

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

COMMERCIAL CONNECT, LLC, )

Plaintiff, )

v. )

INTERNET CORPORATION FOR )  
ASSIGNED NAMES AND NUMBERS )  
and INTERNATIONAL CENTRE FOR )  
DISPUTE RESOLUTION, )

Defendants. )

CASE NO.  
3:16-CV-00012-JHM

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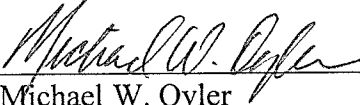
**DECLARATION OF MICHAEL W. OYLER IN SUPPORT OF SPECIAL  
APPEARANCE OF INTERNET CORPORATION FOR ASSIGNED NAMES AND  
NUMBERS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY  
RESTRAINING ORDER**

I, Michael W. Oyler, declare and affirm as follows:

1. I am licensed to practice law in the State of Kentucky and am a member of the law firm of Reed Weitekamp Schell & Vice PLLC, attorneys for Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”). I make this declaration in support of ICANN’s Opposition to Plaintiff Commercial Connect, Inc’s (“Commercial Connect’s”) Motion for Temporary Restraining Order.
2. Attached to this declaration as Exhibit A is a true and correct copy of the Unsponsored TLD Application Transmittal Form for Commercial Connect’s 2000 application for the .SHOP gTLD.
3. Attached to this declaration as Exhibit B is a true and correct copy of the New gTLD Application 2000 Round Credit Request executed by Jeffrey Smith on behalf of Commercial Connect.
4. Attached to this declaration as Exhibit C is a true and correct copy of Module 6 of the New gTLD Applicant Guidebook.
5. Attached to this declaration as Exhibit D is a true and correct copy of Articles IV and V of ICANN’s Bylaws.
6. Attached to this declaration as Exhibit E is a true and correct copy of the district court’s order granting ICANN’s motion to dismiss in *Moore v. Econ, Inc., et al*, Case No. 7:07-cv-1153-RDP (N.D. Ala. Nov. 9, 2007).
7. Attached to this declaration as Exhibit F is a true and correct copy of the district court’s order granting ICANN’s motion to dismiss in *Zuccarini v. Network Solutions, et al.*, Case No. 2:11-cv-14052-JEM (S.D. Fla Dec. 9, 2011).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 25th day of January, 2016 in Louisville, Kentucky.

  
\_\_\_\_\_  
Michael W. Oyler

# **EXHIBIT A**



TLD Application: Un-sponsored TLD  
Application Transmittal Form  
*15 August 2000*

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**Un-sponsored TLD Application Transmittal Form**

An application is hereby made to operate the registry for an un-sponsored top-level domain within the Internet Domain Name System (DNS).

B1. This application is made by:

**Commercial Connect, LLC**  
**1418 South Third Street**  
**Louisville, Kentucky □ 40208-2117**

**(502) 357-6507 □ (502) 636-9157 fax**

**JSS@CommercialConnect.net**

B2. The person signing below certifies that he has full authority to make this application on behalf of the applicant and to make all agreements, representations, waivers, and undertakings stated in this transmittal form and accompanying materials. Copies of the documents demonstrating the authority are attached.

B3. All documents linked directly or indirectly from "TLD Application Process: Information for Applicants," posted at < <http://www.icann.org/tlds/tld-application-process.htm>> have been thoroughly reviewed on behalf of applicant. In particular, the following documents have been reviewed:

B3.1. New TLD Application Process Overview, posted at < <http://www.icann.org/tlds/application-process-03aug00.htm>>.

B3.2. New TLD Application Instructions, posted at < <http://www.icann.org/tlds/application-instructions-15aug00.htm>>.

B3.3. Criteria for Assessing TLD Proposals, posted at < <http://www.icann.org/tlds/tld-criteria-15aug00.htm>>.

The applicant understands that failure fully to follow instructions included in these documents will be a factor negatively affecting consideration of this application.

B4. This application consists of the following, in addition to this transmittal form:

B4.1. The Registry Operator's Proposal, with cover sheet and attachments and accompanying materials.

B4.2. A Description of TLD Policies, with cover sheet and attachments and accompanying materials.

B4.3. A Statement of Requested Confidential Treatment of Materials Submitted.

B4.4. Fitness Disclosure of Registry Operator.

B5. This application is accompanied by one or more 3 1/2" floppy diskettes (IBM high density) or a CD-ROM containing files with items B4.1 and B4.2 above. Each item is provided in a common word-processing format and in HTML format.

B6. Check one:

(X) This application is accompanied by a check, drawn on a United States bank and payable to the Internet Corporation for Assigned Names and Numbers (ICANN), in the amount of 50,000 United States dollars.

( ) At least five business days before submitting this application, the applicant has sent 50,000 United States dollars by wire transfer according to item 18.2 of the New TLD Application Instructions. This application is accompanied by a wire transfer receipt or other document identifying the wire transfer.

The applicant understands and agrees that this \$50,000 is only an application fee to obtain consideration of this application; that the fee will not be refunded or returned in any circumstances (except if this application is not considered due to failure to reach agreement on terms for confidential treatment); that there is no understanding, assurance, or agreement that this application will be selected for negotiations toward entry of an agreement with a registry operator; or that, if this application is selected, the negotiations will lead to entry of such an agreement or establishment of a TLD as sought in this application. The applicant understands and acknowledges that ICANN has the right to reject all applications for new top-level domains that it receives and that there is no assurance that any additional top-level domain will ever be created in the future.

B7. In the event multiple TLD strings are proposed in this application, the applicant understands (a) that all parts of the application must apply, without significant variation, to all of the strings and (b) that, if ICANN determines in its sole discretion that one or more parts (such as the Business Capabilities and Plan or the Description of TLD Policies) apply to different proposed TLD strings in a significantly different manner, the applicant may be required to elect which of the strings to pursue in this application.

B8. The applicant hereby authorizes ICANN to:

B8.1. contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to this application,

B8.2. take any other steps to verify, elaborate on, supplement, analyze, assess, investigate, or otherwise evaluate the information contained in this application or other information that, in ICANN's sole judgment, may be pertinent to this application,

B8.3. consult with persons of ICANN's choosing regarding the information in this application or otherwise coming into ICANN's possession.

B9. The applicant understands that difficulties encountered by ICANN in verifying, elaborating on, supplementing, analyzing, assessing, investigating, or otherwise evaluating any aspect within or related to this application may reflect negatively on the application. In consideration of ICANN's review of the application, the applicant hereby waives liability on the part of ICANN (including its officers, directors, employees, consultants, attorneys, and agents) for its (or their) actions or inaction in verifying the information provided in this application or in conducting any other aspect of its (or their) evaluation of this application. The applicant further waives liability on the part of any third parties who provide information to ICANN or its officers, directors, employees, consultants, attorneys, and agents in connection with the application.

