

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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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. )

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CASE NO. 11-14052-CIV-  
MARTINEZ/LYNCH

**DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND  
NUMBERS, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL  
FURTHER INTERROGATORY RESPONSES**

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## **I. INTRODUCTION**

By his motion to compel ICANN to provide further interrogatory responses, Plaintiff is knowingly burdening this Court and ICANN with all-encompassing, merits-based discovery requests that are inappropriate in light of ICANN's pending motion (filed on March 22, 2011) to dismiss Plaintiff's amended complaint for lack of personal jurisdiction, improper venue, and for failure to state a claim against ICANN. *See* Dkt. 19. ICANN has also moved for a stay of discovery on the grounds that Eleventh Circuit precedent mandates a stay of discovery until ICANN's dispositive motion to dismiss is resolved and because the voluminous and extensive discovery requested by Plaintiff is completely unnecessary, because it cannot uncover any facts that could cure the facial legal deficiencies of Plaintiff's amended complaint. Dkt. 52.

ICANN is now required to respond to Plaintiff's conclusory and unfounded motion to compel, a pleading that suffers the same deficiency as Plaintiff's amended complaint: Plaintiff has failed to – and cannot – assert any cognizable basis for the exercise of personal jurisdiction over ICANN or any claim upon which relief can be granted. Accordingly, no discovery should be required until ICANN's dispositive motion to dismiss is decided.

## **II. PLAINTIFF'S ALLEGATIONS**

Plaintiff alleges that, beginning in 1998, he registered a “certain number of domain names with the domain name registrar Network Solutions.” Am. Compl. at ¶ 28. In 2007, to satisfy a judgment obtained against Plaintiff, the United States District Court for the Northern District of California appointed a receiver and ordered that Network Solutions transfer Plaintiff's domain name registrations to the appointed receiver, Michael Blacksborg. *Id.* at ¶¶ 29-32. Pursuant to the Court's order, Network Solutions transferred ninety domain name registrations from Plaintiff to Mr. Blacksborg. *Id.* at ¶ 32.

In May 2010, Mr. Blacksborg allegedly failed to renew the registration for fourteen of the ninety domain names, which needed to be done on a yearly basis in order for Mr. Blacksborg to maintain his status as the registered domain name holder. *Id.* at ¶ 35. As a result of Mr. Blacksborg's alleged failure to renew the fourteen domain names, the domain names proceeded to an automated Internet auction process, through a mutual agreement between Network Solutions and defendant NameJet. *Id.* at ¶ 36. Plaintiff alleges that the domain names proceeded to auction because of Mr. Blacksborg's non-renewal. Further, had Mr. Blacksborg followed certain post-auction processes (which it is alleged he did not), Blacksborg would have been entitled to up to twenty percent of the auctioned price, the proceeds of which would have gone toward the satisfaction of Plaintiff's debt. *Id.* at ¶¶ 38, 40.

Plaintiff claims that, because the fourteen domain name registrations were part of the court-ordered receivership estate, Network Solutions was negligent in failing to place a "hold" status on the fourteen domain names and allowing those domain names to proceed to automatic auction. *Id.* at ¶¶ 41-54. Plaintiff further claims that NameJet, in auctioning the fourteen domain names "without any regard to their legal status," was "concurrent[ly] negligen[t] in aiding the loss of the domain names from the receiver Blacksborg, and in detriment to Zuccarini and his creditors." *Id.* at ¶ 55.

Plaintiff also names ICANN as a defendant, but Plaintiff's amended complaint does not explain ICANN's function. In fact, 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 coordination role is fulfilled in certain ways. For example, and relevant

to Plaintiff's allegations, consumers may obtain the right to use second-level domain names (such as google.com or uscourts.gov) through companies known as "registrars." ICANN operates the accreditation system that has produced a highly competitive registrar marketplace, with over 900 accredited registrars, including defendant Network Solutions, LLC.

Plaintiff's only allegations with respect to ICANN relate to the Registrar Accreditation Agreement that ICANN maintains with Network Solutions. *See id.*, ¶¶ 59-66. Plaintiff is not a party to that agreement. *Id.*, ¶ 64 (Plaintiff alleges that he is "a party who has *not* entered into any agreement with ICANN or Network Solutions.") (emphasis added). Nonetheless, Plaintiff alleges that ICANN was negligent in "overseeing the actions of Network Solutions," *id.*, ¶ 62, and that ICANN was negligent in not requiring Network Solutions to "place on hold or lock status any domain name that is the subject of court proceedings." *Id.*, ¶ 63.

