

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

GRAHAM SCHREIBER,)	
)	
Plaintiff,)	
)	No. 1:12-cv-00852-GBL-JFA
v.)	
)	
LORRAINE LESLEY DUNABIN,)	
CENTRALNIC, LTD.,)	
NETWORK SOLUTIONS, LLC,)	
VERISIGN, INC.,)	
INTERNET CORPORATION FOR ASSIGNED)	
NAMES AND NUMBERS, and)	
DEMAND MEDIA, INC., D/B/A/ ENOM, INC.,)	
BULKREGISTER, INC.)	
)	
Defendants.)	

**DEFENDANT NETWORK SOLUTIONS LLC’S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF’S COMPLAINT**

Brian J. Winterfeldt (pro hac vice App. pending)
Abigail Rubinstein (pro hac vice App. pending)
Jeremy D. Engle (VA Bar No. 72919)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel. No.: (202) 429-3000
Fax No.: (202) 429-3902
jengle@steptoe.com

Counsel for Defendant Network Solutions, LLC

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**DEFENDANT NETWORK SOLUTIONS LLC’S MEMORANDUM
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Defendant, Network Solutions, LLC (“Network Solutions”) respectfully submits this memorandum of law in support of its motion to dismiss the Complaint filed by Graham Schreiber (“Mr. Schreiber” or “Plaintiff”) pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(5) and 12(b)(6).

I. INTRODUCTION

The Plaintiff, Graham Schreiber is a Canadian individual and apparently the owner of Landcruise Ltd. a Canadian corporation that rents motor homes in Canada.

Mr. Schreiber brought the *pro se* action against Lorraine Dunabin (“Dunabin”), a resident and citizen of the United Kingdom. Dunabin allegedly began a United Kingdom company, Alco Leisure Ltd that uses the name Landcruise for its business that rents motor homes in the United Kingdom. Mr. Schreiber also objects to Alco’s use of the word Landcruise in the third level¹ domain name *Landcruise.uk.com* by Dunabin.

Construing the Complaint in a light most favorable to Plaintiff, it appears that he is claiming trademark infringement, dilution and cybersquatting of the mark Landcruise and related claims as a result of Dunabin’s use of Landcruise in the United Kingdom and registration of the domain name *Landcruise.uk.com*. Mr. Schreiber claims he is damaged because he is blocked from using the Landcruise trademark in the United Kingdom. (Compl. at 4).

Most fundamentally, Mr. Schreiber’s claims against Dunabin fail because trademark rights are territorial and his trademark rights in Canada do not extend to the United Kingdom and

¹ A third level domain is two dots to the left of the first level .com domain.

he does not have the right to stop Dunabin from continuing to use the Landcruise mark in the United Kingdom. Further, neither Mr. Schreiber's trademark rights nor his ownership of the *Landcruise.com* domain name give him any rights to object to Dunabin/Alco's use of the *Landcruise.uk.com* domain name.

Mr. Schreiber's claims against Dunabin must fail because this Court has no jurisdiction over claims between foreign nationals concerning trademark rights in the United Kingdom that are governed by United Kingdom law.

Mr. Schreiber's claims against Network Solutions as well as the other defendants are secondary and dependent on the validity of the claims against Dunabin. Essentially, Mr. Schreiber claims that Network Solutions and the other defendants who have some role in the issuance or maintenance of the *Landcruise.uk.com* domain name have contributed to the infringement and violation of his rights by the *Landcruise.uk.com* domain name owned by Dunabin. Since Mr. Schreiber has no rights that are infringed by that domain name, his claims against Network Solutions must fail.

II. RELEVANT FACTS

A. Graham Schreiber and His Business

Graham Schreiber ("Mr. Schreiber" or "Plaintiff") of Canada, filed this suit *pro se* on July 31, 2012. (DE 1). Mr. Schreiber has a Canadian-based company named "Landcruise Ltd" that he has operated for the past fourteen years and that sells and/or rents motor homes in Canada. (Compl. at 5, 14); *see also* (Compl. Ex. 1 at 6).

In 1998, Mr. Schreiber registered the domain name *Landcruise.com* using Network Solutions as his domain name registrar. He has filed a pending trademark application for the mark LANDCRUISE with the United States Patent and Trademark Office for use in connection with the rental of motor homes. (Compl. 15). Mr. Schreiber claims that Landcruise Ltd. has

been conducting business on the Internet since September 8, 2006, and with its webhosting and email service managed by Network Solutions. (*Id.* at 4, 13; see also Compl. Ex. 1).

B. The Alleged Direct Infringement By Lorrain Dunabin

Lorrain Dunabin (“Dunabin”) is a citizen of the United Kingdom and operates a business in the United Kingdom named “Alco Leisure Ltd.” with an address of 1 Chalder Farm Cottages, Chalder Lane, Sidesham, West Sussex, P20 7RN in the United Kingdom. (Compl. at 4). Dunabin uses the Landcruise name and mark in connection with her motor home rental business located in the United Kingdom. (Compl. at 4). Dunabin has also registered the domain name *Landcruise.uk.com* through the domain name registrar eNOM. (Compl. at 5).

Mr. Schreiber alleges that “Lorraine Dunabin willfully registered *Landcruise.uk.com* which is “abusive” – “infringing” – “Look-a Like” registration, because she, new [sic] of my business, having visited prior to purchasing the name “Landcruise” within the domain name of UK.com.” (Compl. at 4).

Mr. Schreiber also asserts that he has been harmed by Dunabin because she owns the trademark rights to Landcruise in the United Kingdom. (Compl at 4) (“I am damaged, as owner of LANDCRUISE/LANDCRUISE.COM... Because Lorain owns the Trademark of “Landcruise” in the United Kingdom, I’m essentially blocked from entry ... returning ... to present my branded business name, in the UK, since discovery.”).

C. Facts Concerning Network Solutions

As stated in the Complaint, Network Solutions is an accredited domain name register. (Compl. at 11). Since at least as early as 1993, Network Solutions has registered over 3 million domain names. (*See* Ex. 1 to Compl.)

