

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JOHN ZUCCARINI,
Plaintiff,

v.

NETWORK SOLUTIONS, LLC, et al.
Defendants.

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' REPLY
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO
FEDERAL RULES OF CIVIL PROCEDURE 12(b)(2), 12(b)(3), AND 12(b)(6)**

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I. INTRODUCTION

Plaintiff's Amended Complaint should be dismissed with prejudice for lack of personal jurisdiction. Plaintiff argues that this Court can exercise personal jurisdiction over ICANN based on a hodgepodge of purported connections between ICANN and the state of Florida. However, none of these connections establish that ICANN is "carrying on business" in Florida for purposes of Florida's long arm statute. Nor can they. Moreover, even assuming, *arguendo*, Plaintiff could establish that Florida's long arm statute reached ICANN, Plaintiff must still show that due process will be satisfied. He does not and cannot demonstrate that here. As ICANN's contacts with Florida – to the extent they exist – are *unrelated* to Plaintiff's claims, the exercise of jurisdiction over ICANN is constitutionally impermissible, because ICANN's remote contacts with Florida *are not* "continuous and systematic." Plaintiff does not even attempt to satisfy this constitutional standard, and none of the contacts Plaintiff relies on to establish jurisdiction over ICANN prove ICANN's "continuous and systematic" presence in Florida.

Plaintiff's Amended Complaint should be dismissed on the separate and independent ground that this case has nothing to do with Florida and therefore should be dismissed for lack of venue. Plaintiff's opposition does not demonstrate otherwise.

Finally, Plaintiff's negligence claim is baseless. Plaintiff admits that he has no direct relationship with ICANN, through contract or otherwise, and has not alleged facts sufficient to establish that ICANN owed a duty of care to Plaintiff, which defeats Plaintiff's negligence claim.

Plaintiff's Amended Complaint should be dismissed with prejudice.

II. ICANN IS NOT SUBJECT TO PERSONAL JURISDICTION IN FLORIDA.

A. ICANN Does Not Do Business In Florida And Therefore Is Not Subject To Jurisdiction Under Florida's Long Arm Statute.

Plaintiff's only argument for why this Court should exercise jurisdiction over ICANN is based on Section 1(a) of Florida's long arm statute, which subjects a defendant to jurisdiction for any cause of action arising from the defendant's operation of a business in Florida. Opp. at 3-5; Fla. Stat. § 48.193(1)(a). Plaintiff argues that ICANN should be subject to jurisdiction in Florida under Section 1(a) because: (i) ICANN maintains contracts with third parties, where those third parties themselves reside and do business in Florida; and (ii) ICANN participated in a news conference held in Florida on February 3, 2011. None of these alleged conducts, however, relate in any way – much less give rise – to Plaintiff's action. And even if they did, they still would not be sufficient to confer jurisdiction over ICANN. Tellingly, Plaintiff fails to cite a single case holding that jurisdiction under Florida's long arm statute properly may be based on these sorts of contacts. The cases, in fact, hold the opposite.

First, personal jurisdiction cannot be premised solely on a foreign defendant's contracts with a resident corporation or individual. *Wallack v. Worldwide Machinery Sales, Inc.*, 278 F. Supp. 2d 1358, 1366 (M.D. Fla. 2003). Yet Plaintiff's argument that ICANN should be subject to jurisdiction in Florida because it entered into two contracts with Florida businesses – Moniker Online Services, LLC ("Moniker") and ICM Registry, LLC ("ICM") – relies solely on the existence of these contracts. Plaintiff's argument fails. In *Wallack*, for example, a Mississippi corporation contracted with a Florida corporation, and was later sued by that Florida corporation in a Florida court for breach of contract. The court held there was no basis for personal jurisdiction under Section 1(a) of the long arm statute because the only contact the Mississippi corporation had with the state of Florida was its contract with the plaintiff Florida corporation.

