names, but we do not oversee contractual disputes related to payment of registration fees.
>
> Based on the information you have provided, it does not appear that there has been any violation of ICANN policy that would qualify as a violation of the registrar contract with ICANN. A copy of this contract can be found at http://www.icann.org/registrars/ra-agreement-17may01.htm. Should you review this contract and find that there has been some violation that we have not found, please inform us and we will gladly investigate.
>
> While we are not suggesting that your concerns are unfounded, they just do not fit within our scope of authority. We have contacted the registrar to pass along your concerns and were informed that this was a financial or contractual matter between you and your reseller. As such, there is nothing for ICANN to do. You may wish to contact an attorney for legal advice or the appropriate law enforcement or consumer protection agency if you believe that illegal or inappropriate activity is taking place.
>
> Regards,
> Tim Cole
> Chief Registrar Liaison
> Internet Corporation for Assigned Names and Numbers

(*Id.* ¶ 44.) The registration term for Mr. Moore's domain names expired during this period, but because RegisterFly had suspended Mr. Moore's account, he was unable to renew them. (*Id.* ¶

46.) After those rights expired, Mr. Moore contacted eNom, which informed Mr. Moore that RegisterFly never paid eNom to renew those domains but that eNom could renew the domains if Moore paid a renewal fee. (*Id.* ¶¶ 47, 49.)

ARGUMENT

ICANN does no business in Alabama, and its sole contact with Alabama does not support jurisdiction; therefore, plaintiffs' claims should be dismissed. Even if this Court had jurisdiction over ICANN, plaintiffs fail to state any claims against ICANN, and the complaint must be dismissed under Rule 12(b)(6).

I. THERE IS NO PERSONAL JURISDICTION OVER ICANN.

Plaintiffs bear "the burden of establishing a prima facie case of personal jurisdiction." *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006). Even if such a prima facie case is made, "[w]here, as here, the defendant submits affidavits to the contrary, the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction . . . ." *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.* 288 F.3d 1264, 1269 (11th Cir. 2002). Because "Alabama has extended the jurisdiction of Alabama courts to the extent permissible under the due process clause of the Fourteenth Amendment," a plaintiff must show that "the exercise of jurisdiction . . . satisfie[s] the requirements of due process." *Olivier v. Merritt Dredging Co.*, 979 F.2d 827, 830 (11th Cir. 1992).

The due process inquiry requires a showing that the defendant has "certain minimum contacts" with the forum State, and that exercise of that jurisdiction would not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted). There are two types of personal jurisdiction, "general" and "specific." *See, e.g., Stubbs*, 447 F.3d at 1360 n.3. Here, plaintiffs have not, and cannot, establish either type.

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

"General jurisdiction" refers to the ability of a court to "exercise[] personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.9 (1984). Such jurisdiction requires that the defendant have "continuous and systematic general business contacts" with the forum state. *Id.* at 416. Factors which weigh against general jurisdiction include a lack of business or a business license in the forum, *id.* at 416, a lack of property ownership in the forum, *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1266 (N.D. Ala. 2000), or a lack of any "bank accounts, telephone listings, or mailing addresses in" the forum. *Exter Shipping, Ltd. v. Kilakos*, 310 F. Supp. 2d 1301, 1312 (N.D. Ga. 2004). General jurisdiction does not arise because a party maintains website or otherwise offers information nationwide. *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999) (nationwide toll-free telephone number and website insufficient); *Matthews v. Brookstone Stores, Inc.*, 469 F. Supp. 2d 1056, 1064 (S.D. Ala. 2007) (website insufficient). 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. v. Atlas Copco AB*, 205 F.3d 208, 216 (5th Cir. 2000); *Matthews*, 469 F. Supp. 2d at 1065.

ICANN is not subject to general jurisdiction in Alabama. ICANN has no employees, assets, bank accounts, real property, personal property, offices, or other facilities in Alabama. (Ex. A, Declaration of Doug Brent Addressing Jurisdictional Issues, at ¶ 5.) ICANN is not licensed to do business in Alabama, does not have a registered agent for service of process in Alabama, and has no phone numbers or mailing addresses there. (*Id.*) ICANN has no agreements with registries or registrars that reside in Alabama. (*Id.* ¶ 6.) ICANN does not

collect fees from domain name registrants, such as Mr. Moore, and has had no contracts with Mr. Moore or Mr. Gentry. (*Id.* ¶¶ 4, 7.) Finally, ICANN's website, which is operated from web servers physically located in Southern California, does not offer anything for sale. (*Id.* ¶ 8.)