A domain name registrar is an organization or commercial entity that manages the reservation of Internet domain names. A domain name registry is a database of all the domain

names registered in a top level domain. A registry operator is the part of the Domain Name System (DNS) of the Internet that keeps the database of domain names, and generates the zone files which convert domain names to IP addresses. Registrants of second-level domains sometimes act as a registry by offering sub-registrations to their registration. In other words, the domain registrar is the service that takes a consumer's registration information and reserves the domain from the main registry. The registrar will then submit the technical information to the registry operator. The registry operator maintains the database and provides the technical information to locate the domain name and the accompanying website.²

D. Plaintiff's Attempt to Serve Network Solutions

Corporation Service Company is Network Solutions' registered agent for service of process. Corporation Service Company is located at 2711 Centerville Road, Suite 400, Wilmington, Delaware. (Declaration of Norma Wheeler attached as Exhibit 1, ¶ 4).

On or about August 17 or August 20, 2012, Network Solutions received a summons and complaint from Plaintiff at its Herndon, Virginia office. The Summons and Complaint were first mailed via United States Postal Service, Federal Express, or United Parcel Service to Network Solutions in Virginia. (*Id.* ¶ 5). The summons and complaint were then mailed to Web.com at its principal place of business in Jacksonville, Florida, by Mark Cyrus, a facilities employee at Network Solutions, as is the normal course of business for any and all mail delivered to Network Solutions. (*Id.* ¶6).

² See *American Girl, LLC v. Nameview, Inc.*, 381 F. Supp. 2d 876, 878 (E.D. Wis. 2005) (explaining how the Internet operates and defining domain name registrar and domain name registry.") (citing TORSTEN BETTINGER, *DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK* 3–6 (2005); JANE K. WINN & BENJAMIN WRIGHT, *THE LAW OF ELECTRONIC COMMERCE* § 11.03[A] (4th ed. 2005).

The Summons was not addressed to any officer, director or employee of the company or any agent authorized to accept service of process on behalf of Web.com; rather, it was addressed to Network Solutions. (*Id.* ¶ 7).

Network Solutions has not been contacted by Corporation Service Company or the Virginia State Corporation Commission regarding service of Plaintiff's summons and complaint. (*Id.* ¶ 8-11).

III. ANALYSIS

A. The Standard

This motion is brought under Federal Rule 12(b)(1) for lack of subject matter jurisdiction, Federal Rule 12(b)(5) for insufficient service of process, and Federal Rule 12(b)(6) for failure to state a claim. The standard to determine a motion to dismiss pursuant to 12(b)(1) and 12(b)(6) is the same. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982) (emphasis added) (holding if the Rule 12(b)(1) motion is a facial challenge attacking subject-matter jurisdiction by asserting that “a complaint simply fails to allege facts upon which subject matter jurisdiction can be based[,]” then “the facts alleged in the complaint are assumed to be true and the plaintiff ... is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.”).

A motion to dismiss pursuant Rule 12(b)(6) tests the legal sufficiency of a complaint and generally should be granted unless an adequately stated claim is “supported by showing any set of facts consistent with the allegations in the complaint.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). A court must construe the complaint in the light most favorable to the plaintiff and construe the facts asserted as true. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). A pleading, however, that “offers labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations and citations omitted). Plaintiffs “must provide enough detail to illuminate

the nature of the claim and allow defendants to respond.” *Jackson v. Michalski*, 10-cv-00052, 2011 WL 3679143, at *5 (W.D. Va. 2011).

In the case of a *pro se* plaintiff, like all plaintiffs, the *pro se* plaintiff has to plead facts that support a claim and the court and the defendants do not have any obligation to search the complaint for a viable claim. The court is not required “to conjure up questions never squarely presented to them.” *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) (“[d]istrict judges are not mind readers”); *Brock v. Carroll*, 107 F.3d 241, 243 (4th Cir. 1997) (Luttig, J., concurring) (district court is not the *pro se* plaintiff's advocate, *sua sponte* developing statutory and constitutional claims the plaintiff failed to raise on the face of the complaint (citation omitted)); *see also Jackson v. Michalski*, No. 10-cv-00052, 2011 WL 3679143, at *5 (W.D. Va. 2011) (citing *Holsey v. Collins*, 90 F.R.D. 122, 123-24 (D. Md. 1981) (“observing that voluminous, repetitive, and conclusory complaint ‘places an unjustifiable burden on defendants to determine the nature of the claim against them and to speculate on what their defenses might be,’ and ‘imposes a similar burden on the court to sort out the facts now hidden in a mass of charges, arguments, generalizations and rumors’”)); *see also Whitlock v. Street*, No. 12cv95, 2012 U.S. Dist. LEXIS 120795, at *12 (E.D. Va. Aug. 24, 2012) (noting courts recognize a plaintiff “can plead himself out of court by pleading facts that show he has no legal claim”).

B. There Is No Subject Matter Jurisdiction

1. The Lanham Act Cannot Be Applied Extraterritorially

The underlying facts, for which the entire Complaint is based, are that by using Landcruise in the United Kingdom and registering *Landcruise.uk.com*, Dunabin has harmed Mr. Schreiber because he is now barred from using Landcruise in the United Kingdom and registering Landcruise in the *uk.com* second level domain name space. (Compl. at 4). As a result of Dunabin's actions in the United Kingdom, Mr. Schreiber asserts claims of trademark

infringement (15 U.S.C. § 1125(a)), dilution (15 U.S.C. § 1125(c)) and cybersquatting (15 U.S.C. § 1125(d)) under the Lanham Act (15 U.S.C. § 1051 et seq.). The subject matter jurisdiction that enables this Court to decide these claims is through the Lanham Act. All of the other claims, which appear to be common law and Virginia State law infringement and dilution, breach of contract, fraud and “shaking down” would fall under “Supplemental Jurisdiction” pursuant to 28 U.S.C § 1367 because they are so related and “part of the same case and controversy.” *See id.*