B10. The applicant hereby authorizes ICANN (and its officers, directors, employees, consultants, attorneys, and agents) to publish on ICANN's web site, and to disclose or publicize in any other manner, all materials submitted to, or obtained or generated by, ICANN (or its officers, directors, employees, consultants, attorneys, and agents) in connection with the application, including ICANN's (or their) evaluations and analyses in connection with the application or ICANN's investigation or evaluation of the application, except to the extent set forth in a written and duly signed agreement between ICANN and the applicant on the terms for confidential treatment of particular materials or information submitted by applicant. The applicant grants ICANN and its officers, directors, employees, consultants, attorneys, and agents a license to use any copyright or other intellectual property that applicant may have in any portion of the application for this purpose.

B11. The applicant hereby gives ICANN permission to use the applicant's name and/or logo in ICANN's public announcements (including informational web pages) relating to top-level domain space expansion.

B12. The applicant hereby agrees, acknowledges, and represents that it has no legally enforceable right to acceptance or any other treatment of this application or to the delegation in any particular manner of any top-level domain that may be established in the authoritative DNS root. It further agrees, acknowledges, and represents that it has no legally enforceable rights in, to, or in connection with any top-level domain by virtue of its preparation or submission of this application or by virtue of ICANN's receipt of this application, ICANN's acceptance of the application fee, ICANN's consideration or other handling of this application, or statements made in connection with this or other applications ICANN receives.

B13. The applicant understands and agrees that it will acquire rights in connection with a top-level domain only in the event that it enters one or more written, duly signed agreements with ICANN, and that applicant's rights in connection with that top-level domain will be limited to those expressly stated in the written, duly signed agreements.

B14. In consideration of ICANN's review of the application:

B14.1. the applicant, for itself and each of its officers, directors, employees, consultants, attorneys, agents, partners, and joint venturers, hereby agrees that neither ICANN, nor any of its officers, directors, employees, consultants, attorneys, and agents, shall have any liability for its/his/her receipt, consideration, evaluation, analysis, or other activities in any way connected with this application; and

B14.2. the applicant hereby releases and forever discharges ICANN and each of its officers, directors, employees, consultants, attorneys, and agents from any and all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD.

B15. Please send an e-mail to the following address acknowledging receipt of this application:

**JSS@CAS-Com.net**

By signing this transmittal form, the undersigned certifies, on his or her own behalf and on behalf of the applicant, that all information contained in this application, and all supporting documents included with this application, is true and accurate to the best of his/her/its knowledge and information. The undersigned and the applicant understand that any material misstatement or misrepresentation will reflect negatively on this application and may cause cancellation of any delegation of a top-level domain based on this application.

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Signature

**Jeffrey S. Smith**

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Name (please print)

**President/CEO**

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Title



**Commercial Connect, LLC.**

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Name of Applicant

**September 29, 2000**

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Date

# **EXHIBIT B**

### New gTLD Application 2000 Round Credit Request


I, **Jeffrey Smith**, am the registered Primary Contact for Application number **1-1830-1672** applied for on behalf of the Applicant entity named **Commercial Connect LLC**. As Primary Contact, I request the refund for the 2000 proof-of-concept round credit, in the amount of 86000 USD.

I confirm that **Commercial Connect LLC** is the same entity that applied for **.SHOP** in the 2000 Proof of Concept Round.

I confirm that **Commercial Connect LLC** was not awarded any string pursuant to the 2000 proof-of-concept round and that **Commercial Connect LLC** has no legal claims arising from the 2000 proof-of-concept process.

Primary Contact Email	JSmith@dotShop.com
CSC Case #	20405
Refund Amount	86000 USD

Beneficiary Name	Commercial Connect LLC
SWIFT/ABA/ACH/IBAN Number	ABA# 083000137
Beneficiary Account Number	829137629
Bank Name	Chase Bank NA
Bank Address 1	416 W Jefferson St
Bank Address 2	
Bank City	Louisville
Bank State/Province	KY
Bank Postal Code	40202
Bank Country	U.S.

Signature 

Jeffrey Smith  
Print Name

CEO  
Title

Commercial Connect LLC  
Company/Organization

Date

6/12/12

TRANSMISSION VERIFICATION REPORT

TIME : 06/12/2012 11:24  
NAME : COMMERCIAL CONNECT  
FAX : 502-634-1484  
TEL : 502-636-3091  
SER.# : U62513J1J223530

DATE, TIME	06/12 11:23
FAX NO./NAME	9-13109572347
DURATION	00:00:45
PAGE(S)	01
RESULT	OK*
MODE	PHOTO ECM

\* :COLOR FAX NOT AVAILABLE

# **EXHIBIT C**



# **gTLD Applicant Guidebook**

(v. 2012-06-04)

**Module 6**

4 June 2012

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# Module 6

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## *Top-Level Domain Application - Terms and Conditions*

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.
2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.
3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more

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gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.
5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's or an ICANN Affiliated Party's consideration of the application, and any approval rejection or withdrawal of the application; and/or (b) ICANN's or an ICANN Affiliated Party's reliance on information provided by applicant in the application.



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6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.
7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other

materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement <http://newgtlds.icann.org/en/applicants/agb/program-privacy>, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:
  - a. Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;
  - b. Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;
  - c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

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- d. Applicant may be requested to supply certain information in the original language as well as in English.
9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.
10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.
11. Applicant authorizes ICANN to:
  - a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;
  - b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.

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12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.
13. Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.
14. ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

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such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

# **EXHIBIT D**

including the imposition of any fees or charges, ICANN (Internet Corporation for Assigned Names and Numbers) shall:

- a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
- b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and
- c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee (Advisory Committee) and take duly into account any advice timely presented by the Governmental Advisory Committee (Advisory Committee) on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 6(1)(b) of this Article, prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

#### **Section 7. TRANSLATION OF DOCUMENTS**

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

### **ARTICLE IV: ACCOUNTABILITY AND REVIEW**

#### **Section 1. PURPOSE**

In carrying out its mission as set out in these Bylaws, ICANN (Internet Corporation for Assigned Names and Numbers) should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN (Internet Corporation for Assigned Names and Numbers) actions and periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

#### **Section 2. RECONSIDERATION**

1. ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action of ICANN (Internet Corporation for Assigned Names and Numbers) may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
  - a. one or more staff actions or inactions that contradict established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies); or
  - b. one or more actions or inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
  - c. one or more actions or inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board that are taken as a result of the Board's reliance on false or inaccurate material information.
3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
  - a. evaluate requests for review or reconsideration;
  - b. summarily dismiss insufficient requests;
  - c. evaluate requests for urgent consideration;
  - d. conduct whatever factual investigation is deemed appropriate;
  - e. request additional written submissions from the affected party, or from other parties;
  - f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
  - g. make a recommendation to the Board of Directors on the merits of the request, as necessary.
4. ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the



reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:
  - a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or
  - b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
  - c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.
6. To properly initiate a Reconsideration process, all requestors must review and follow the Reconsideration Request form posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website. at [http://www.icann.org/en/groups/board/governance/reconsideration\(/en/groups/board/governance/reconsideration\)](http://www.icann.org/en/groups/board/governance/reconsideration(/en/groups/board/governance/reconsideration)). Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.
7. Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.
8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is the same for all of the requestors. Every requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.
9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the

requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website.