ICANN thus has none of the contacts with Alabama that are relevant to the general jurisdictional inquiry. *See Butler*, 83 F. Supp. 2d at 1266; *Exter Shipping*, 310 F. Supp. 2d at 1312. That Alabama residents may access ICANN's website and e-mail questions to ICANN employees (Am. Compl. ¶ 44) is far from sufficient to satisfy the rigorous "continuous and systematic" test for general jurisdiction. *Mink*, 190 F.3d at 336-37; *Matthews*, 469 F. Supp. 2d at 1064. Nor is it sufficient that ICANN accredits non-Alabama registrars who *themselves* provided services to Alabama residents (Am. Compl. ¶¶ 5-8). *Purdue*, 338 F.3d at 778; *Alpine View*, 205 F.3d at 216.

B. There Is No Jurisdiction Based on Nationwide Service of Process

Should plaintiffs argue that, for their antitrust and RICO claims, the relevant forum for the jurisdictional inquiry is the entire United States, due to nationwide service of process provisions in those statutes, that argument would also fail.

First, the antitrust laws do not provide for nationwide service of process in these circumstances. Section 12 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process *in such cases* may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22 (emphasis added). The "plain language of Section 12 indicates that its service of process provision applies (and, therefore, establishes personal jurisdiction) only in cases in which its venue provision is satisfied"—*i.e.*, when the suit is brought where defendant is "an inhabitant," "may be found," or "transacts business." *Daniel v. Am. Bd. of Emergency Med.*, 428

F.3d 408, 423 (2d Cir. 2005); *GTE New Media Servs. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000) (same).

This Circuit implicitly recognized this limitation in *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir. 1988). There, the Eleventh Circuit applied 15 U.S.C. § 22's service of process provision to an out-of-state corporation, but only where it found that the defendant had transacted business in the forum district, *id.* at 849-50; that venue was appropriate, *id.* at 855; and that the corporate defendant had minimum contacts with the district, *id.* at 853-54. The minimum contacts analysis would have been pointless had service of process alone been sufficient to establish personal jurisdiction.[6]

The section 12 venue provision is not satisfied as to ICANN here. ICANN is not an "inhabitant" of Alabama. *See Aro Mfg. Co. v. Auto. Body Research Corp.*, 352 F.2d 400, 404 (1st Cir. 1965) (holding that, under section 12, "[t]he word 'inhabitant' is synonymous with 'resident.' A corporation is a resident of the state in which it is incorporated . . . ."). And, as shown above, ICANN does not transact business in Alabama; for that reason, ICANN also cannot be "found" in Alabama. *See id.* (holding that, "[w]hen applied to a corporation," to be "found" in a district "is the equivalent of saying that it must be present there by its officers and agents carrying on the business of the corporation"); *Caribe Trailers Sys., Inc. v. P.R. Mar. Shipping Auth.*, 475 F. Supp. 711, 716 (D.D.C. 1979) ("A corporation is found where it has presence and continuous local activities" (quotation marks and citation omitted)). As antitrust venue is improper here, nationwide service of process is also unavailable.

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[6] Two circuits have held that nationwide service of process is available in *all* antitrust cases. *See In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 297 (3d Cir. 2004); *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1179-80 (9th Cir. 2004). Those Circuits' decisions are inconsistent with the plain meaning of section 12, as shown above, and are contrary to *Delong Equipment*.

Second, plaintiffs cannot invoke nationwide jurisdiction under the RICO statute because their RICO claim fails to state a claim. *See infra* at Part II.C. This claim thus has no bearing on the jurisdiction inquiry. *See, e.g., Aeropower, Ltd. v. Matherly*, No. 1:03-cv-889, 2007 WL 163082, at *5-13 (M.D. Ala. Jan. 18, 2007) (dismissing RICO claim for failure to state a claim, and then dismissing remaining charges for lack of personal jurisdiction); 4A Charles Alan Wright & Arthur R. Miller., *Federal Practice and Procedure* § 1069.7 (3d ed. 2002) (noting that if "the only jurisdictionally sufficient claim is dropped or dismissed" then claims for which there is no jurisdiction "should be dismissed as well"); *Rogers v. Nacchio*, No. 06-13712, 2007 WL 2002594, at *1 n.1 (11th Cir. July 12, 2007) (holding that when plaintiff's claims are "insubstantial, implausible, or otherwise completely devoid of merit," they "may not take advantage of . . . nationwide service of process" (citation omitted)).