### III. ARGUMENT

#### A. Plaintiff's Motion Is Premature Because Plaintiff Has Not Met His Burden Of Establishing This Court's Jurisdiction Over ICANN.

On March 22, 2011, ICANN filed its pending motion to dismiss Plaintiff's amended complaint on several independent grounds, including lack of personal jurisdiction, improper venue, and for failure to state a claim against ICANN ("Motion to Dismiss"). (Dkt. 19.) In its Motion to Dismiss and supporting declaration, ICANN demonstrated that there is no connection between Plaintiff's claims and this forum, or between ICANN and this forum. In particular, ICANN has no employees, assets, bank accounts, real property, personal property, offices, or other facilities in Florida. *See* Declaration of Akram Atallah In Support of ICANN's Motion to Dismiss, ¶¶ 4, 6-8 (Dkt. No. 19-1). ICANN is not licensed to do business in Florida, does not have a registered agent for service of process in Florida, and has no phone numbers or mailing addresses in Florida. *Id.* at ¶¶ 5, 9-10. ICANN does not collect fees directly from domain name

registrants, such as Plaintiff, and has no contracts with Plaintiff. *Id.* at ¶¶ 3, 13. Finally, ICANN's website, which is operated from web servers physically located in Southern California and Virginia, does not offer anything for sale. *Id.* at ¶ 14.

As set forth more fully in the Motion to Dismiss, ICANN could not reasonably anticipate being haled into court in Florida, and to do so would offend the traditional notions of fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). Given these fundamental constitutional concerns, Plaintiff's interrogatories are premature. *Kerce v. Lappin*, No. 3:10-CV-1647, 2011 WL 208413 (M.D. Pa. Jan. 20, 2011) (denying motion to compel pending resolution of dispositive motion to dismiss); *see also Mvisible Techs., Inc. v. Mixxer, Inc.*, No. 06-61792-CIV-COHN, 2007 WL 809677 (S.D. Fla. March 15, 2007) (granting defendants' motion to stay discovery pending resolution of motion to dismiss for lack of personal jurisdiction). This Court should not require ICANN to participate in overly burdensome discovery concerning the substance of Plaintiff's claims pending its decision on the dispositive Motion to Dismiss. Indeed, if granted, ICANN's Motion to Dismiss will dispose of all claims against ICANN. That said, it makes little sense for the parties to engage in time consuming and expensive – yet potentially unnecessary – discovery when the ruling on ICANN's Motion to Dismiss could render those efforts a nullity.

**B. ICANN's Objections Are Consistent With Eleventh Circuit Precedent That Mandates A Stay Of Discovery Until ICANN's Dispositive Motion To Dismiss Is Resolved.**

On September 14, 2011, ICANN moved this Court for an order staying discovery in this action pending resolution of ICANN's Motion to Dismiss. (Dkt. 52 (“Motion to Stay Discovery”).) In its Motion to Stay Discovery, ICANN demonstrated that – consistent with clear Eleventh Circuit precedent – an order staying discovery is appropriate pending the Court's ruling on ICANN's Motion to Dismiss because ICANN has challenged the legal sufficiency of the

amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim against ICANN. See *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (“*Chudasama*”) (“Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved *before* discovery begins.”) (emphasis added).

Specifically, in addition to raising constitutional concerns regarding lack of personal jurisdiction and improper venue, ICANN challenged Plaintiff’s amended complaint as being devoid of any allegations that would establish that ICANN created a foreseeable zone of risk of harming Plaintiff, which is a “minimal threshold legal requirement for opening the courthouse doors” to Plaintiff. *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1202 (Fla. 1997) (quoting *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992)). Thus, ICANN’s Motion to Dismiss is a “facial challenge[] to the legal sufficiency of a claim,” which “presents a purely legal question” and does not require any “discovery before the court rules on the motion.” *Chudasama*, 123 F.3d at 1367. Under these circumstances, ICANN demonstrated that ICANN’s Motion to Dismiss “should . . . be resolved *before* discovery begins.” *Chudasama*, 123 F.3d at 1367 (emphasis added); *Moore v. Potter*, 141 F. App’x 803, 807 (11th Cir. July 8, 2005) (same); *Redford v. Gwinnett Cnty. Judicial Circuit*, 350 F. App’x 341, 346 (11th Cir. Sept. 25, 2009) (same).