10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.
11. The Board Governance Committee may ask the ICANN (Internet Corporation for Assigned Names and Numbers) staff for its views on the matter, which comments shall be made publicly available on the Website.
12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.
13. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.
14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN (Internet Corporation for Assigned Names and Numbers) staff, and by any third party.
15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.
16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or

recommendation. The final recommendation shall be posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website.

17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website. The Board's decision on the recommendation is final.
18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN (Internet Corporation for Assigned Names and Numbers)'s headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.
19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.
20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:
  - a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;
  - b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;

- c. an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and
- d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

### **Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS**

1. In addition to the reconsideration process described in Section 2 of this Article (/en/about/governance/bylaws#IV-2), ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.
3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN (Internet Corporation for Assigned Names and Numbers) violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
  - a. did the Board act without conflict of interest in taking its decision?;
  - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN (Internet Corporation for Assigned Names and Numbers)'s response shall not exceed that same length. Parties may submit documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.
6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN (Internet Corporation for Assigned Names and Numbers) structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.
7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN (Internet Corporation for Assigned Names and Numbers) ("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN (Internet Corporation for Assigned Names and Numbers).
8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this [Section 3 \(/en/about/governance/bylaws#IV-3\)](#).
9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.
10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:
  - a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations (Supporting Organizations), or from other parties;
  - c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
  - d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
  - e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
  - f. determine the timing for each proceeding.
12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.
  13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.
  14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN (Internet Corporation for Assigned Names and Numbers) for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN (Internet Corporation for Assigned Names and Numbers).org and is incorporated into this Section 3 of the Bylaws.
  15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.
  16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the request for independent review, the IRP Panel must award to ICANN (Internet Corporation for Assigned Names and Numbers) all reasonable fees and costs incurred by ICANN

(Internet Corporation for Assigned Names and Numbers) in the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.
19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website when they become available.
20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.
21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

#### **Section 4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS**

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN (Internet Corporation for Assigned Names and Numbers) structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN (Internet Corporation for Assigned Names and Numbers) being reviewed by a two-thirds vote of all members of the Board.

2. The Governmental Advisory Committee (Advisory Committee) shall provide its own review mechanisms.

## ARTICLE V: OMBUDSMAN

### Section 1. OFFICE OF OMBUDSMAN

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

2. The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

3. The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

4. The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names and Numbers) budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board. Nothing in this Article shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

### Section 2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in Section 2 of Article IV or the Independent Review Policy set forth in Section 3 of Article IV have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying



the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results.

### **Section 3. OPERATIONS**

The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;
2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;
3. have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));
4. heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;
5. maintain neutrality and independence, and have no bias or personal stake in an outcome; and
6. comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts-of-interest and confidentiality policies.

### **Section 4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES**

1. No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet

Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

2. ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

3. Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

4. The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

5. The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

## **Section 5. ANNUAL REPORT**

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

## **ARTICLE VI: BOARD OF DIRECTORS**

### **Section 1. COMPOSITION OF THE BOARD**

The ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board") shall consist of sixteen voting members ("Directors"). In addition, four non-voting liaisons ("Liaisons") shall be designated for the purposes set forth in Section 9 of this Article. Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

# **EXHIBIT E**

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

**MICHAEL MOORE; RONALD P.  
GENTRY,**

**Plaintiffs,**

**v.**

**ENOM, INC.; et al.,**

**Defendants.**

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**Case No.: 7:07-CV-1153-RDP**

**MEMORANDUM OPINION**

This case is before the court on the Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) filed by Defendant Internet Corporation For Assigned Names and Numbers (“ICANN”) on August 30, 2007. (Doc. # 22).<sup>1</sup> After submission by both parties of initial briefs on the matter of personal jurisdiction over ICANN (Docs. # 23, 33), and a request by Plaintiffs to conduct discovery on the defenses raised in the motions to dismiss filed by Defendants (Doc. # 29), the court held a telephone conference on September 20, 2007. The parties agreed during the conference that Plaintiffs would be given the opportunity to file any additional factual or legal support regarding the court’s personal jurisdiction over Defendant ICANN before the court took the matter under submission, and ICANN was permitted a reply. (Docs. # 36, 37, 38, 39, 40, 41). Additionally, Plaintiffs were permitted to file a Third Amended Complaint on October 8, 2007, which gave them another opportunity to correct and amend their allegations of jurisdiction. (Doc.

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<sup>1</sup> By order dated September 20, 2007, the portion of Defendant ICANN’s motion seeking dismissal on the basis of Fed. R. Civ. P. 12(b)(6) was denied, without prejudice. (Doc. # 36). The court specifically noted that the portion of Defendant ICANN’s motion to dismiss that raises a Rule 12(b)(2) personal jurisdiction challenge would remain pending. (Doc. # 36 at 2 n.1).

# 42). The matter of the court's personal jurisdiction over ICANN is now under submission and properly ripe for decision and, as outlined below, the court finds that because it lacks jurisdiction over ICANN, it is due to be dismissed from this action.

### **I. Standard of Review**

As a general rule, courts should address issues relating to personal jurisdiction before reaching the merits of a plaintiff's claims because a defendant that is not subject to the jurisdiction of the court cannot be bound by its rulings. *See Madara v. Hall*, 916 F.2d 1510, 1513-14 & n. 1 (11th Cir. 1990); Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, Civil 2d § 1351, at 243-44 (1990). Thus, as a preliminary matter, this court must determine if it has the power to bind Defendant ICANN with a ruling on the merits of the case.