While there are cases where the Lanham Act may be applied extraterritorially, “only foreign acts having as significant effect on U.S. commerce are brought under its compass.” *Tire Engineering and Distribution LLC v. Shandong Linhleng Rubber Co., Ltd.*, 682 F.3d 292, 310 (4th Cir. 2012) *see also Nintendo of America, Inc. v. Aeropower Co.,Ltd.*, 34 F.3d 246, 250-251 (4th Cir. 1994). The Fourth Circuit has explained:

While a court may issue an injunction having extraterritorial effect in order to prevent trademark violations under the Lanham Act, it should do so only where the extraterritorial conduct would, if not enjoined, have a significant effect on United States commerce, and then only after consideration of the extent to which the citizenship of the defendant, and the possibility of conflict with trademark rights under the relevant foreign law might make issuance of the injunction inappropriate in light of international comity concerns.

Nintendo, 34 F.3d at 250-251.

This suit is a complaint from a citizen of Canada, regarding use of a trademark in the United Kingdom by a citizen of the United Kingdom. As the Plaintiff states in his complaint:

I am damaged, as owner of LANDCRUISE/ LANDCRUISE.COM ... Because Lorain owns the Trademark of “Landcruise” in the United Kingdom, I’m essentially blocked from entry ... returning ... to present my branded business name, in the UK, since discovery.

The harm that Plaintiff is alleging is that he cannot expand into the United Kingdom. Plaintiff does not allege any effect on United States commerce or that he cannot use Landcruise in the United States or that he cannot conduct business in the United States. There is no effect, let alone a significant effect, on United States commerce. Moreover, the defendant is a citizen of the United Kingdom and the plaintiff is a citizen of Canada. Thus, no citizen of the United States is being harmed, such that the Lanham Act should be applied extra-territorially to a defendant located in the United Kingdom conducting business in the United Kingdom.

In *Nintendo*, the Fourth Circuit vacated an extraterritorial application of the Lanham Act even though the infringing conduct in Canada and Mexico had a significant impact on United States commerce because the lower court failed to consider the defendant's citizenship and the possibility of conflict with Canadian or Mexican law. Similarly here, the defendant is a citizen of the United Kingdom and the Complaint states that the defendant has trademark rights in that jurisdiction. Thus, there is a real and strong possibility that any decision by this Court would conflict with trademark rights under the law of the United Kingdom and make issuance of the injunction or an award of damages inappropriate in light of international comity concerns.

Additionally, it is possible for the "significant effects requirement to be satisfied by extraterritorial conduct even when that conduct will not cause confusion among U.S. consumers, ... where sales to foreign consumers would jeopardize the income of an American company" *Tire Engineering*, 682 F.3d at 310. In *Tire Engineering*, the Fourth Circuit found that the Lanham Act could not apply extraterritorially because the plaintiffs were not United States corporations and lack a pervasive system of domestic operations. Therefore, the Lanham Act could not provide Plaintiff relief. Similarly here, the plaintiff is a citizen of Canada with a business located in Canada. Plaintiff has not alleged a pervasive system of operations in the

United States. In fact, Plaintiff has made no allegations regarding his conducting business in or with the United States. Therefore, the Lanham Act cannot provide Mr. Schreiber with relief for his claims against Dunabin's actions in the United Kingdom.

It is not uncommon for Courts to find that the Lanham Act does not apply extraterritorially and therefore there is no subject matter jurisdiction. *See e.g., McBee v. Delica Co., Ltd.*, 75 U.S.P.Q.2d 1609 (1st Cir. 2005) (upholding lower Court's decision to dismiss for lack of subject matter jurisdiction Lanham Act dispute between U.S. citizen and Japanese company operating a website); *see also, Roquette America, Inc. v. Aylum N.V.*, No. 03-0434, 2004 WL 1488384 *6 (S.D.N.Y July 1, 2004) ("The gravamen of this complaint is a dispute between European rivals, Roquette and Amylum [sic], that arose in Europe. Despite some arguable minor connections to the United States, the crucial acts of unfair competition all took place in Europe. Because the Lanham Act does not apply extraterritorially, plaintiffs' Lanham Act claim must be dismissed for lack of subject matter jurisdiction.").

Because the Lanham Act does not apply extraterritorially to Dunabin's actions in the United Kingdom and its application may conflict with United Kingdom law, relief cannot be granted to Mr. Schreiber under the Lanham Act. Thus, the Court should dismiss the complaint for lack of subject matter jurisdiction and should not exercise supplemental jurisdiction over Plaintiff's remaining related claims. *Bhd. of Locomotive Eng'rs Div. 269 v. Long Island R.R. Co.*, 85 F.3d 35, 39 (2d Cir.1996) ("When all bases for federal jurisdiction have been eliminated ... the federal court should ordinarily dismiss the state claims." (citation omitted)).

Accordingly, the complaint should be dismissed with prejudice for lack of subject matter jurisdiction.

C. Plaintiff Fails To State A Claim For Relief Under The Lanham Act

1. Plaintiff Does Not Allege Valid Trademark Rights in the United States

Assuming, *arguendo*, that there is subject matter jurisdiction, Mr. Schreiber's claims fails to assert claims of trademark infringement,³ dilution,⁴ and cybersquatting⁵ under the Lanham Act, because he fails to assert ownership of a valid trademark in the United States. Mr. Schreiber bases his trademark rights on his use of Landcruise in Canada and his registration of the domain name *Landcruise.com*. Such actions do not create valid trademark ownership rights in the United States. In the United States, trademark rights are solely acquired through use in commerce. *See Emergency One, Inc. v. American Fire Eagle Engine Co., Inc.* (4th Cir. 2003) (citing *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1105 (6th Cir. 1991) ("ownership rights flow only from prior appropriation and actual use in the market")). Plaintiff fails to assert any use of Landcruise in the United States.

a. Use of Landcruise in Canada Does not Create Trademark Rights in the United States

Use and registration of a trademark in a foreign country, such as Canada, does not create trademark rights in the United States. "It has long been recognized that use of a foreign mark in

³ "In order to assert a claim of trademark infringement and unfair competition under §§ 1114 and 1125(a), and (c) of the Lanham Act, as an initial matter plaintiff must allege that it owns a valid trademark. *See Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 259 (4th Cir. 2007)

⁴ "To state a dilution claim under the [Trademark Dilution Revision Act], a plaintiff must show: (1) that the plaintiff owns a famous mark that is distinctive ..." *Vuitton*, 507 F.3d at 264-65.