ICANN’s objections to Plaintiff’s interrogatories were squarely based on the Eleventh Circuit’s decision in *Chudasama*. Consistent with *Chudasama* and its progeny, ICANN should not be required to engage in burdensome discovery practices until resolution of its dispositive Motion to Dismiss.

**1. Plaintiff Did Not Oppose ICANN's Request For A Stay Of Discovery Pending Resolution Of ICANN's Motion To Dismiss.**

In response to ICANN's Motion to Stay Discovery, Plaintiff stated that he "would not oppose the delay of further discovery till ICANN's motion to dismiss is ruled upon if the Court would extend the time for discovery from the current November 30, 2011 date, till a date the Court deems appropriate if ICANN's motion to dismiss is denied." (Dkt. 54 at 2.) ICANN did not oppose Plaintiff's request to continue the discovery cutoff date in this matter if discovery was stayed pending resolution of ICANN's dispositive Motion to Dismiss. (Dkt. 55 (ICANN's Reply In Support of Motion to Stay).)

Despite such representations, Plaintiff subsequently filed this Motion to Compel further interrogatory responses from ICANN. Plaintiff does not explain his apparent reversal nor proffer any basis for why ICANN's Motion to Stay Discovery should be denied. ICANN remains amenable to a continuation of the discovery cutoff date if discovery is stayed pending this Court's decision on ICANN's Motion to Dismiss.

**C. Plaintiff's Interrogatories Are Overly Broad And Seek Irrelevant Information.**

The Eleventh Circuit repeatedly has empowered district courts to limit the scope of discovery where the information sought is irrelevant. *See, e.g., Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320, (11th Cir. 1999) ("[A] district court can deny a motion to compel further discovery if it concludes that the questions are irrelevant.") (citation omitted). *See also Avirgan v. Hull*, 116 F.R.D. 591 (S.D. Fla. 1987) (limiting discovery to issues clearly related to central allegations of the complaint); *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 101 F.R.D. 342 (D.C. 1984) (discovery is limited by the relevance of the request to the subject matter of the litigation). Here, Plaintiff's irrelevant and burdensome discovery requests are just the type the Federal Rules of Civil Procedure and the courts contemplate – and in fact – routinely limit.

Plaintiff asserts a single cause of action for negligence against ICANN. The elements of a cause of action for negligence in Florida are well-established: (1) defendant owed a duty of care; (2) defendant breached that duty of care; (3) the breach of duty both actually and proximately caused plaintiff's injuries; and (4) plaintiff suffered damages as a result of the breach. *Williams v. Davis*, 974 So. 2d 1052, 1056 (Fla. 2007). With respect to the duty requirement, the Florida Supreme Court has held that for a Plaintiff "to bring a common law action for negligence in Florida, the 'minimal threshold legal requirement for opening the courthouse doors' is finding that a defendant's alleged actions created a foreseeable 'zone of risk' of harming others." *Kitchen*, 697 So. 2d at 1202 (quoting *McCain*, 593 So. 2d at 502).

As set forth in detail in ICANN's pending Motion to Dismiss, Plaintiff's amended complaint fails to allege facts sufficient to establish that ICANN created a foreseeable zone of risk of harming Plaintiff. (Mot. to Dismiss, Dkt. 19 at 14-17.) In other words, Plaintiff has not – and cannot as a matter of law – demonstrate that ICANN owed him a duty of care. Unable to satisfy a fundamental element of his negligence claim, Plaintiff cannot now cast his fishing line out, at great expense to ICANN, to see what information he can reel in. Plaintiff's Motion to Compel should be denied. *Kerce*, 2011 WL 208413 (denying motion to compel pending resolution of dispositive motion to dismiss).

**1. Interrogatory Nos. 1-5: Information Relating To "Performance Reviews" Of Nearly 1,000 Accredited Registrars Is Irrelevant.**

Plaintiff's Interrogatory Nos. 1-5 seek information relating to the existence of – and the reasons for – any ICANN policy that would require ICANN to conduct "periodic reviews of the performance of the domain name registrars that [ICANN] accredit[s]," including how often reviews are performed and the reasons underlying any such review. Ex. A at 4 (Plaintiff's First Set of Interrogatories to ICANN, Nos. 1-5.) ICANN objected to Interrogatory Nos. 1-5 on



relevance grounds, among others, stating that Plaintiff “seeks information wholly unrelated to Plaintiff and not connected to the allegations in the Amended Complaint and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.” Ex. B at 4-8 (ICANN’s Objections and Responses to Plaintiff’s First Set of Interrogatories, Nos. 1-5.)