In order to overcome a Rule 12(b)(2) motion testing the court's exercise of personal jurisdiction over a non-resident defendant where, as here, the issue is to be decided on the briefs and accompanying evidence but without a discretionary evidentiary hearing,<sup>2</sup> a plaintiff must demonstrate a "prima facie case of jurisdiction," *i.e.*, submit evidence sufficient to defeat a motion for judgment notwithstanding the verdict. *Francosteel Corp., Unimetal-Normandy v. M/V Charm, Tiki, Mortensen & Lange*, 19 F.3d 624, 626 (11th Cir. 1994); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988). Consonant with that standard of review, the court construes the allegations in the complaint as true if they are uncontroverted by affidavits or deposition testimony. *Bracewell v. Nicholson Air Servs., Inc.*, 748 F.2d 1499, 1504 (11th Cir. 1984).

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<sup>2</sup> The court in its discretion declines to conduct an evidentiary hearing and observes that no party has requested such a hearing. Fed.R.Civ.P. 12(b)(2); *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 255 (11th Cir.1996).

The Eleventh Circuit has explained on more than one occasion that, “[i]f a plaintiff pleads sufficient material facts to establish a basis for personal jurisdiction and a defendant then submits affidavits controverting those allegations, ‘the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction[,] unless those affidavits contain only conclusory assertions that the defendant is not subject to jurisdiction.’” *Whitney Info. Network, Inc. v. Xcentric Venture, LLC*, 2006 WL 2243041, \*3 (11th Cir. 2006) (quoting *Meier v. Sun Int’l Hotels, Ltd.*, 288 F.3d 1264, 1269 (11th Cir. 2002)). If the evidence conflicts, the court makes reasonable inferences in favor of the plaintiff, particularly when the jurisdictional questions are seemingly intertwined with the merits of the case. *Delong*, 840 F.2d at 845.

## **II. Relevant Facts**

It is undisputed that ICANN, a non-profit corporation with its principal place of business in California, administers the Internet’s domain name system on behalf of the Internet community pursuant to a series of agreements with the United States Department of Commerce. ICANN’s duties include designating entities to be domain name registry operators, such as VeriSign, Inc. (“VeriSign”), which operates the “.com” registry. ICANN also “accredits domain name registrars” to sell domain name subscriptions directly to consumers and to coordinate with the registry operators to effect those registrations. Defendant eNom, Inc. (“eNom”) is a domain name registrar.

Each computer connected to the Internet has an IP address - a unique set of numbers - that identifies it and allows it to “talk” to other computers. The “Domain Name System” or “DNS” correlates unique letters or words to specific IP addresses for ease of reference. For example, the DNS allows an Internet user to reach this court’s website by typing “alnd.uscourts.gov” instead of the numerical IP address 207.41.17.30.

The DNS is organized hierarchically. The “top level domains” (“TLDs”) appear as the suffixes to Internet addresses, and include generic TLDs such as “.com,” and “.gov,” as well as country-specific TLDs such as “.uk” and “.us.” Below that are “Second-level domain names” such as *google.com* or *uscourts.gov*. The IP addresses for each TLD, contained in a “root zone file,” are maintained on 13 computers called “root servers,” including the “A” root server. Each TLD, in turn, is served by a registry operator that maintains the definitive list of IP addresses for each second-level domain with that TLD.<sup>3</sup>

ICANN coordinates certain aspects of the DNS, which includes entering into agreements with the registry operators for TLDs and also facilitating policy development for the Internet regarding the creation of new TLDs. Consumers may obtain the right to use second-level domain names through companies known as “registrars.” ICANN operates the accreditation system that has produced a registrar marketplace, with over 800 accredited registrars, including Defendant eNom. Defendant RegisterFly.com, Inc. was an accredited registrar before ICANN cancelled its accreditation earlier this year.<sup>4</sup>

Plaintiff Michael Moore alleges that he contracted to register 109 Internet domain names with RegisterFly and/or eNom in 2005,<sup>5</sup> while Plaintiff Ronald Gentry alleges that he paid a separate fee for each one of those domain names. It is undisputed that ICANN did not receive any registration

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<sup>3</sup> For example, VeriSign operates the “.com” registry; while the “.gov” TLD is operated by the GSA.

<sup>4</sup> ICANN has terminated RegisterFly’s accreditation and filed suit against it for breach of its registrar agreement, which has resulted in a permanent injunction preventing RegisterFly from operating as a registrar. See *Internet Corp. for Assigned Names & Numbers v. RegisterFly.Com, Inc.*, No. 2:07-cv-02089 (C.D. Cal. filed Mar. 29, 2007).

<sup>5</sup> Plaintiffs claim that although they thought they had registered the domain names with RegisterFly, that company was actually acting as a reseller of domain names for eNom, another ICANN accredited registrar.

fees directly from Plaintiffs; however, Plaintiffs allege that ICANN, by way of its contracts with its registrars, indirectly received a fee for each of the domain names that Plaintiffs registered, as would be the case anytime an Alabama citizen registers a domain name with one of its registrars.<sup>6</sup> It is also undisputed that ICANN is not a party to the contracts between Plaintiffs and RegisterFly or eNom and is not a party to any contract with Plaintiffs regardless of the subject matter. Plaintiffs claim, however, that they entered into 109 separate agreements for the registration of their domain names that required them to submit to ICANN's Uniform Dispute Resolution Policy, Domain Transfer Agreement, and all of ICANN's current and future policies and specifications.<sup>7</sup>

Plaintiffs claim that RegisterFly and/or eNom placed a number of charges on Gentry's credit card that were unauthorized and fraudulent and that Moore reversed those charges and informed RegisterFly that it was not authorized to place any more charges upon any credit card associated with

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<sup>6</sup> In support of this assertion that ICANN receives fees when Alabama citizens register a domain name, Plaintiffs cite to the registrar's contractual obligation to pay fees to VeriSign (Docs. # 37, 39, at Ex. 1 ¶ 5.3), Verisign's obligation under the .com Registry agreement to pay ICANN fees (Docs. # 37, 39, at Ex. 2 ¶ 7.B), and a contractual term setting forth the price that VeriSign may charge "ICANN-accredited registrars" (Docs. # 37, 39, at Ex. 2 ¶ 22.A). The court notes that none of these contractual provisions discuss fees that may be charged to domain name registrants like Plaintiffs, and certainly do not show that Plaintiffs paid any fee *directly* to ICANN. However, it does not appear that ICANN disputes that they receive fees from VeriSign and other registrars that may *indirectly* result from fees paid by registrants like Plaintiffs.