Third, even if nationwide service of process were available for a viable RICO or antitrust claim, it would not end the jurisdictional inquiry. Personal jurisdiction is claim-specific, so there would still be no jurisdiction over the other claims in suit. *See, e.g., Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274-75 (5th Cir. 2006); *Remick v. Manfredy*, 238 F.3d 248, 255-56 (3d Cir. 2001). This result is not altered by the doctrine of "pendent personal jurisdiction," in which some courts have held that a Court with personal jurisdiction over one claim may exercise jurisdiction over claims that share the "common nucleus of operative facts." *See Action Embroidery Corp.*, 368 F.3d at 1181; *Robinson Eng'g Co. Pension Plan & Trust v. George*, 223 F.3d 445, 449 (7th Cir. 2000); 4A Wright, *supra*, § 1069.7.

Here, plaintiffs' complaint demonstrates that there are two entirely separate nuclei of operative facts—those relating to the antitrust claims, and those relating to everything else. (*Compare* Am. Compl. at 4 ("Facts Regarding The Plaintiffs' Claims Under Sections 1, 2 And 4

of The Sherman Act" *with id.* at 10 ("Facts With Regard to the Remaining Counts").) Thus, personal jurisdiction over the antitrust claims would not support jurisdiction over any of the other claims, and vice versa.

C. The Court Lacks Specific Jurisdiction With Respect to Each of the Claims.

"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. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007) (quotation marks and citation omitted). Specific jurisdiction requires that defendant's contacts with the forum state (1) be "related to the plaintiff's cause of action or have given rise to it;" (2) involve "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum;" and (3) be "such that the defendant should reasonably anticipate being haled into court there." *Id.* (quotation marks and citation omitted).

As noted, ICANN does no business in Alabama and is not party to any contracts with the Plaintiffs. (*See* Ex. A, ¶¶ 4-7.) Plaintiffs themselves allege only *one* contact between ICANN and an Alabama resident—an e-mail sent to Mr. Moore on an unspecified date "[i]n reply to" e-mails or registered letters sent by Mr. Moore to ICANN. (Am. Compl. ¶ 44.) Plaintiffs do *not* allege that this email was "related to" or "gave rise" to any of their causes of action; that is, they do not claim that this email made misrepresentations, violated the mail fraud or RICO laws, formed a contractual relationship, or violated antitrust law. Specific jurisdiction should be denied for this reason alone.

Further, even if that email had been adequately related to any of the claims in suit, personal jurisdiction would still have been lacking because by responding to Mr. Moore's unsolicited email, ICANN did nothing to "purposefully avail[] itself of the privilege of conducting activities" in Alabama, and could not "reasonably anticipate being haled into [this] court." *Sloss*, 488 F.3d at 925 (quotation marks and citation omitted). The case of *Sun Bank,*

N.A. v. E.F. Hutton & Co., 926 F.2d 1030 (11th Cir. 1991) is directly on point. In *Sun Bank*, a Florida bank investigating a customer's credit- worthiness placed two calls to the customer's reference in Massachusetts. *Id.* at 1032. The bank sued the reference in Florida district court for misrepresentations made during those calls. The Eleventh Circuit affirmed a dismissal for lack of personal jurisdiction. The Court observed that the reference had "entered into no contract or other continuing relationship[] or obligation[] with Sun Bank," that he "did not seek out Sun Bank's business," and that his "contacts with Sun Bank occurred not because [he had] purposefully availed himself of the privilege of conducting activities within Florida," but rather because the bank's customer "told that bank to call [him] in Massachusetts." *Id.* at 1034 (quotation marks and citation omitted). The Court thus rejected jurisdiction. S*ee also L.O.T.I. Group Prods. v. Lund*, 907 F. Supp. 1528, 1534 (S.D. Fla. 1995) (no jurisdiction where plaintiff "initiat[ed]" defendant's contacts with forum state).