Aside from stating that “the Federal Rules allow for broad discovery” (Mot. to Compel at 11), Plaintiff’s motion to compel is utterly devoid of any explanation for why this information is relevant to his claim that ICANN was negligent in not requiring Defendant Network Solutions to “place on hold or lock status any domain name that is the subject of court proceedings.” Amd. Compl., ¶ 63. Moreover, contrary to Plaintiff’s assertion, the Federal Rules of Civil Procedure contemplate appropriate limits to discovery, Fed. R. Civ. P. 26(b)(2)(C), and courts – including this Court – have limited discovery requests that lack relevancy or may be otherwise objectionable. *See, e.g., State Nat’l Ins. Co. v. Al Lamberti*, No. 08-60760-Civ-Seltzer, 2009 WL 702239 (S.D. Fla. March 17, 2009). Notwithstanding Plaintiff’s failure to explain why this information should be compelled, Plaintiff’s Motion to Compel further responses to Interrogatory Nos. 1-5 should be denied for at least three additional reasons.

First, as explained above, Plaintiff’s failure to establish that ICANN had a duty to oversee Network Solutions or any other registrars’ actions so as to prevent the injury alleged here is fatal to its motion to compel further discovery responses. Absent a duty of care owed to Plaintiff, it is irrelevant whether ICANN maintained a policy that would require ICANN to conduct “periodic reviews of the performance of the domain name registrars that [ICANN] accredit[s].”

Second, ICANN operates a registrar accreditation system that has produced a highly competitive registrar marketplace, with *over 900* accredited registrars. Plaintiff’s Interrogatory

Nos. 1-5 are overly broad in that they seek information concerning ICANN's policies relating to hundreds of accredited registrars that have nothing to do with Plaintiff's allegations. Such a request is overly burdensome, seeks plainly irrelevant information, and should not be compelled.

Finally, Plaintiff's Interrogatory Nos. 1-5 contain no time limitation and therefore purport to seek information dating back to ICANN's formation more than a decade ago, in 1998. Such a request is overly broad and therefore burdensome, and a further response should not be compelled.

**2. Interrogatory Nos. 6-9: Information Relating To ICANN's "Performance Reviews" Of Network Solutions Is Irrelevant.**

Plaintiff's Interrogatory Nos. 6-9 are largely identical to Nos. 1-5, but specifically seek information relating to performance reviews ICANN may have conducted of Defendant Network Solutions. Ex. A at 5 (Plaintiff's First Set of Interrogatories to ICANN, Nos. 6-9.) ICANN objected to Interrogatory Nos. 6-9 on relevance grounds, among others. Ex. B at 8-11 (ICANN's Objections and Responses to Plaintiff's First Set of Interrogatories, Nos. 6-9.)

Plaintiff again fails to address ICANN's relevance objection and does not explain how information relating to ICANN's performance review(s) of Network Solutions, if any, is at all relevant to his claims. It is not. Plaintiff admits that he is not a party to the Registrar Accreditation Agreement between Network Solutions and ICANN. *Id.* ¶ 24 ("A consumer cannot directly register and manage their domain name information with ICANN."); *see also id.* at ¶ 64 ("Zuccarini files this action as a party who has not entered into any agreement with ICANN . . ."). As Plaintiff concedes, the Registrar Accreditation Agreement does not extend rights to non-parties, including Plaintiff, but instead is entered into solely between ICANN and the registrar. Nor does the Registrar Accreditation Agreement impose any obligations on ICANN or Network Solutions vis-à-vis Plaintiff. Because it is not likely or even foreseeable that

ICANN's conduct, in executing a Registrar Accreditation Agreement with Network Solutions, would result in the type of injury alleged by Plaintiff here, Plaintiff cannot establish that ICANN owed him a duty of care under the ICANN/Network Solutions Registrar Accreditation Agreement (or otherwise). Having no rights under the Registrar Accreditation Agreement, information relating to Network Solutions' performance under that agreement is irrelevant to Plaintiff's claims.