<sup>7</sup> ICANN points out that Plaintiffs failed to provide a copy of those agreements to support their assertion, and ICANN demonstrates that the provision to which Plaintiffs refer is actually a clause in the standard accreditation agreement used between ICANN and its registrars which states:

**3.8 Domain-Name Dispute Resolution.** During the Term of this Agreement, Registrar shall have in place a policy and procedures for resolution of disputes concerning Registered Names. Until different policies and procedures are established by ICANN under Section 4, Registrar shall comply with the Uniform Domain Name Dispute Resolution Policy identified on ICANN's website ([www.icann.org/general/consensus-policies.htm](http://www.icann.org/general/consensus-policies.htm)).

(Doc. # 41, Ex. A ¶ 3.8).



his account. Plaintiffs claim that despite that request, RegisterFly and/or eNom placed further, unauthorized charges on Plaintiffs' credit cards. RegisterFly eventually suspended Moore's account and, according to Plaintiffs, "illegally seized the 109 Internet names that Michael Moore had registered and transferred the domain names into an account owned and maintained by eNom." RegisterFly requested nearly \$1,300 in past-due payments, and Plaintiffs claim that although they sent RegisterFly the requested funds via certified check, only 80 domain names were reactivated. Plaintiffs allege that they sent e-mails to ICANN personnel regarding the dispute with Registerfly, to which ICANN responded as follows in an email to Plaintiff Moore:

Dear Mr. Moore,

I have been forwarded several copies of this inquiry that you have sent to numerous people at ICANN and will take this opportunity to respond. Please understand that ICANN's role is limited. ICANN is a non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions to preserve the operational stability of the Internet. ICANN does not have direct responsibility for the actions of resellers, but we do contract with registrars (through which resellers do business). ICANN's authority with regard to registrars is limited to a contractual relationship governing the registration of domain names, but we do not oversee contractual disputes related to payment of registration fees.

Based on the information you have provided, it does not appear that there has been any violation of ICANN policy that would qualify as a violation of the registrar contract with ICANN. A copy of this contract can be found at <http://www.icann.org/registrars/ra-agreement-17may01.htm>. Should you review this contract and find that there has been some violation that we have not found, please inform us and we will gladly investigate.

While we are not suggesting that your concerns are unfounded, they just do not fit within our scope of authority. We have contacted the registrar to pass along your concerns and were informed that this was a financial or contractual matter between you and your reseller. As such, there is nothing for ICANN to do. You may wish to contact an attorney for legal advice or the appropriate law enforcement or consumer protection agency if you believe that illegal or inappropriate activity is taking place.

Regards,  
Tim Cole  
Chief Registrar Liaison  
Internet Corporation for Assigned Names and Numbers

### III. Discussion

The personal jurisdiction analysis is a two-step inquiry. First, this court must determine whether the exercise of jurisdiction over ICANN is appropriate under the long-arm statute of Alabama, the forum state. *Sloss Industries Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007); *see also Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir. 1996).<sup>8</sup> Second, this court

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<sup>8</sup> Although personal jurisdiction over ICANN also could be established under the nationwide service of process provision of RICO, which is one of the bases for relief pled in this case, Plaintiffs are entitled to take advantage of that statute's nationwide service provision *only* if they have stated a colorable RICO claim against ICANN. *See Republic of Panama v. BCCI Holdings (Luxemborg) S.A.*, 119 F.3d 935, 941-42 (11th Cir. 1997); *Rogers v. Nacchio*, No. 06-13712, 2007 WL 2002594, at \*1 n.1 (11th Cir. Jul. 12, 2007). In other words, if their RICO claims against ICANN are "insubstantial, implausible, or otherwise completely devoid of merit," Plaintiffs may not take advantage of the nationwide service of process provision as a means of establishing personal jurisdiction. *Republic of Panama*, 119 F.3d at 942; *Rogers*, 2007 WL 2002594, at \*1 n.1. Such is the case here.

Count Four of Plaintiffs' Third Amended Complaint attempts to state RICO violations pursuant to both 18 U.S.C. § 1962(c), which provides that it is unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity," and 18 U.S.C. § 1962(d), which makes it unlawful for any person to conspire to violate the RICO statute. Plaintiffs allege that ICANN, RegisterFly, eNom, and VeriSign "constitute a group . . . associated in fact that Plaintiffs refer to as the ICANN Enterprise." (Doc. # 42, at 25). Plaintiffs further allege that the ICANN Enterprise has engaged in predicate acts including mail fraud, wire fraud, robbery and extortion and that "Defendants control and operate the ICANN Enterprise [by] engaging in wire fraud; misrepresenting material facts . . . ; unlawfully tying fees for administrative tasks to the regular service fee, by restraining competition and by unlawfully transferring Internet names." (Doc. # 42, at ¶¶ 69-72). Plaintiffs contend that the ICANN Enterprise engaged in the foregoing predicate acts "to force contractual provisions on the domain name registers, control fees charged to Internet registrars to register, the ability to register names on the Internet, the ability to maintain Internet domain names, and conceal the manner in which it was done." (Doc. # 42, at 25).

The court is persuaded by ICANN's arguments that Plaintiffs' RICO allegations against it are wholly insufficient and completely devoid of merit. In order to state a violation of § 1962(c), Plaintiffs must allege: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering

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activity.” *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988) (internal quotation marks and citation omitted). Here, despite multiple opportunities to amend their complaint - even after they were informed of Defendants’ concerns regarding the adequacy of their allegations - Plaintiffs have failed to adequately plead at least two of the four requirements to state a colorable RICO violation.

First, in order to adequately state the second requirement of a RICO enterprise, Plaintiffs must allege facts that, if proved, would show “evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.” *Williams v. Mohawk Indus.*, 465 F.3d 1277, 1284 (11th Cir. 2006)(quotation marks and citation omitted). The alleged enterprise must have “a structure and goals separate from the predicate acts” themselves, *Ageloff v. Kiley*, 318 F. Supp. 2d 1157, 1159 (S.D. Fla. 2004), and the Defendant must have “some part in directing” the “the operation or management of the enterprise itself.” *Williams*, 465 F.3d at 1285 (quotation marks and citation omitted). “[S]imply plugging in names does not establish an enterprise,” *Anderson v. Smithfield Foods, Inc.*, 207 F. Supp. 2d 1358, 1363-64 (M.D. Fla. 2002), as Plaintiffs “must plead specific facts, not mere conclusory allegations,” *Fla., Office of Att’y Gen., Dep’t of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1305 (S.D. Fla. 2005).