Id. at 1366. The court ruled that “[t]he fact that a foreign defendant contracts with a Florida resident is not enough to establish personal jurisdiction over the foreign defendant.” *Id.* The defendant did not have an office or an agent in Florida, and did not otherwise operate or conduct business in Florida, and thus, did not fall within the meaning of Section 1(a). *Id.*; *see also Travel Opportunities of Fort Lauderdale, Inc. v. Walter Karl List Mgmt.*, 726 So. 2d 313, 313-14 (Fla. Dist. Ct. App. 1998) (no personal jurisdiction over defendant pursuant to Section 1(a) even though the defendant contracted with a Florida corporation because the defendant had no offices, no post office box, no telephone, no employees, no bank accounts, or any other property in Florida).

Plaintiff does not cite to – nor can he – any support for his conclusion that “ICANN conducts business in Florida through contracts and business contacts it has entered into.” *Opp.* at 4, 5. ICANN’s business is not conducted in Florida. ICANN’s performance of its obligations under all of its agreements is primarily performed out of its headquarters in California. Plaintiff does not refute this fact.

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

statute. *See, e.g., Musiker v. Projectavision, Inc.*, 960 F. Supp. 292, 295 (S.D. Fla. 1997) (no jurisdiction under Section 1(a) based on defendant's telephone calls and mailing of information to Florida, and attending a meeting in Florida).

In addition, Plaintiff does not offer any legal or factual support to demonstrate that the cause of action against ICANN, "arises" from any of ICANN's alleged contacts with the state, and his Amended Complaint against ICANN should be dismissed. *See* Fla. Stat. § 48.193(1)(a). In his opposition, the Plaintiff wholly ignores the need to demonstrate any nexus between ICANN's alleged contacts with Florida and his cause of action against ICANN.

As explained in ICANN's moving papers, the long-arm statute requires the existence of "a direct affiliation, nexus, or substantial connection . . . between the basis for the cause of action and the business activity." *Golant v. German Shepherd Dog Club of Am., Inc.*, 26 So. 3d 60, 62 (Fla. Dist. Ct. App. 2010); *see also Fraser v. Smith*, 594 F.3d 842, 848 (11th Cir. 2010) (no personal jurisdiction under Section 1(a) where plaintiff did not allege that defendant's solicitation activities in Florida caused the plaintiff to charter defendant's boat, which gave rise to the cause of action). Again, ICANN has no employees, offices or agents in Florida, does not hold a business license in Florida, and does not offer anything for sale in Florida. Declaration of Akram Atallah In Support of ICANN's Motion to Dismiss ("Atallah Decl.") (Dkt. # 19-1), ¶¶ 4, 6, 10, 14. Under these circumstances, the mere fact that ICANN has a contract with a Florida company is not sufficient to confer jurisdiction under Section 1(a). *Wallack*, 278 F. Supp. 2d at 1366. Moreover, even if one of the parties to this case was a Florida-based company with which ICANN holds an agreement, Florida jurisdiction over ICANN would still be improper. *See Vaughn v. AAA Employment, Inc.*, 511 So. 2d 1045, 1046 (Fla. Dist. Ct. App. 1987) (no

jurisdiction under Florida's long arm statute based on defendant's contract with a Florida corporation, even though cause of action arose out of the contract).

Furthermore, Plaintiff does not attempt to refute the evidence submitted in ICANN's motion to dismiss. That evidence clearly established that ICANN has no company facilities, assets or real estate in Florida, is not registered to do business in Florida, does not solicit business in Florida, does not have any phone number or mailing address in Florida, does not sell any goods or services in Florida, does not have a bank account in Florida, and does not have any employees in Florida. Atallah Decl., ¶¶ 4-8, 10-11, 14. Under similar circumstances, the Eleventh Circuit upheld the dismissal of a complaint for lack of personal jurisdiction. *Sculptchair Inc. v. Century Arts, Ltd.*, 94 F.3d 623 (11th Cir. 1996) (no personal jurisdiction over a group of defendants under Florida's long arm statute because the defendants did not manufacture, sell or solicit orders for products in Florida and they did not maintain offices or agents in the state). The result should be no different here, and the Amended Complaint should be dismissed.

B. Plaintiff Has Not Satisfied Due Process And Therefore ICANN Is Not Subject To Jurisdiction Under The Fourteenth Amendment.