Mr. Moore's allegation in this case is far weaker even than that in *Sun Bank.* Mr. Moore sent e-mail to ICANN about a dispute with RegisterFly. ICANN responded with a single, short email, informing Mr. Moore that ICANN had no authority to assist him with what appeared to be a contractual dispute with RegisterFly. (Am. Compl. ¶ 44.) That contact, unilaterally initiated by plaintiff Moore himself, is insufficient to subject ICANN to suit in this forum.[7]

[7] Nor could plaintiffs rely on a theory that ICANN committed some wrong *outside* of Alabama that injured plaintiffs inside Alabama. *See Calder v. Jones*, 465 U.S. 783 (1984) (holding that there was personal jurisdiction over defendants who published a libel in California, knowing that it would harm the subject of the libel who lived elsewhere). First, a *Calder* argument must be specifically pled, and plaintiffs make no such allegations. *Am. Copper & Brass, Inc. v. Mueller Eur., Ltd.*, 452 F. Supp. 2d 821, 828 (W.D. Tenn. 2006). In any event, *Calder* requires more than "mere awareness that one's intentional acts will cause harm in the forum state." *Ashton v. Florala Mem. Hosp.*, No. 2:06CV226, 2006 WL 2864413, at *10 (M.D. Ala. Oct. 5, 2006) (quotation marks and citations omitted). Plaintiffs have not alleged, and cannot show, that ICANN undertook any activities with the purpose of causing harm to them.

II. THE COMPLAINT FAILS TO STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

In order to state a claim, a plaintiff must provide "[f]actual allegations . . . enough to raise a right to relief above the speculative level" and that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65, 1974 (2007). This requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965.

Further, Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." To satisfy this rule, a plaintiff must state: "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quotation marks and citation omitted). Finally, plaintiffs must not "lump[] together all of the defendants in their allegations" but must make individualized claims. *Ambrosia Coal & Constr. Co. v. Pages Morales*, 482 F.3d 1309, 1317 (11th Cir. 2007).

ICANN is named as a defendant in Counts 2 through 9. Each of these claims fails one or both of these pleading standards, and should be dismissed.

A. The Misrepresentation and Suppression Claims (Counts 2 & 7) Should Be Dismissed Because the Complaint Alleges No Facts Relevant to ICANN.

Count 2 of the Complaint alleges that eNom and ICANN falsely represented that "by registering Internet names and paying a certain sum that Plaintiffs would receive certain rights . . . in these Internet names," that "the rights . . . could be renewed by paying a certain sum," that "the rights . . . could not be transferred," and that "after they had acquired the rights . . . that it

[sic] would abide by ICANN's rules, regulations, policies and procedures." (Am. Compl. ¶¶ 62-63.) Plaintiffs allege that these representations induced them to "pa[y] to have 109 Internet names registered." (*Id.* ¶ 66.)

The Amended Complaint, however, gives no indication that ICANN made *any* alleged misrepresentations, let alone what was specifically said, who specifically made the representations, why they were false, and how they misled plaintiffs. Indeed, the only specific statement attributed to ICANN (Am. Compl. ¶ 44) patently does *not* make the representations recounted in ¶ 62. Moreover, that statement occurred only *after* Mr. Moore had already purchased the domain names at issue, foreclosing the possibility that ICANN's statement "induced" him to purchase those names. Because the amended complaint does not plead any of the alleged misrepresentations of Count 2, let alone with the requisite specificity, it must be dismissed. *Ziemba*, 256 F.3d at 1202; *Ambrosia*, 482 F.3d at 1317.

Count 7, the state-law suppression claim, is likewise a fraud claim that must be pled with specificity under Rule 9(b). *See Lewis v. City of Montgomery*, No. 2:04-CV-858, 2006 WL 1761673, at *7 (M.D. Ala. Jun. 27, 2006); Ala. Code § 6-5-102 ("Suppression of a material fact which the party is under an obligation to communicate constitutes fraud."). Plaintiffs allege generically that "Defendants" suppressed a laundry list of facts from Plaintiffs, had a duty to disclose, and induced Plaintiffs to purchase domain names. (*Id.* ¶¶ 101-05.) The Complaint thus lumps defendants together and fails to specify any omission by ICANN, let alone with the required Rule 9(b) specificity (*i.e.*, specific written documents or oral communications containing omissions, the identities of persons making those communications, and the source of any duty to disclose). Furthermore, as with Count 2, the only communication by ICANN alleged in the Complaint occurred *after* plaintiffs had purchased the Internet domain names, and

therefore could *not* have induced plaintiffs to buy those names. *Ziemba*, 256 F.3d at 1202; *Ambrosia*, 482 F.3d at 1317; *Lewis*, 2006 WL 1761673, at *7-8.

B. The Mail and Wire Fraud Claims (Count 3) Should Be Dismissed for Failure to State a Claim.

Count 3 alleges that plaintiffs "have been injured in their business or property by the Defendants' overt acts of mail and wire fraud" in violation of 18 U.S.C. §§ 1341 and 1343. (Am. Compl. ¶¶ 77-83.) These claims must be dismissed for two reasons.