In this case, apart from insufficient bare legal conclusions that the enterprise exists and is “ongoing,” Plaintiffs have alleged no facts regarding any organizational structure among the four corporations that could possibly constitute an enterprise. (Doc. # 42, at ¶¶ 69-89.) Plaintiffs simply claim that Defendants have committed misconduct together, which is precisely the sort of allegation that has been held to be insufficient to state a RICO violation. *See, e.g., Aeropower LTD v. Matherly*, No. 1:03-cv-889-WKW, 2007 WL 163082, at \*10 (M.D. Ala. Jan. 18, 2007 (holding that a “conclusory allegation that the defendants conspired with each other is insufficient to survive a motion to dismiss as [plaintiffs] alleged no facts to show or to create a reasonable inference that the defendants made an agreement”). Moreover, ICANN argues - and Plaintiffs have not refuted - that the plain language of the statute provides that an “association-in-fact” RICO enterprise may not consist entirely of corporations, as Plaintiff has alleged. Section 1961(4) provides that an enterprise “includes [1] any individual, partnership, corporation, association, or other legal entity, and [2] any union or group of individuals associated in fact although not a legal entity,” thus distinguishing that a “group of individuals” - not a group of corporations - is needed for an “association-in-fact” enterprise.

Moreover, Plaintiffs’ RICO allegations are deficient with respect to the third “pattern” element of RICO which requires a showing of “continuity” and specific allegations of a series of discrete predicate acts extended over time or likely to do so. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241-42 (1989); *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1265 (11th Cir. 2004). Here, Plaintiffs not only failed to allege a discrete or specific set of predicate acts that either formed a closed pattern of racketeering or are likely to extend into the future, but they have not pled each alleged predicate act (mail and wire fraud) with particularity under Rule 9(b). *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1380 (11th Cir. 1997) (noting that plaintiffs are required to plead their RICO claims with the specificity required in Rule 9(b)). Plaintiffs’ complaint merely alludes to unspecified “agreements, correspondence and statements” that “contain[ed] false and fraudulent misrepresentations” (Doc. # 42, at ¶¶ 76-83), and improperly “lumps together” all

examines whether exercising jurisdiction over ICANN would violate the Due Process Clause of the Fourteenth Amendment, which requires both: (1) that the defendant have minimum contacts with the forum state; and (2) that the exercise of jurisdiction not offend “traditional notions of fair play and substantial justice.” *Sculptchair*, 94 F.3d at 626 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). With Alabama as the forum state, the Due Process inquiry pursuant to the Fourteenth Amendment and the long-arm statute inquiries “merge, because Alabama’s long-arm statute permits the exercise of personal jurisdiction to the fullest extent constitutionally permissible.”

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Defendants. These allegations are simply not sufficient to state a viable claim under RICO.

Plaintiffs’ failure to properly allege a substantive RICO claim against ICANN is also fatal to their derivative RICO conspiracy claim brought pursuant to § 1962(d). To adequately plead a RICO conspiracy, Plaintiffs must allege “the existence of a conspiracy, and the commission of an overt act in furtherance of the conspiracy that causes injury to the plaintiff.” *Beck v. Prupis*, 162 F.3d 1090, 1098 (11th Cir. 1998). To constitute an “overt act,” conduct must be a substantive RICO violation; therefore, there can be no RICO conspiracy liability without an underlying RICO violation. *Beck*, 162 F.3d at 1098-99; *Rogers*, 2007 WL 2002594, at \*6 (“[W]here a plaintiff fails to state a RICO claim and the conspiracy count does not contain additional allegations, the conspiracy claim necessarily fails.”). Thus, Plaintiffs’ RICO conspiracy claim is likewise devoid of merit and cannot serve as a vehicle for establishing personal jurisdiction over ICANN.

As a final comment on the quality of Plaintiffs’ RICO claims, the court notes that ICANN’s contention that the claims are irremediably deficient has essentially remained uncontested by Plaintiffs, despite their assertion that they would “amend[] their RICO allegations to withstand Defendants’ present motions.” (Doc. # 38, at 4). Although the parties submitted an initial round of briefs on the issue of personal jurisdiction, Plaintiffs failed to rely upon the nationwide service of process provision of RICO as a basis for personal jurisdiction until their supplemental brief filed on September 25, 2007. (Doc. # 38, at 4). And even then, their entire argument that personal jurisdiction lies under the nationwide service of process provision of RICO consists of these two sentences: “To conclude, RICO provides for nationwide service of process in private suits. 18 U. S. C. 1965(d). Plaintiffs are in the process of amending their RICO allegations to withstand Defendants’ present motions.” (Doc. # 38, at 4). Despite that promise that they would cure the RICO claim deficiencies, a review of the Third Amended Complaint reveals no material change to the RICO allegations that would demonstrate a factual or legal basis for those claims. (Doc. # 42). Thus, because ICANN has shown that Plaintiffs have failed to state a colorable RICO claim against it despite purported amendments to cure the defects associated with those allegations, Plaintiffs cannot rely upon RICO’s nationwide service of process provision to establish personal jurisdiction over ICANN. Accordingly, the court’s analysis above will focus on the jurisdiction permitted under Alabama’s long-arm statute.

*Eurisol*, 488 F.3d at 925 (citing Ala. R. Civ. P. 4.2(b); *Sieber v. Campbell*, 810 So.2d 641, 644 (Ala.2001)). Thus, the relevant analysis is to first examine ICANN's contacts with Alabama and next to determine if the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.

#### **A. Minimum Contacts**

With respect to the minimum contacts analysis, the level and nature of such conduct and connections may support two types of jurisdiction: (1) specific jurisdiction that arises "out of a party's activities in the forum state that are related to the cause of action alleged in the complaint," and (2) general jurisdiction which consists of "continuous and systematic" contacts with the forum that are not necessarily related to the cause of action. *Eurisol*, 488 F.3d at 925. As to either form of contacts, the significant question is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Here, Plaintiffs argue that this court has both general and specific jurisdiction over ICANN. Although Plaintiffs only need establish one form to satisfy the minimum contacts requirement, for the reasons outlined below the court finds that they have not met their burden in this case to show either.

##### **1. Specific Jurisdiction**

According to the Supreme Court, when a forum seeks to assert specific personal jurisdiction over a nonresident defendant, due process requires the defendant have "fair warning" that a particular activity may subject it to the jurisdiction of a foreign sovereign. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Thus, in order for this court to have specific jurisdiction over ICANN, its contacts with Alabama must satisfy three criteria: (1) they "must be related to the [Plaintiffs']

cause of action or have given rise to it;” (2) they must involve “some act by which [ICANN] purposefully avails itself of the privilege of conducting activities within the forum;” and (3) they “must be such that [ICANN] should reasonably anticipate being haled into court there.” *Eurisol*, 488 F.3d at 925 (citations omitted). The minimum contacts analysis is “immune to solution by checklist,” *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 499 (5th Cir.1974) (quotation marks omitted), and ICANN’s contacts must be viewed “both quantitatively and qualitatively,” *Eurisol*, 488 F.3d at 925.