⁵ To establish a cause of action under the Anti-Cybersquatting Consumer Protection Act ("ACPA"), a plaintiff must prove that: (i) it has a valid trademark entitled to protection.... *B&J Enters. Ltd. v. Giordano*, No. 06-1235, 2008 U.S. Dist. LEXIS 116688 (D. Md. Mar. 11, 2008) (citing *Maruti.com v. Maruti Udyog Ltd.*, 447 F. Supp. 2d 494, 497 (D. Md. 2006)); *see also DaimlerChrysler v. The Net Inc.*, 388 F.3d 201, 204 (6th Cir. 2004).

a foreign country creates no trademark rights under United States law.” *International Bancorp, LLC v. Societe des Bains de Mer et duCercle Des Etrangers A Monaco*, 329 F.3d 359 (4th Cir. 2003); *see also Person’s Co.*, 900 F.2d at 1568-69 (stating “foreign use of a foreign trademark creates no rights under United States law”). The fact that Mr. Schreiber has used Landcruise in Canada in connection with his business there for over a decade, does not create trademark rights in the United States.

b. Registration of the Domain Name Landcruise.com Does Not Create Trademark Rights in the United States

Moreover, Mr. Schreiber’s registration of the *Landcruise.com* domain name does not create trademark rights in the United States. A domain name is a place on the Internet where a website is located. 1 J. THOMAS MCCARTHY, MCCARTHY OF TRADEMARKS AND UNFAIR COMPETITION, § 7:17.50 at 7-29 (4th ed. 2012). “The mere registration of a designation as a domain name with the intent to use it commercially does not establish “use” of the designation as a trademark.” *Brookfield Commc’ns v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1052 (9th Cir. 1999). *See also, Newborn v. Yahoo! Inc.*, 391 F. Supp. 2d 181 (D.D.C. 2005) (“The mere registration of a domain name with a domain name registrar by itself does not confer trademark rights.”).

Plaintiff appears to consider his registration of the *Landcruise.com* domain name through Network Solutions as equivalent to a federal trademark registration through the United States Patent and Trademark Office. According to the Complaint, “Network Solutions furnished [Mr. Schreiber with] a “Certificate of Registration {RegistrationPlus} “Certificate of Mark” {*Landcruise.com*} incorporating the ‘Landcruise’ and ‘.com’ into the new business trading environment,” along with a “Publication number,” called a ‘NIC Handle,’ for both Landcruise as LC631-ORG ... operating at the pleasure of the US Congress [and] Department of Commerce

... in 1998 and currently.” (Compl. at 13-14). Plaintiff asserts that domain name registration authorities, including Registrars and Registry Operators such as Network Solutions, Verisign and ICANN, “secure[] names for use in commerce” in an “equivalent” or “identical practice” to the United States Patent and Trademark Office. (*Id.*)

In fact, such actions do not constitute use in commerce in the United States such that Plaintiff would acquire trademark rights in this country. “Courts have noted that “[a]nyone may register any unused domain name upon payment of a fee. Of course, this registration in no way trumps federal trademark law; registration of a mark or name with [Network Solutions, Inc.] does not itself confer any federal trademark rights on the registrant.” *Washington Speakers Bureau, Inc. v. Leading Authorities, Inc.*, 33 F. Supp. 2d 488, 491 n. 3 (E.D.Va.1999).

Mr. Schreiber appears to erroneously believe that registration of the *Landcruise.com* domain name and putative use of the Landcruise trademark in Canada entitles him to exclusive worldwide rights to the Landcruise trademark, as well as a monopoly over all second level domain names and subdomain names—everything “to the left of the dot”, such as *Landcruise.uk.com*. It is well established that one person can own rights to the Landcruise mark in Canada, and another may certainly own rights to the same Landcruise mark in the United Kingdom. *Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha*, 754 F.2d 591, 599 (5th Cir.1985)). (“trademark rights are territorial and exist according to the terms of each country's laws.”); *see also Person's Co. v. Christman*, 900 F.2d 1565, 1568-69, 14 U.S.P.Q.2d 1477 (Fed.Cir.1990) (“The concept of territoriality is basic to trademark law; trademark rights exist in each country solely according to that country's statutory scheme.”). Thus, Mr. Schreiber may have valid rights in the Landcruise mark in Canada and at the same time Dunabin may have valid rights in the Landcruise mark in the United Kingdom.

c. **Plaintiff Does Not Allege Use in the United States**

In order to allege ownership of a valid trademark in the United States—whether the mark is registered or unregistered—a plaintiff must demonstrate actual use of the mark in commerce. *See Emergency One, Inc. v. American Fire Eagle Engine Co., Inc.*, 332 F.3d at 267 (citing *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d at 1105 (“ownership rights flow only from prior appropriation and actual use in the market”)); *see also* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, §§ 16:1, 16.18 (4th ed. 2003). “[U]se in commerce” is defined in the Lanham Act as “the bona fide use of a mark in the ordinary course of trade ... on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce” 15 U.S.C. § 1127.

Plaintiff appears to be asserting use in the United States based on his registration of a domain name and the subsequent web hosting of the domain name with Network Solutions located in Virginia. (Compl. at 3) (“[i]n 2006 Landcruise the business began full trading from Virginia, with web-hosting [and] email, managed by Network Solutions” whereby “Landcruise became bona fide, as doing business in Virginia...”). He further states that the domain name “has been on FTP servers, hosted by Network Solutions, conducting business to the World, via Cyberspace,” that it has been “continuously placed on the ‘registry’ purchase ... at an ‘arms length’ via ownership of privilege, the ‘mark’ having been in continuous business, just shy of eleven (11) years....” (Compl. at 11-12).