First, there is no private right of action under the federal mail and wire fraud statutes. *See Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) (describing the mail and wire fraud statutes as "purely penal"); *Wisdom v. First Midwest Bank*, 167 F.3d 402, 408 (8th Cir. 1999) ("Congress did not intend to create a private right of action in enacting either the mail or wire fraud statutes").

Second, mail and wire fraud claims, even in those circumstances where they may be pled, are subject to the specificity requirements of Rule 9(b). *See, e.g., Byrne v. Nezhat,* 261 F.3d 1075, 1109-10 (11th Cir. 2001) (mail fraud); *Republic of Pan. v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 9492 (11th Cir. 1997) (wire fraud). Here, the allegations that "Defendants," lumped together, committed mail and wire fraud by transmitting unspecified "agreements, correspondence and statements," is insufficient to satisfy Rule 9(b). *See Brooks v. Blue Cross & Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1381 (11th Cir. 1997).

C. The RICO Claims (Count 4) Should Be Dismissed for Failure to State a Claim and for Failure to Satisfy Rule 9(b).

Count 4 alleges that ICANN, RegisterFly, eNom, and VeriSign form an "ongoing organization" known as the "ICANN Enterprise," that "Defendants control and operate" by "engaging in wire fraud; misrepresenting material facts . . . ; unlawfully tying fees for administrative tasks to the regular service fee, by restraining competition and by unlawfully

transferring Internet names." (Am. Compl. ¶¶ 69-72.) Plaintiffs allege that Defendants violated the RICO statute, and conspired to do so, 18 U.S.C. § 1962(c), (d), through a "pattern" of mail and wire fraud. (*Id.* ¶¶ 73-75, 83-89.)

18 U.S.C. § 1962(c) provides that it is unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." In order to allege a RICO violation, a plaintiff must allege: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988) (internal quotation marks and citation omitted).

1. Plaintiffs Do Not Sufficiently Allege an "Enterprise."

In order to plead a RICO enterprise, a plaintiff must provide facts that, if proved, would show "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Williams v. Mohawk Indus.*, 465 F.3d 1277, 1284 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007) (quotation marks and citation omitted). The alleged enterprise must have "a structure and goals separate from the predicate acts" themselves, *Ageloff v. Kiley*, 318 F. Supp. 2d 1157, 1159 (S.D. Fla. 2004), and the Defendant must have "some part in directing" the "the operation or management of the enterprise itself." *Williams*, 465 F.3d at 1285 (quotation marks and citation omitted). Thus, "simply plugging in names does not establish an enterprise." *Anderson v. Smithfield Foods, Inc.*, 207 F. Supp. 2d 1358, 1363-64 (M.D. Fla. 2002), *aff'd*, 353 F.3d 912 (11th Cir. 2003). Plaintiffs "'must plead specific facts, not mere conclusory allegations'" to do so. *Fla., Office of Att'y Gen., Dep't of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1305 (S.D. Fla. 2005) (quoting *Manax v. McNamara*, 842 F.2d 808, 811 (5th Cir. 1988)).

Here, plaintiffs do not allege such facts. First, apart from insufficient bare legal conclusions that the "enterprise" exists and is "ongoing," no facts are alleged regarding any organizational structure among the four corporations that could possibly constitute an enterprise. (Am. Compl. ¶¶ 69-72.) The defendants are simply claimed to have committed misconduct together, which is precisely the sort of allegation held to be insufficient to state a RICO violation.

Moreover, an "association-in-fact" RICO enterprise may not consist *entirely* of corporations. The RICO statute provides that an enterprise "includes [1] any *individual*, partnership, corporation, association, or other legal entity, and [2] any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). The plain language of the statute thus distinguishes "individuals" from "corporations," and provides that a "group of *individuals*" is needed for an associated-in-fact enterprise.[8] Here, however, Plaintiffs allege that the "group . . . associated in fact" that comprise the so-called "ICANN Enterprise" is composed solely of corporations. (Am. Compl. ¶ 69.) Under the plain language of the RICO statute, this is not a valid enterprise.