Furthermore, Plaintiff does not and cannot argue that the facts within his amended complaint resulted in a breach of Network Solutions' Registrar Accreditation Agreement. Plaintiff likewise fails to allege any facts that would suggest that Network Solutions took any act that would warrant contractual compliance review of Network Solutions. Information relating to any performance review of Network Solutions is therefore irrelevant and Plaintiff's Motion to Compel further responses should be denied.<sup>1</sup>

**3. Interrogatory Nos. 10-15: Information Regarding Affirmative Defenses Not Yet Plead Cannot Be Compelled.**

Plaintiff's Interrogatory Nos. 10-15 seek information concerning "each affirmative defense [ICANN] alleged in [its] answer to plaintiff's complaint." Ex. A at 5-6 (Plaintiff's First Set of Interrogatories to ICANN, Nos. 10-15.). ICANN, however, was never served with plaintiff's original complaint, as Plaintiff filed and served his amended complaint before effectuating service of the original complaint on ICANN. ICANN moved to dismiss Plaintiff's amended complaint, and that motion is still pending. ICANN, therefore, has not answered

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<sup>1</sup> ICANN also objected to Plaintiff's Interrogatory Nos. 5-9 on the grounds that the phrase "the performance of Network Solutions, LLC" is vague and ambiguous, and is in fact so broad as to make arduous the task of identifying the information Plaintiff seeks. It is unclear whether Plaintiff is interested in whether Network Solutions has fulfilled the terms and conditions of its Registrar Accreditation Agreement with ICANN, how, subjectively, Network Solutions has performed under the Agreement, or Network Solutions' performance in some other realm.

Furthermore, Interrogatory Nos. 5-9 contain no time limitation and therefore purport to seek information dating back to ICANN's formation more than a decade ago, in 1998. Such a request is overly broad and therefore burdensome, and a further response should not be compelled.

Plaintiff's amended complaint and has not plead any affirmative defenses outside its pending Motion to Dismiss. Plaintiff's Motion to Compel fails to explain what additional information could be compelled at this time.

**4. Interrogatory Nos. 16-25: Information Regarding "Hold Or Locked Status" Policies For Domain Name Registrations That Are Subject To Legal Proceedings Is Irrelevant.**

Plaintiff's Interrogatory Nos. 16-25 seek information concerning policies or procedures ICANN may have "that would require any domain name registrar that [ICANN] accredit[s] to place on hold or lock status any domain name that [ICANN is] aware of which is the subject of ongoing legal proceedings or court order[s]." Ex. A at 6-7 (Plaintiff's First Set of Interrogatories to ICANN, Nos. 16-25.) As before, ICANN interposed a relevance objection, among others.<sup>2</sup> Ex. B at 13-20 (ICANN's Objections and Responses to Plaintiff's First Set of Interrogatories, Nos. 16-25.)

Plaintiff contends that information relating to whether ICANN, in its policies and procedures, considered the "risk" or "hardship" to those involved in legal proceedings relating to domain name registrations is relevant to show that ICANN acted with "malice" toward Plaintiff or that ICANN's conduct was "oppressive," and thus forms the basis for Plaintiff's punitive damages claim. (Mot. to Compel, 17-18, 20.) Plaintiff's argument puts the cart before the horse.

As explained above, Plaintiff has failed to establish that ICANN had a duty to oversee Network Solutions or any other registrars' actions so as to prevent the injury alleged. Thus, whether or not ICANN maintains a policy that would require a domain name registrar to place on hold or locked status any domain name subject to legal proceeding or information concerning whether or not ICANN considered the "risk" or "hardship" any such policy might cause is

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<sup>2</sup> Like the other interrogatories, Plaintiff's Interrogatory Nos. 16-25 also suffer the fatal defect of lacking a relevant time period.

irrelevant. Because Plaintiff cannot satisfy the duty element of his negligence claim, which is the “minimal threshold legal requirement for opening the courthouse doors” (*Kitchen*, 697 So. 2d at 1202 (citation omitted)), Plaintiff is unable to prove simple negligence, let alone gross negligence to support punitive damages. Plaintiff’s Motion to Compel should be denied.

#### IV. CONCLUSION

Plaintiff’s all-encompassing, merits-based discovery requests are inappropriate in light of ICANN’s pending motion to dismiss Plaintiff’s amended complaint for lack of personal jurisdiction, improper venue, and for failure to state a claim against ICANN. Because neither Plaintiff’s amended complaint nor Plaintiff’s Motion to Compel assert any cognizable basis for the exercise of jurisdiction over ICANN or any claim upon which relief can be granted, Plaintiff’s Motion to Compel must be denied.

Dated: October 28, 2011

Respectfully submitted,

/s/ Maria Ruiz

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