Even assuming, *arguendo*, that Plaintiff can meet his burden of proof and establish that ICANN is subject to personal jurisdiction under Florida's long arm statute, Plaintiff must still prove that Florida jurisdiction over ICANN comports with due process. Plaintiff cannot meet this rigorous constitutional standard, and has not even attempted to do so.

Where, as here, a defendant's contacts with the forum state are unrelated to the plaintiff's claims, the exercise of jurisdiction is constitutionally permissible only where the defendant's contacts are "continuous and systematic" within the state. *Fraser*, 594 F.3d at 846. Here, none of the contacts Plaintiff cites satisfy this due process standard. As courts within the Eleventh

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

As noted above, ICANN does not have any offices or other company facilities in Florida. Attalah Decl., ¶ 4. ICANN does not have any employees or staff based in Florida. *Id.* at ¶ 6. ICANN does not maintain any telephone listings or addresses in Florida. *Id.* at ¶ 5. ICANN does not own any property in Florida. *Id.* at ¶ 8. Because ICANN does not maintain any continuous or systematic presence within Florida, its contacts are insufficient to subject it to general personal jurisdiction in this state.¹

III. VENUE IS IMPROPER, WHICH ALSO WARRANTS DISMISSAL

As established above and in ICANN’s moving papers, ICANN does not conduct any business in Florida and has not entered into any contract with Plaintiff or any other person or entity in Florida. This case has nothing to do with Florida and therefore should be dismissed for lack of venue under Federal Rule of Civil Procedure 12(b)(3); see *also Burger King Corp. v. Thomas*, 755 F. Supp. 1026, 1028 (S.D. Fla. 1991) (plaintiff bears burden of proof that his claims are brought in the proper judicial district).

¹ “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) (citation omitted). Plaintiff does not assert that any of ICANN’s purported contacts are related to his claims. Specific personal jurisdiction is therefore absent. *Fraser v. Smith*, 594 F.3d 842, 850 (11th Cir.) (“‘[A] fundamental element of the specific jurisdiction calculus is that plaintiff’s claim must ‘arise out of or relate to’ at least one of defendant’s contacts with the forum.’”) (citation omitted).

IV. PLAINTIFF DOES NOT STATE A CAUSE OF ACTION AGAINST ICANN FOR NEGLIGENCE.

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

Based on the above, Plaintiff argues that ICANN was negligent in not performing a "review and inquiry" of Network Solutions to ensure that Network Solutions locked the domain names, which would have kept them from expiring. Plaintiff further suggests that ICANN should have performed this "review and inquiry" simply because Network Solutions was a party to two prior lawsuits (one nearly a decade old), neither of which has anything to do with the rights of third parties in receivership proceedings. Opp. at 7-10. In sum, Plaintiff seems to be arguing that ICANN should have watched Network Solutions carefully and require it to lock names (in other words, breach its contract) – when Network Solutions had no authority to do so. This is not and cannot be the grounds for a negligence claim.

As pointed out by ICANN, what Plaintiff's Amended Complaint does not do is provide any factual support from which to show that ICANN created a foreseeable risk of harm to Plaintiff arising from the actions of the receiver, Network Solutions and/or NameJet. Plaintiff's

arguments similarly do not support any reading of Plaintiff's Amended Complaint that ICANN created a foreseeable risk of harm to Plaintiff.

Plaintiff does not dispute that he does not and cannot allege any facts to demonstrate that Network Solutions breached its Registrar Accreditation Agreement based upon the facts alleged in the case. *See* ICANN's Motion to Dismiss, Dkt. # 19, at 17. Plaintiff does not dispute that he does not and cannot allege any facts that demonstrate that Network Solutions took any act in relation to the fourteen domain name registrations at issue that would warrant ICANN to initiate a contractual compliance review. To the contrary, Plaintiff argues that ICANN is negligent because it failed to require Network Solutions to breach its Registrar Accreditation Agreement. In short, Plaintiff does not dispute that his entire argument against ICANN is based upon non-existent policies that Plaintiff wishes were in place.² This cause of action cannot stand.