Even when viewed in a light most favorable to Plaintiff, these statements fail to establish sufficient use of the Landcruise mark in United States commerce. It is true that the Internet is available worldwide. However, operating a website available on the Internet does not necessarily constitute use in commerce in the United States. The website must have an effect on United States commerce and consumers. *See e.g., Specht v. Google, Inc.*, 758 F. Supp. 2d 570,

593 (N.D. Ill. 2010) (“Allowing a mark owner to preserve trademark rights by posting the mark on a functional yet almost purposeless website, at such a nominal expense, is the type of token and residual use of a mark that the Lanham Act does not consider a bona fide use in commerce.”).

The fact that Mr. Schreiber operates a website at the domain name *Landcruise.com* is not the equivalent of using Landcruise in connection with the *bona fide* offering of goods or services in United States commerce.

Unfortunately, Mr. Schreiber’s use of Landcruise in Canada and registration and operation of the website *Landcruise.com* do not constitute use in commerce in the United States such that Plaintiff would acquire trademark rights in this country. Accordingly, Plaintiff fails to assert valid trademark rights in the United States and his claims for trademark infringement, dilution and cybersquatting must be dismissed.

2. Plaintiff Fails to Allege Critical Elements of Trademark Infringement, Dilution and Cybersquatting

Even if Plaintiff has established valid trademark rights, his claims for infringement, dilution and cybersquatting must fail because Plaintiff has failed to establish critical elements of such claims.

a. There is No Likelihood of Confusion

In order for there to be trademark infringement, Plaintiff must allege that Dunabin's use of Landcruise in the United Kingdom and registration of *Landcruise.uk.com* creates a likelihood of confusion among consumers in the United States. *CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263 (4th Cir. 2006). The Complaint does not discuss any effect that Dunabin’s use of Landcruise, or registration of *Landcruise.uk.com* may have on consumers in the United States or commerce in the United States. Thus, the claims for direct trademark infringement should be

dismissed. *See Jackson v. Michalski*, 2011 WL 3679143, at *14 (dismissing *pro se* plaintiff's complaint where "under the facts alleged no confusion is possible").

b. Landcruise Is Not a Famous Mark

Similarly, the critical elements for a claim of dilution is that the Plaintiff's mark is famous and that as a result of the use of the defendant's mark the distinctiveness of the famous mark is likely to be impaired or the reputation of the famous mark is likely to be harmed. 15 U.S.C. § 1125(c)(1). *See also Vuitton*, 507 F.3d at 265.

A mark is "famous" when it is "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." 15 U.S.C. § 1125(c)(2)(A) (the determination of fame includes *inter alia* the amount, volume and geographic extent of sales of services offered under the mark and the extent of actual recognition of the mark).

Plaintiff does not assert that his mark Landcruise is famous. On the contrary, he appears to immediately concede that the mark is not famous—"while 'Famous Brands' are hard to establish or prove; 'Incontestable' seems to be more openly embraced" and "requires only five (5) years of uninterrupted or contested use." (Compl. at 14). The Trademark Dilution Revision Act clearly sets forth the requisite elements to assert a claim of dilution as well as the factors to establish a famous mark,⁶ which have nothing to do with the incontestable status of a mark.

⁶ "(A) For purposes of paragraph (1), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following: (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties. (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark. (iii) The extent of actual recognition of the mark" 15 U.S.C. § 1125(c)(2).

Plaintiff makes no attempt to address these elements. He admits that his mark is not famous. He fails to allege any facts to support a claim that Dunabin's mark gives rise to an association with his mark in the minds of consumers in the United States. And he also fails to allege any facts that such an association is likely to blur or tarnish the reputation of his mark. Accordingly, his claims for trademark dilution should be dismissed.

c. There Is No Bad Faith

The critical element to establish cybersquatting, is that the defendant had registered the domain name with "bad faith intent to profit." *B&J Enters, Ltd. v. Giordano*, No. 06-1235, 2008 U.S. Dist. LEXIS 116688 (D. Md. Mar. 11, 2008) (citing *Maruti.com v. Maruti Udyog Ltd.*, 447 F. Supp. 2d 494, 497 (D. Md. 2006)); see also *DaimlerChrysler v. The Net Inc.*, 388 F.3d at 204. The Anti-Cybersquatting Consumer Protection Act ("ACPA") also does not generally apply to subdomain names. See e.g. *Goforit Entm't LLC v. Digimedia.com L.P.*, 750 F. Supp. 2d 712 (N.D. Tex. 2010).

As discussed above, Plaintiff does not allege ownership or use in commerce of a valid trademark in the United States. Plaintiff admits that Dunabin is the owner of trademark rights in the United Kingdom for Landcruise. Generally, when an individual has legitimate intellectual property rights, bad faith intent cannot be found. Indeed, one of the factors weighing against a finding of bad faith set forth in the ACPA is "the trademark or other intellectual property rights of the person, if any, in the domain name." 15 U.S.C. § 1125(d)(1)(B)(i). Accordingly, the claims for cybersquatting should be dismissed with prejudice.

3. There Is No Contributory Infringement

**a. If there Is No Claim for Direct Infringement
There is No Claim For Contributory Infringement**

Clearly, as set forth above Plaintiff does not have cognizable claims for direct infringement, dilution and cybersquatting. Because there are no underlying claims for trademark infringement and dilution, there can be no contributory claims against Network Solutions and the other defendants. *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 163 (4th Cir. 2012) (“for there to be liability for contributory trademark infringement, the plaintiff must establish underlying direct infringement”).

b. The Safe Harbor Provisions of the Lanham Act Apply

Even if viewing the complaint in a light most favorable to Plaintiff, and if the Court finds Mr. Schreiber has valid direct claims, he does not state a cognizable claim for contributory infringement against Network Solutions.