Plaintiffs argue that this court has specific jurisdiction over ICANN because: (1) ICANN responded via email to Plaintiff Moore’s email inquiries regarding his dispute with RegisterFly and eNom; (2) when Defendants RegisterFly and eNom contracted with ICANN to become accredited Internet name registrars, ICANN knew that RegisterFly and eNom would be doing business in Alabama and collecting fees from Alabama citizens who registered Internet domain names with them; (3) as a result of the registration of Internet domain names by Alabama citizens, ICANN expected to, and received, benefits when Plaintiffs, who are Alabama citizens, paid fees to RegisterFly and eNom for the registration of 109 Internet names; and (4) Plaintiffs’ registered Internet names were directed via IP address to servers located in Jefferson County, Alabama and related to websites accessed by Internet users all over the country. (Doc. # 33, at 6). Plaintiffs admit that all of their contracts with RegisterFly and eNom “occurred outside” of Alabama and that ICANN never entered into a direct contract with Plaintiffs. (Doc. # 33, at 6-7).

Although it is possible that one very significant contact giving rise to the litigation may be sufficient alone to satisfy the minimum contacts requirement, Plaintiffs’ attempt in this case to hinge personal jurisdiction on one isolated email that was sent by ICANN “[i]n reply to” e-mails or

registered letters initiated solely by Plaintiff Moore is simply inadequate.<sup>9</sup> Even assuming, as Plaintiffs now claim, that the email was “related to” or “gave rise” to their causes of action, jurisdiction is still lacking because ICANN’s singular response to inquiries initiated solely by one of the Plaintiffs, with whom it has no contractual relationship, does not constitute purposeful availment of the privilege of conducting activities in the state in which Plaintiffs reside.<sup>10</sup> See *Sun Bank, N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030, 1032-34 (11th Cir. 1991)(finding that a Florida district court had no personal jurisdiction over a Massachusetts resident after a Florida bank initiated contact with the resident because he had “entered into no contract or other continuing relationship[] or obligation[]” with the Florida bank, had not sought out the bank’s business, and his contacts with

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<sup>9</sup> In addition to the one email sent from ICANN to Plaintiff Moore (Docs. # 37, 40 at Ex. 54), Plaintiffs have submitted over a hundred pages of e-mails sent *by Moore* to numerous other parties, including ICANN. (Docs. # 37, 39, 40, at Exs. 6-51). These e-mails are irrelevant to the court’s jurisdictional analysis as Plaintiffs’ act of sending e-mail *from* Alabama does not subject ICANN to personal jurisdiction *in* Alabama.

<sup>10</sup> Plaintiffs’ attempt to characterize their emails to ICANN, and the single response email from ICANN, as having “participated in ICANN’s Uniform Dispute Resolution Policy [UDRP] regarding one of the names that was taken from them and [] ICANN [having] considered the merits of Plaintiffs’ complaint and [having] rendered a decision with regard to the complaint,” is unavailing. There is simply no support for this bald assertion and the court will not consider it in the jurisdictional equation. Plaintiffs alleged “participation” in the UDRP is nothing more than an e-mail from Plaintiff Moore to *eNom*, copying “icann@icann.org.” (Docs. # 37, 40, at Ex. 53). The purported merits “decision” by ICANN regarding Plaintiffs’ UDRP “claim” is simply an email from an ICANN representative that: (1) does not mention the UDRP; (2) does not appear to have been written in response to the “participation” email; (3) does not purport to be a judgment or legal decision; and (4) expressly disclaims that ICANN is taking sides in Moore’s dispute by stating that “we are not suggesting that your concerns are unfounded, they just do not fit within our scope of authority.” (Docs. # 37, 40, at Ex. 54). In any event, that ICANN established a nationwide policy that its registrars agreed to adopt does not subject ICANN to jurisdiction every time a registrar enters into a separate contract with a domain name registrant that refers to that policy. See, e.g., *Rank v. Hamm*, No. 2:04-0997, 2007 WL 894565, at \*12 (S.D. W. Va. Mar. 21, 2007) (holding that “adoption of a nationwide policy does not of itself result in [the policy creator’s] purposefully directing personal activities toward West Virginia,” where that policy was implemented by third-parties within the State).

the bank “occurred not because [he had] purposefully availed himself of the privilege of conducting activities within Florida,” but rather because the bank’s customer “told that bank to call [him] in Massachusetts”); *see also L.O.T.I. Group Prods. v. Lund*, 907 F. Supp. 1528, 1534 (S.D. Fla. 1995) (finding no jurisdiction where plaintiff “initiat[ed]” defendant’s contacts with forum state).<sup>11</sup>

Alternatively, relying on *World-Wide Volkswagen Corp.*, Plaintiffs argue that the stream of commerce test permits this court to exercise specific jurisdiction over ICANN in this case even though the actions giving rise to the suit took place outside of the forum state and even though ICANN had no direct contact with Plaintiffs. Plaintiffs suggest that ICANN purposefully availed itself of the opportunity to conduct business in Alabama based solely on the fact that ICANN was - or should have been - aware that after it contracted with Defendants eNom and RegisterFly to be registrars, then eNom and RegisterFly, through the stream of commerce, might subsequently contract with Alabama citizens. (Doc. # 33, at 7). This argument cuts no ice at all. As the Late Judge Nelson of this court aptly stated: “Although the concept of foreseeability is not irrelevant . . . , the kind of foreseeability critical to the proper exercise of personal jurisdiction, according to the Supreme Court, is not the ability to see that the acts of third persons may affect the forum, but rather that the defendant’s own purposeful acts will have some effect in the forum.” *Brown v. Astron Enterprises, Inc.* 989 F.Supp. 1399, 1405 (N.D.Ala. 1997). Thus, even when it is foreseeable to the defendant that the stream of commerce may or will sweep the product into the forum state, that

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<sup>11</sup> The court rejects Plaintiffs’ farfetched claim that ICANN is subject to personal jurisdiction in Alabama because the 109 Internet domain names that they registered through RegisterFly and eNom “are maintained on computers that are located in Jefferson County, Alabama.” (Doc. # 33, at 9). That the domain names Plaintiffs registered with other parties are maintained on servers in Alabama has nothing to do with ICANN’s contacts with Alabama. ICANN does not, and is not alleged to, own or operate those servers.



awareness does not convert the mere act of placing the product into the stream of commerce into an act purposefully directed toward the forum state. *Associated Transport Line, Inc. v. Productos Fitosanitarios Proficol El Carmen, S.A.*, 197 F.3d 1070, 1075 (11th Cir.1999) (noting that “awareness that product will enter state is not enough to satisfy due process-not the kind of purposeful activity required”). That ICANN might have been able to predict that its registrars would eventually contract with Alabama citizens is of no import here.