Instead of relying on facts, Plaintiff now presents this Court with pages of inapposite argument and allegations not supported within the Amended Complaint. Plaintiff tells this Court of a high-profile fraudulent transfer issue from 2003, a case that ICANN was not a party to and based upon facts unrelated to Plaintiff's case. Plaintiff also tells this Court of a 2008 lawsuit involving Network Solutions and discussing Network Solutions' conduct when a person searched for available domain name registrations through Network Solutions and did not immediately register those names. *Opp.* at 7.³ Neither of these situations has anything to do

² Plaintiff's bare argument, without supporting authorities, should not be considered. "[A] 'skeletal argument' unsupported by relevant authority or reasoning is viewed as a mere assertion which does not sufficiently raise the issue so as to merit the court's attention." *Donahay v. Palm Beach Tours & Transp., Inc.*, No. 06-61279, 2007 WL 1119206, at *2 (S.D. Fla. Apr. 16, 2007) (quoting *Diamond v. Chulary*, 811 F. Supp. 1321, 1335 (N.D. Ill. 1993) (& citing cases); *NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998) ("Issues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived.").

³ Plaintiff admits that much of his Opposition is discussing matters that are "not part of this Complaint." *Opp.* at 7. Plaintiff dedicates over two pages of his opposition brief to the matter of *Chris McElroy v. Network Solutions, LLC, et al.*, Case No. 2:08-cv-01247-PSG-VBK, which was filed in the United State District Court for the Central District of California and which was closed in October 2009. Plaintiff fails to mention, however, that the plaintiff in that case voluntarily dismissed ICANN with prejudice on March 4, 2009. ICANN never settled the matter, never admitted liability in that action and, in fact, was dismissed before it answered the complaint.

with the rights of third parties in receivership proceedings that ICANN understands Plaintiff's Amended Complaint to put at issue.

Even if ICANN was obligated to oversee Network Solutions in the manner alleged by Plaintiff, Plaintiff has not – and cannot – establish that ICANN's actions created a foreseeable zone of risk of harming Plaintiff. *See Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1202 (Fla. 1997) (“a defendant's alleged actions [must create] a foreseeable ‘zone of risk’ of harming others.”). Plaintiff does not refute the fact that he is not party to any contract with ICANN or that he does not have any direct relationship with ICANN. *See* Am. Compl., ¶¶ 24, 64. The Amended Complaint contains no allegations that ICANN had any relationship with Plaintiff that could conceivably create a foreseeable risk to Plaintiff.

Plaintiff now argues (without citation to his Amended Complaint) that a foreseeable risk of harm to Plaintiff exists because ICANN knew that Network Solutions had a history of improperly transferring domain names. *Opp.* at 11. But Plaintiff fails to demonstrate that any conduct by Network Solutions breached its agreement with ICANN or would otherwise warrant the contractual review Plaintiff wishes were required. Moreover, allegations regarding Network Solutions' historical conduct are absent from Plaintiff's Amended Complaint and therefore cannot form the basis of the Court's foreseeable risk analysis. *Capina v. Liberty Life Ins., Inc.*, 2010 WL 5608851, at * 1 (S.D. Fla. Dec. 6, 2010) (Court ““may only examine the four corners

(continued...)

Plaintiff also claims that Network Solutions was involved in the improper transfer of the domain names *sex.com* and *freemovies.org*, that ICANN should have been aware of these transfers, and that, as a result, ICANN owed a duty to Plaintiff to oversee Network Solutions so as to prevent the purported injury suffered by Plaintiff here. *Opp.* at 6-8. But again, Plaintiff's Amended Complaint does not contain any allegations relating to *sex.com* or *freemovies.org*, or any other allegations that would give rise to a duty on the part of ICANN to oversee Network Solutions. Plaintiff's reliance on these matters must be disregarded. *Capina v. Liberty Life Ins., Inc.*, 2010 WL 5608851, at *1 (S.D. Fla. Dec. 6, 2010) (review is limited to matters within the four corners of the complaint).

of the complaint and not matters outside the complaint without converting the motion to dismiss to a motion for summary judgment”.) (citation omitted).