The Lanham Act provides a Safe Harbor Provision for Domain Name Registrars, Domain Name Registries and other domain name registration authorities. 15 U.S.C. §1114(2)(D). The statute provides:

A domain name registrar, a domain name registry, or other domain name registration authority that takes any action described under clause (ii) affecting a domain name shall not be liable for monetary relief or, except as provided in subclause (II), for injunctive relief, to any person for such action, regardless of whether the domain name is finally determined to infringe or dilute the mark.

Id.

A domain name registrar or registry is only liable if there is a “showing of bad faith intent to profit from such registration or maintenance of the domain name.” 15 U.S.C. § 1114 (2)(D)(iii).

As the Fourth Circuit explained “Congress intended expressly to limit the liability of domain name registrars under the Act as long as the domain name registrars comply with the conditions stated in § 1114 (2)(D)(i). *Hawes v. Network Solutions, Inc.*, 337 F.3d 377 (4th Cir. 2003).

Network Solutions is a domain name registrar. Its role in this Complaint is that it is the registrar for Plaintiff’s *Landcruise.com* domain name. Network Solutions has not taken any action outside the normal course of business. Accordingly, the safe harbor provisions apply to Network Solutions and the claims against it should be dismissed.

c. Network Solutions Does Not Have Sufficient Control Over Dunabin For there to Be Claims of Contributory Liability for Trademark Infringement, Dilution of Cybersquatting

Moreover, for there to be contributory liability under the Lanham Act for infringement, dilution,⁷ or cybersquatting,⁸ “a defendant must: (1) intentionally induce another to infringe a trademark, or (2) continue to supply a product to a third party with actual or constructive knowledge of the infringement.” *Size, Inc. v. Network Solutions, Inc.*, 255 F. Supp. 2d 568, 572 (E.D. Va. 2003) (citing *Inwood Labs., Inc. v. Ives Lab., Inc.*, 456 U.S. 844, 854 (1982)). Most notably, domain name registrars, such as Network Solutions, generally lack the requisite degree of monitoring or control over the activity of domain name registrants to trigger liability for contributory trademark infringement. *See Size, Inc. v. Network Solutions, Inc.*, 255 F. Supp. 2d at 573 (finding that “[Network Solutions] is simply a routing service, and does not supply

⁷ Plaintiff would need to establish the same facts as for contributory infringement. *See Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 526 (S.D.N.Y. 2008).

⁸ “In general, courts apply the elements of a claim of contributory infringement to a claim of contributory cybersquatting under the ACPA.” *Petroliam Nasional Berhad v. GoDaddy.com, Inc.*, No. 09-5939, 2010 U.S. Dist. LEXIS 99963, at *8 (N.D. Cal. Sept. 9, 2010) (citing *Solid Host, NL v. NameCheap, Inc.*, 652 F. Supp. 2d 1092, 1112 (C.D. Cal. 2009)).

domain name combinations any more than the Postal Service supplies street addresses to its customers”).

Domain name registrars are not obligated to examine domain names to ensure that the registrant is not violating the rights of a third party. A registrar who simply accepts the registration of a domain name generally is not liable for trademark infringement or dilution, unfair competition, or violations of the ACPA. *Bird v. Parsons*, 289 F.3d 865, 877–81 (6th Cir.2002) (finding domain name registrar not liable for trademark infringement, unfair competition, trademark dilution, or violations of ACPA); *see also Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 956–67 (C.D.Cal.1997), *aff'd*, 194 F.3d 980 (9th Cir.1999) (finding domain name registrar not liable for trademark infringement, unfair competition, trademark dilution, or contributory infringement).

Network Solutions is a domain name registrar. Network Solutions does not have control over Dunabin or her use of Landcruise or registration of *Landcruise.uk.com*. In fact, Dunabin used a different registrar, eNom, to register the domain *Landcruise.uk.com*. The mere operation and maintenance of a domain name registry does not create the requisite degree of monitoring or control to trigger contributory liability. *See id.* Thus, Network Solution’s actions as a domain name registrar do not create a cognizable claim for contributory infringement as a result of Dunabin’s registration of the *Landcruise.uk.com* domain name. Accordingly, Plaintiff’s claims for contributory liability under the Lanham Act should be dismissed with prejudice.

D. To the Extent Plaintiff Asserts Breach of Contract Against Network Solutions for “Conflicts” With the RAA, That Claim Must Be Dismissed.

Plaintiff does not formally allege a breach of contract claim against Network Solutions. However, to the extent Plaintiff may have asserted such a claim, it must be dismissed.

Plaintiff alleges that Network Solutions was in “conflict” with the 2009 Registrar Accreditation Agreement with ICANN (“RAA”). (*See* Compl. at 11-12). The specific details of those meritless allegations are irrelevant because Plaintiff lacks standing to assert that any conflicts with the RAA inure to his benefit in the form of a breach of contract. Plaintiff does not allege, nor could he, that he is either a party to the RAA or a third-party beneficiary. Thus, any breach of contract claim relating to the RAA fails as a matter of law. *See Trigo v. Travelers Commercial, Ins. Co.*, No. 10-00028, 2010 U.S. Dist. LEXIS 92913, at *14-15 (W.D. Va. Sept. 7, 2010) (stating one who is not party or in privity lacks standing to sue under an instrument absent exception to common law rule); *Radosevic v. Virginia Intermont College*, 651 F. Supp. 1037, 1039 (W.D. Va. 1987) (stating four corners of a contract evidence whether contracting parties clearly and definitely intended to directly benefit third party and absent such indication one lacks standing to sue under instrument) (citing *Obenshain v. Halliday*, 504 F. Supp. 946 (E.D. Va. 1980)).