2. Plaintiffs Do Not Plead a "Pattern" of Racketeering.

The "pattern" element of RICO requires a showing of "continuity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241-42 (1989). "'Continuity' is both a closed- and open-ended concept,

[8] *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277, 1284 (11th Cir. 2006), which found that a corporation was part of an association-in-fact enterprise, is not to the contrary. There, the enterprise consisted of a group of individuals *in addition* to Mohawk, thus satisfying the statutory requirement. *See id.* (finding "association-in-fact between Mohawk and third-party recruiters."). This reading of *Williams* is required by the Supreme Court's consideration of that case. The Court granted *certiorari* in *Williams* to consider whether Mohawk and its agents could form an associated-in-fact enterprise, but the case was ultimately dismissed. *See* 465 F.3d at 1281 (describing procedural history). During oral argument, a majority of the Justices, including Chief Justice Roberts and Justices Scalia, Kennedy, Souter, and Alito, expressed skepticism that a RICO "enterprise" could include an association-in-fact comprised of corporations. *See* Transcript of Oral Argument, *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016, at 28-54 (Apr. 26, 2006), *available at* 2006 WL 1194498.

referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* In either event, a series of discrete predicate acts extended over time or likely to do so must be pled specifically. *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1265 (11th Cir. 2004).

Plaintiffs' complaint does not adequately plead continuity. They allege no discrete or specific set of predicate acts that either formed a closed pattern of racketeering or that are likely to extend into the future. Moreover, because "[c]ivil RICO claims . . . are essentially a certain breed of fraud claims," *Ambrosia*, 482 F.3d at 1316, each alleged predicate act must be pled with particularity under Rule 9(b). *Brooks,* 116 F.3d at 1381. Plaintiffs' predicate act allegations, however, merely allude to unspecified "agreements, correspondence and statements" that "contain[ed] false and fraudulent misrepresentations." (Am. Compl. ¶¶ 77-83.) As shown above, *see supra* Part II.A., these allegations fall far short of 9(b)'s requirements: they improperly lump together all "Defendants," do not state when these representations were made, who made them, or precisely what they said, why they were false, and how they misled Plaintiffs. *See Ziemba*, 256 F.3d at 1202; *Ambrosia*, 482 F.3d at 1317. Because plaintiffs do not plead predicate acts of mail and wire fraud, let alone with specificity, Count 4 must be dismissed.

3. Plaintiffs Do Not Adequately Plead a Conspiracy.

Plaintiffs also allege a violation of 18 U.S.C. § 1962(d), which prohibits conspiracies to violate RICO. (Am. Compl. ¶¶ 87-89.) To plead a RICO conspiracy, a Plaintiff must allege "the existence of a conspiracy, and the commission of an overt act in furtherance of the conspiracy that causes injury to the plaintiff." *Beck v. Prupis*, 162 F.3d 1090, 1098 (11th Cir. 1998), *aff'd* 529 U.S. 494 (2000). To constitute an "overt act," conduct must be a substantive RICO violation; therefore, there can be no RICO conspiracy liability without an underlying RICO violation. *See Beck*, 162 F.3d at 1098-99; *Rogers*, 2007 WL 2002594, at *6 ("where a plaintiff fails to state a

RICO claim and the conspiracy count does not contain additional allegations, the conspiracy claim necessarily fails."). Plaintiffs must also allege facts that, if proven, would show an agreement to violate the RICO laws. *Aeropower*, 2007 WL 163082, at *10.

Plaintiffs' RICO conspiracy claim must be dismissed. First, because plaintiffs have not properly alleged any substantive RICO claims, their derivative RICO conspiracy claim must also fail. *See Beck*, 162 F.3d at 1098-99. Further, apart from a bare, conclusory recitation of the elements of the offense (Am. Compl. ¶ 89), plaintiffs aver no facts that, if proven, would demonstrate the existence of an agreement to injure plaintiffs. These unsupported legal conclusions fail to state a claim. *See Aeropower*, 2007 WL 163082, at *10.

D. There is No Antitrust Standing For The Antitrust Claims (Counts 5 & 6), Nor Do Those Counts State A Claim.

Plaintiffs' "exclusive dealing" claim alleges that ICANN has restrained trade "in the markets for entry onto the Legacy A root server." (Am. Compl. ¶ 92) Plaintiffs, however, lack antitrust standing to bring any such claim, fail to state any fact that could possibly constitute antitrust violations, and indeed, by their own admission do not allege a proper "market" at all.

1. Plaintiffs Lack Standing for their Exclusive Dealing Claim and Have Not Alleged a Violation of the Antitrust Laws.

Plaintiffs argue that ICANN restrained competition in the market for "entry onto the Legacy A root server." (Am. Compl. ¶¶ 19, 92, 99.) However, they allege no desire to enter that "market," and admit that the "alternate roots" and unapproved registries are the "victims" of the alleged wrongdoing. (*Id.* ¶¶ 30-32.) Those parties, and not plaintiffs, are better positioned to vindicate their own rights. *See Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983). Thus, as eNom demonstrates more fully in its brief, plaintiffs lack antitrust standing. (*See* eNom Mot. to Dismiss at Part III.B.1.a.)