In applying the foreseeable “zone of risk” test, courts focus on the likelihood that a defendant’s conduct will result in the type of injury suffered by the plaintiff. *Palm Beach-Broward Med. Imaging Ctr., Inc. v. Cont’l Grain Co.*, 715 So. 2d 343, 345 (Fla. 4th DCA. 1998). Here, Plaintiff was allegedly injured when a court-appointed receiver neglected to timely renew fourteen domain name registrations with a domain name registrar. Am. Compl., ¶¶ 36, 39-40. Based on the receiver’s inaction, the domain name registrations were automatically auctioned off, which allegedly caused the receiver to lose assets held for the benefit of Plaintiff’s creditors. *Id.* That ICANN’s administration of the domain name system somehow renders this type of injury to Plaintiff foreseeable is simply nonsensical.⁴

V. CONCLUSION

For all of the reasons set forth above, ICANN respectfully requests that the Court grant its motion to dismiss in its entirety, without leave to amend.

⁴ The three cases Plaintiff cites in his opposition to ICANN’s motion to dismiss are inapposite. *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989) stands for the unremarkable proposition that a person is owed a duty of care by the police officer when he is directed to stop (and therefore is in custody). *City of Pinellas Park v. Brown*, 604 So. 2d 1222 (Fla. 1992) held that the police owed a duty of care to innocent motorists killed in a high speed chase of a traffic violator, because a high speed chase involving a large number of vehicles was likely to result in injury to a foreseeable victim. And the court in *Henderson v. Bowden*, 737 So. 2d 532 (Fla. 1999) found that the sheriff’s deputies owed a duty of care to passengers of a vehicle stopped for a DUI where the sheriff’s deputies negligently allowed one of the passengers to drive to a nearby convenient store to call his parents even though he was more intoxicated than driver. Here, by contrast, Plaintiff’s position is that ICANN’s administration of the domain name system led to the foreseeable risk that an unknown court-appointed receiver could fail to timely renew domain name registrations with a domain name registrar, resulting in that registrar auctioning off such domain names, thereby causing the receiver to lose assets held for the benefit of Plaintiff’s creditors. The facts alleged here do not even come close to the facts alleged in *Kaisner*, *City of Pinellas Park*, or *Henderson*. Plaintiff’s cases are inapposite and do not establish that ICANN owed a duty of care to Plaintiff.

Dated: April 18, 2011

Respectfully submitted,

/s/ Maria H. Ruiz

Maria H. Ruiz

Florida Bar No. 182923

MRuiz@kasowitz.com

KASOWITZ BENSON TORRES &

FRIEDMAN LLP

1441 Brickell Avenue, Suite 1420

Miami, FL 33131

Telephone: (786) 587-1044

Facsimile: (305) 675-2601

Kathleen P. Wallace

(Admitted Pro Hac Vice)

Jones Day

555 S. Flower Street, 50th Floor

Los Angeles, CA 90071

213-489-3939

Fax: 213-243-2539

Email: kwallace@jonesday.com

*Attorneys for Defendant Internet Corporation
for Assigned Names and Numbers*

Attorneys for Defendant

INTERNET CORPORATION FOR

ASSIGNED NAMES AND NUMBERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail and regular mail on Plaintiff and via the Court's CM/ECF system on all remaining persons on the Service List below on April 18, 2011.

John Zuccarini (Plaintiff, pro se)
190 SW Kanner Highway
Stuart, FL 34997

Jamie Michelle Roos
jhertz@steinsperling.com
Florida Bar No. 694231
Timothy B. Hyland
thyland@steinsperling.com
(*Pro Hac Vice admission pending*)
Stein Sperling Bennett De Jong Driscoll & Greefeig, PC
25 West Middle Lane
Rockville, MD 20851
301-838-3326
Fax: 301-354-8326
Attorneys for Defendants Network Solutions, LLC and NameJet, LLC

Kathleen P. Wallace
(*Admitted Pro Hac Vice*)
Jones Day
555 S. Flower Street, 50th Floor
Los Angeles, CA 90071
213-489-3939
Fax: 213-243-2539
Email: kwallace@jonesday.com
Attorneys for Defendant Internet Corporation for Assigned Names and Numbers

/s/ Maria H. Ruiz

Maria H. Ruiz