Reinforcing Plaintiff’s lack of a claim, he cites the provision in the RAA expressly disclaiming any third-party beneficiaries to the contract.⁹ (Compl. at 16) (“Section 8.5 No Third Party Beneficiaries. This Agreement shall not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.”). Plaintiff merely asserts that he registered a domain name. This does not make him a party to the agreement, and as a result he cannot assert any basis for breach of contract. *See, e.g., Balsam v. Tucows Inc.*, 627 F.3d 1158, 1163 (9th Cir. 2010) (concluding that “the ‘No Third Party Beneficiaries’ clause unambiguously manifests an intent *not* to create any

⁹ Plaintiff does not even allege that he is referring to any particular agreement jointly signed by Network Solutions and ICANN, but rather, appears to refer to the generic RAA available on ICANN’s website.

obligations to third parties through the RAA” under California law). Accordingly, to the extent that Plaintiff is alleging a breach of contract claim against Network Solutions, it must be dismissed.

E. Plaintiff’s “Shaking Down” Claim Must Be Dismissed.

To avoid dismissal under Rule 12(b)(6), a complaint must allege facts stating a claim for relief that is “plausible on its face.” *Twombly*, 550 U.S. at 570; *see also Ashcroft*, 556 U.S. at 668-69; *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). *Twombly* and *Iqbal* thus “require that complaints in civil actions be alleged with greater specificity than previously was required.” *Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir. 2012) (citation omitted).

Plaintiff’s claim for “Shaking Down” must be dismissed as it fails to state a legally cognizable theory of potential liability. Even accepting the pled facts as true, there is no discernible legal wrong that can be deduced from the allegations of Network Solutions “purported (and unsupported) association with owning “‘shakedown’ domains of EU.com, CN.com . . .” (Compl. at 6); the “shakedown team at WIPO” (*id.*); and/or the alleged obligation to register second-level domains in other top-level domains (Compl. at 6, 8, 10, 12). None of these pseudo-factual allegations regarding a “GENTLE SHAKEDOWN” (Compl. at 12) state a claim for relief that is cognizable or plausible on its face. Therefore, Plaintiff’s claim for “Shaking Down” must also be dismissed.

F. Plaintiff’s Complaint Also Must Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(5) for Insufficient Service of Process

Pursuant to Fed. R. Civ. P. 12(b)(5), a complaint may be dismissed for insufficient service of process. Here, Plaintiff’s service of process on Network Solutions is insufficient

under federal and Virginia law because he served the summons and complaint via mail, Federal Express, or United Parcel Post.

Where the procedural requirements of sufficient process are not satisfied, a court lacks power to assert personal jurisdiction over the defendant. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (“[i]n the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant”); *Harding v. Williams Prop. Co.*, No. 96-2713, 1998 WL 637414, at *4 (4th Cir. Aug. 31, 1998); *Board of Trustees, Sheet Metal Workers’ Nat’l Pension Fund v. McD Metals*, 964 F. Supp. 1040, 1043-44 (E.D. Va. 1997). As numerous cases make clear, “the party on whose behalf service is made must establish its validity when challenged [and] to do so, he must demonstrate that the procedures employed satisfy the requirements of the relevant portions of Rule 4 and any other applicable law.” *E.g., Jackson*, 2011 WL 3679143, at *4; *see also* 4A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FED. PRAC. & PROC.* § 1083 (3d ed. 2002).

Inconsistent with federal and Virginia law, Plaintiff attempted to serve Network Solutions by Federal Express, First Class Mail or United Parcel Post. Under Fed. R. Civ. P. 4(h), service can be effected on a domestic corporation by delivering a copy of the summons and complaint to an officer, a managing or general agent, or an agent for process or by following the law for serving a summons of the state in which the district court is located or service is made. *See* Fed. R. Civ. P. 4(e)(1); 4(h). Under Virginia law, the only way to properly serve process on a corporation is by personal service on any officer, director or registered agent of the corporation, or by substitute service on the corporation’s registered agent, or where none is appointed or maintained or can be served, on the Clerk of the State Corporation Commission who becomes the agent. *See* Va. Code Ann. § 13.1-637; Va. Code Ann. § 13.1-836.

Here, Mr. Schreiber sent either via United States Postal Service, Federal Express, or United Parcel service the Summons and Complaint to Network Solutions' principal place of business in Herndon, Virginia. Wheeler Decl. ¶ 5. The summons was neither addressed for delivery nor delivered to any officer, director, managing or general agent, or any other agent authorized to accept service on behalf of the corporation. *Id.* ¶ 7. None of the service requirements established by Rule 4 or Virginia Code Sections 8.01-299, 13.1-637 or 13.1-836, have been complied with. Mr. Schreiber never served, attempted to personally serve, nor delivered the summons and complaint to any Network Solutions officer or director, managing or general agent, or its registered agent for service of process – Corporation Service Company. *Id.* ¶ 3-11. Similarly, there is no indication that any attempt was made by Mr. Schreiber to serve the corporation through the clerk of the Virginia State Corporation Commission. *Id.* ¶ 3-11.

Therefore, the service of the Summons and Complaint on Network Solutions via mail or other deliver service is ineffective.¹⁰ As Network Solutions is entitled to receive a summons and complaint that complies with the Federal Rules, this Court should grant Defendant's motion and dismiss the Complaint at least pending proper service of a summons and complaint on Network Solutions within 120 days of the filing of the complaint or within a specified period of time. *See* Fed. R. Civ. P. 4(m).

¹⁰ Plaintiff's *pro se* status does not excuse non-compliance with procedural rules. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) ("we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel"); *McMasters v. United States*, 260 F.3d 814, 818 (7th Cir. 2001) (finding *pro se* plaintiff failed to effect proper service when she mailed copy of summons and complaint to Attorney General but did not serve U.S. Attorney as required by Fed. R. Civ. P. 4(i)); *Hansan v. Fairfax County Pub. Sch. Bd.*, No. 09-558, 2010 U.S. Dist. LEXIS 42937, at *11 (E.D. Va. Apr. 30, 2010) (untimely service of process by *pro se* plaintiff), *aff'd*, 405 F.App'x 793 (4th Cir. 2010).