Plaintiffs also fail to plead a violation of the antitrust laws, or any injury to competition. (*Id.* at Part III.B.1.b-d.) Their exclusive-dealing claims should be dismissed.

2. Plaintiffs' Own Allegations Disprove Their Alleged Market

To allege a violation of § 1 of the Sherman Act, a party must plead "(1) the anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the defendant's conduct has no pro-competitive benefit or justification." *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1071 (11th Cir. 2004) (quotation marks, footnote and citation omitted). Plaintiffs allege that ICANN restrained competition in the market for "entry onto the Legacy A root server." (Am. Compl. ¶¶ 19, 92, 99.) But their own complaint shows that this is not a "market."

Plaintiffs allege that the "A root" is the computer server which "sets the standard" for the DNS "from which every other root synchronizes their data," and that, beneath these "secondary roots" are the TLDs, such as .com.[9] (Am. Compl. ¶ 16.) But as plaintiffs' own discussion of the A root demonstrates, there is no sense in which this computer server is itself a "market." Plaintiffs acknowledge that there are alternative domain name systems, and refer to "ICANN's only competitors, the alternate roots." (Am. Compl. ¶ 31.)

Where the plaintiffs' allegations do not demonstrate an economically coherent market, the claim should be dismissed. *See Apani Sw., Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 628 (5th Cir. 2002). Thus, for example, where an alleged market is facially too narrow or otherwise improper, courts routinely dismiss antitrust claims premised upon them. *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997); *TV Commc'ns Network,*

[9] As noted above, *see supra* n.1, the A root is, in fact, no longer the master root server. Nonetheless, the antitrust claims should be dismissed regardless of which root server actually serves this function, and, as the discussion above shows, those claims would fail even if plaintiffs' claims were correct in this regard.

Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992). That is precisely the case here.

3. Plaintiffs Do Not State a Tying Claim Against ICANN

Count 6 alleges that "Defendants" have illegally tied together two fees for domain name registrants—one for "regular service" and another for "administrative tasks." (Am. Compl. ¶¶ 96-99.) "An illegal tying arrangement has five elements: (1) a tying and a tied product; (2) evidence of actual coercion by the seller that in fact forced the buyer to [purchase] the tied product; (3) that the seller have sufficient market power in the tying product market to force the buyer to accept the tied product; (4) anticompetitive effects in the tied market; and (5) involvement of a not insubstantial amount of interstate commerce in the tied product market." *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502-03 (11th Cir. 1985) (quotation marks and citation omitted). Plaintiffs' allegations fail to state a claim against ICANN.

The complaint does not allege that ICANN was the "seller" of anything, as required for a tying claim, let alone that it tied the sale of two services together. As plaintiffs acknowledge, ICANN does not provide the service of domain name registration; rather, it is the domain name registrars that provide such services for end-users (Am. Compl. ¶¶ 22-23.) Plaintiffs also admit that RegisterFly registered their domain names. (*Id.* ¶¶ 33, 47, 52.) ICANN was therefore not a "seller" of any service, and cannot be liable for tying.

Moreover, plaintiffs' complaint establishes that ICANN did not "coerc[e]" them, directly or indirectly, to pay any fees. Plaintiffs acknowledge that ICANN did not require registrars to charge the fees at issue; instead, plaintiffs allege that "accredited Internet name registrars such as RegisterFly.com and eNom, Inc. were *allowed* to charge domain name registrants a fee." (Am. Compl. ¶ 25 (emphasis added); *see also id.* ¶¶ 95-99.) Because plaintiffs do not allege that

ICANN *forced* registrars to impose any fees on domain name registrants, they allege no facts that, if true, would show "evidence of actual coercion" by ICANN.