IV. CONCLUSION

For the foregoing reasons, this Court does not have subject matter jurisdiction over the underlying dispute between Mr. Schreiber and Dunabin regarding the use of the Landcruise mark in the United Kingdom and the registration of the domain name *Landcruise.uk.com*. Therefore, the Complaint should be dismissed with prejudice.

In the event that the Court finds there is subject matter jurisdiction, Plaintiff has failed to state a cognizable claim against Network Solutions upon which relief can be granted. Mr. Schreiber does not have valid underlying claims against Dunabin. Therefore, the claims for contributory liability against Network Solutions and the other related defendants must be dismissed with prejudice. Alternatively, the Court should find service has been improper and dismiss the Complaint at least pending proper service upon Network Solutions.

Respectfully Submitted,

/s/ Jeremy D. Engle

Brian J. Winterfeldt (pro hac vice App. pending)

Abigail Rubinstein (pro hac vice App. pending)

Jeremy D. Engle (VA Bar No. 72919)

STEPTOE & JOHNSON LLP

1330 Connecticut Avenue, NW

Washington, DC 20036-1795

Tel. No.: (202) 429-3000

Fax No.: (202) 429-3902

jengle@steptoe.com

Counsel for Defendant Network Solutions, LLC

September 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2012, a copy of the foregoing Defendant Network Solutions LLC's Motion to Dismiss Pro Se Plaintiff's Complaint was electronically filed with the Clerk of the Court using the CM/ECF system and was mailed first class, along with the NEF, to the following:

Graham Schreiber
5303 Spruce Avenue
Burlington, Ontario
Canada L7L-1N4

Pro Se Schreiber

/s/ Jeremy D. Engle

Brian J. Winterfeldt (pro hac vice App. pending)
Abigail Rubinstein (pro hac vice App. pending)
Jeremy D. Engle (VA Bar No. 72919)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel. No.: (202) 429-3000
Fax No.: (202) 429-3902
jengle@steptoe.com

Counsel for Defendant Network Solutions, LLC

September 10, 2012

ANNEX 1

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EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

)	
GRAHAM SCHREIBER,)	
)	
Plaintiff,)	
)	
v.)	
)	
LORRAINE LESLEY DUNABIN,)	
CENTRALNIC, LTD.,)	
NETWORK SOLUTIONS, LLC,)	
VERISIGN, INC.,)	
INTERNET CORPORATION FOR ASSIGNED)	
NAMES AND NUMBERS, and)	
DEMAND MEDIA, INC., D/B/A/ ENOM, INC.,)	
BULKREGISTER, INC.)	
)	
Defendants.)	
)	

No. 1:12-cv-00852-GBL-JFA

**DECLARATION OF NORMA
WHEELER IN SUPPORT OF
DEFENDANT NETWORK
SOLUTIONS' MOTION TO
DISMISS FOR INSUFFICIENT
SERVICE OF PROCESS AND
FAILURE TO STATE A CLAIM**

I, Norma Wheeler, state and declare as follows:

1. This declaration is submitted in support of the Motion to Dismiss for Insufficient Service of Process and Failure to State a Claim filed by Defendant Network Solutions (“Network Solutions”). I am more than 18 years of age, am capable of making this declaration. I make this declaration based upon my personal knowledge and documents maintained by Network Solutions and its parent company, Web.com, in the ordinary course of business.

2. I have been employed by Web.com since June 2008. My current position is Corporate Paralegal of Web.com.

3. Network Solutions is a technology company with a domain name registration business. It is organized under the laws of Delaware and its principal place of business is in Herndon, Virginia. It is also a wholly-owned subsidiary of Web.com.

4. Corporation Service Company is Network Solutions' registered agent for service of process. Corporation Service Company is located at 2711 Centerville Road, Suite 400, Wilmington, Delaware.

5. Upon information and belief, on or about August 17, 2012 or August 20, 2012, Network Solutions received a summons and complaint from Graham Schreiber at its Herndon, Virginia office, both of which I understand pertain to the present litigation. Upon information and belief, the summons and complaint were first mailed either via the United States Postal Service, Federal Express, or United Parcel Service, to Network Solutions in Virginia.

6. The summons and complaint were then mailed to me on August 20, 2012 at Web.com's principal place of business in Jacksonville, Florida, by Mark Cyrus, a facilities employee at Network Solutions, as is the normal course of business for any and all mail delivered to Network Solutions. I received the summons and complaint via Federal Express on August 21, 2012.

7. The summons was not addressed to any officer, director or employee of the company or any agent authorized to accept service of process on behalf of Web.com; rather, it was addressed to Network Solutions.

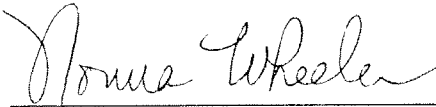
8. As part of my employment duties, I have been designated by Web.com to accept service of process on behalf of Network Solutions. As such, I am familiar with the procedure by which Network Solutions is notified of service of a summons and complaint on Network Solutions, by our registered agent, Corporation Service Company.

9. The normal course of business is for Corporation Service Company to notify me via telephone or in writing that it has been served with process and that the summons and complaint will be delivered to my attention at Web.com.

10. I have not been contacted by Corporation Service Company about service of Mr. Schreiber's summons and complaint (either via personal service or delivery) on said company, as registered agent for Network Solutions.

11. Similarly, I have not been contacted by the Virginia State Corporation Commission ("Commission") that a copy of Mr. Schreiber's summons and complaint was served on the Commission. In addition, I am not aware of any attempt by the Commission to contact Web.com or Network Solutions about service of Mr. Schreiber's summons and complaint on Network Solutions.

Pursuant to 28 U.S.C §1746, I Norma Wheeler, further declare under penalty of perjury that all statements made herein based on my own personal knowledge are true and that all statements made on information and belief are believed to be true.

Executed on: September 6, 2012 
Norma Wheeler