Even apart from this fatal defect, the tying claim fails because, by plaintiffs' own admission, only one service—domain name registration—was sold. (Am. Compl. ¶¶ 25, 96-97.) Requiring the payment of administrative fees as a condition of a sale does not constitute tying as a matter of law. *See, e.g., Johnson v. Nationwide Indus., Inc.*, 715 F.2d 1233, 1237 (7th Cir. 1983) (rejecting tying allegation where condominium sales required purchase of building management contract, noting that "practical considerations require that almost every sale of a condominium unit in a large condominium be subject to a management contract"); *Forrest v. Capital Bldg. & Loan Ass'n*, 385 F. Supp. 831, 835-36 (M.D. La. 1973) (rejecting claim that legal and notary service were tied where mortgage lender required borrower to pay legal fees necessary to certify the title of the mortgaged property, noting that "[o]nly one product is sold or extended in the market place, *i.e.* home and commercial credit" and that "the legal services . . . are not for sale to the prospective borrower but are merely an incidental service required both by state law and federal regulation to consummate the loan."), *aff'd*, 504 F.2d 891 (5th Cir. 1974); *Principe v. McDonald's Corp.*, 631 F.2d 303, 308 (4th Cir. 1980) (holding that McDonalds' practice of leasing its name to franchisees only if franchisee rented its premises from McDonalds and paid a security deposit was not illegal tying, as the "lease, note and license are not separate products but component parts of the overall franchise package"). For this reason, too, plaintiffs fail to allege a tying claim, and Count 6 should be dismissed.

E. Plaintiffs' Breach of Contract and Third-Party Beneficiary Claims (Counts 8 & 9) Fail to State a Claim Against ICANN.

Plaintiffs allege that they "had express contracts with Defendants where they registered domain names through and/or with the Defendants," and that "Defendants breached the

contracts." (Am. Compl. ¶ 109.) A "breach of contract under Alabama law requires: (1) the existence of a valid contract binding the parties in the action, (2) [the plaintiff's] own performance under the contract, (3) the defendant's nonperformance, and (4) damages." *Morrow v. Green Tree Servicing, L.L.C.*, 360 F. Supp. 2d 1246, 1251 (M.D. Ala. 2005) (quotation marks and citation omitted). As with all pleadings, plaintiffs must provide more than a "formulaic recitation of the elements of a cause of action," and "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1964, 1974.

Plaintiffs' breach of contract claim fails this test. Plaintiffs do not identify any contract ICANN allegedly had with them or how ICANN allegedly breached that contract. To the contrary, plaintiffs allege that they had a contractual relationship with the *registrars*, not with ICANN, which had no part in registering Plaintiffs' domain names (and, in fact, does not act as a registrar for any domain names.) (Am. Compl. ¶¶ 22-23, 33, 47, 52.) This is insufficient to state a contract claim against ICANN. *See, e.g., Johnson v. Mobile County Sheriff Dept.*, No. Civ.A.06-0821, 2007 WL 2023488, *1 (S.D. Ala. July 9, 2007) (dismissing breach of contract claim that failed to "identify the contract at issue or describe how it was breached"); *Am. Casual Dining, L.P. v. Moe's Sw. Grill, L.L.C.*, 426 F. Supp. 2d 1356, 1369 (N.D. Ga. 2006) ("Because [plaintiff] cannot point to any contractual provision that [defendant] breached . . . [plaintiff] cannot state a claim for breach of contract based on these allegations"); *Behrman v. Allstate Life Ins. Co.*, 388 F. Supp. 2d 1346, 1353 (S.D. Fla. 2005) (dismissing breach of contract claims that "fail[] to identify *how* Defendants materially breached the contract"), *aff'd*, 178 F. App'x 862 (11th Cir. 2006) (emphasis in original). Count 8 must therefore be dismissed.

Plaintiffs' third-party beneficiary claim, which alleges that eNom, ICANN and RegisterFly.com "entered into various contracts" of which "Plaintiffs were the intended

beneficiary" (Am. Compl. ¶ 112), is similarly flawed. In Alabama, "[a] party claiming to be a third-party beneficiary, must establish that the contracting parties intended, upon execution of the contract, to bestow a *direct,* as opposed to an *incidental,* benefit upon the third party." *Cincinnati Ins. Cos. v. Barber Insulation, Inc.*, 946 So. 2d 441, 443 (Ala. 2006) (quotation marks and citation omitted) (emphasis in original). Plaintiffs fail to make even a bare recitation of this necessary element, let alone identify the contractual provision between the Defendants that was supposed to directly benefit Plaintiffs, or how that provision was breached. Count 9 must also be dismissed for failure to state a claim.

CONCLUSION

Plaintiffs have not, and cannot establish that this Court has personal jurisdiction over any of its claims against ICANN. In any event, all of Plaintiffs' claims should be dismissed for failure to state a claim. ICANN respectfully requests the Court to dismiss all claims against it.

Dated: August 30, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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