Likewise, any indirect benefit that ICANN receives from the contracts between Plaintiffs and its registrars, to which ICANN is not a party, cannot subject it to personal jurisdiction in Plaintiffs’ home state. “[F]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State.” *World-Wide Volkswagen*, 444 U.S. at 299. Indeed, the “‘substantial connection’ . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State,” such as designing the product for the market in the forum State; advertising in the forum State; establishing channels for providing regular advice to customers in the forum State; or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano*, 480 U.S. 102, 111 (1987); *see also SEC v. Carrillo*, 115 F.3d 1540, 1545 (11th Cir.1997) (noting that it is well established that advertising “reasonably calculated to reach the forum” may be purposeful availment, as can direct solicitation mailings). Here, Plaintiffs have done nothing more than show that ICANN accredits a nationwide army of domain name registrars who then contract with citizens in every state. Plaintiffs have not shown that ICANN targeted or directed Alabama citizens specifically. Accordingly, the court finds that

Plaintiffs have not met the requirements of specific jurisdiction based upon ICANN's contacts with Alabama that are related to the claims in this case.

## 2. General Jurisdiction

Even more tenuous is Plaintiffs' contention that this court has general jurisdiction over ICANN. General jurisdiction may be exercised when a defendant's contacts with the forum are sufficiently numerous, purposeful, and continuous, as to render fair an assertion of power over the defendant by that state's courts no matter the nature or extent of the relationship to the forum entailed in the particular litigation; if general jurisdiction is established, absolutely no connection need be shown between the state and the claim for the defendant to be summoned constitutionally before that forum's courts. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984)). Regardless of the general nature of the contacts in question, however, for purposes of satisfying due process, they must still be purposeful on the part of the defendant; "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Although the Eleventh Circuit has made clear that personal jurisdiction will not be supported because of "random, fortuitous, or attenuated contacts ... or because of the unilateral activity of a third person," *Madara v. Hall*, 916 F.2d 1510, 1516 (11th Cir.1990)(citations omitted), that is exactly the basis for Plaintiffs' general jurisdiction theory in this case. Plaintiffs allege that "each time an Alabama citizen registers an Internet domain name; some one visits a website that is maintained by an Alabama citizen; [sic] visits a website that is owned by an Alabama citizen; an Alabama citizen purchases goods or services via the Internet or an Alabama citizen simply surfs the

net, Defendant ICANN has contact with Alabama.” (Doc. # 33, at 8-9). It goes without saying that ICANN does not administer the operation of the Internet, much less operate every website on the Internet. Nonetheless, Plaintiffs essentially argue that by virtue of ICANN’s administration of the domain name system of behalf of the Internet community, each and every time a resident of a particular state uses, accesses, or even thinks about the Internet, it translates into a jurisdictionally significant contact between ICANN and that resident’s home state. If that were sufficient to satisfy the requirements of Due Process, the mere existence of the Internet - which indirectly connects every person with access to it - would reduce the concept of personal jurisdiction to a game of “Six Degrees of Kevin Bacon.”

Moreover, that Alabama citizens can view ICANN’s website and email questions to ICANN is not dispositive because general jurisdiction does not arise simply because a party maintains website or otherwise offers information nationwide. *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999) (holding that a company’s maintenance of a nationwide toll-free telephone number and website were insufficient to establish personal jurisdiction); *Matthews v. Brookstone Stores, Inc.*, 469 F. Supp. 2d 1056, 1064 (S.D. Ala. 2007) (same). ICANN’s website, which is operated from web servers physically located in Southern California, does not offer anything for sale or otherwise allow those who access it to enter into an agreement with ICANN through the Internet. (Brent Declaration, at ¶ 8). *See, e.g., Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (holding that, “even repeated contacts” with Texas residents through a web site did not qualify as “continuous and systematic,” as a web site may be “doing business *with* Texas . . . not doing business *in* Texas”) (emphasis in original); *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (noting that “the fact that [an ICANN-accredited registrar] maintains a website that is accessible to anyone over the Internet

is insufficient to justify general jurisdiction,” and finding it “significant that . . . registrants initiate the contact with” defendant); *see also Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (holding that “maint[enance of] an Internet website accessible by anyone capable of using the Internet, including people living in California . . . fall[s] well short of the ‘continuous and systematic’ contacts” needed for general jurisdiction); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 715 (4th Cir. 2002) (“We are not prepared at this time to recognize that a State may obtain general jurisdiction over out-of-state persons who regularly and systematically transmit electronic signals into the State via the Internet based solely on those transmissions. Something more would have to be demonstrated.”). Nor can general jurisdiction be premised on a “stream of commerce” theory, *i.e.*, that a defendant has contacts with third parties who then do business in the forum state. *See, e.g., Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 778 (7th Cir. 2003); *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 216 (5th Cir. 2000); *Matthews*, 469 F. Supp. 2d at 1065. Therefore, ICANN’s contracts with domain name registrars who presumably do business with purchasers in virtually every state are not sufficient to establish general jurisdiction in Alabama because ICANN itself has no *direct* contacts with Alabama.

Courts analyzing general jurisdiction have included the following as factors that weigh against the exercise of non-specific jurisdiction over a non-resident defendant: (1) a lack of business or a business license in the forum, *Helicopteros*, 466 U.S. at 416; (2) a lack of property ownership in the forum, *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1266 (N.D. Ala. 2000)(Hancock, J.); and (3) a lack of any “bank accounts, telephone listings, or mailing addresses in” the forum, *Exter Shipping, Ltd. v. Kilakos*, 310 F. Supp. 2d 1301, 1312 (N.D. Ga. 2004). Here, Plaintiffs have not offered any competent evidence to controvert ICANN’s averment that it has no employees, assets,

bank accounts, real property, personal property, offices, or other facilities in Alabama. (Brent Declaration, at ¶ 5.) ICANN is not licensed to do business in Alabama, does not have a registered agent for service of process in Alabama, and has no phone numbers or mailing addresses here. (Brent Declaration, at ¶ 5.) ICANN has no agreements with registries or registrars that reside in Alabama nor does ICANN collect fees directly from domain name registrants such as Plaintiffs. (Brent Declaration, at ¶¶ 4, 6, 7.) Based upon these facts, the court cannot conclude that ICANN has “systematic and continuous” contacts with Alabama such that it is subject to the jurisdiction of Alabama courts for any claim brought against it here.

**B. Fair Play and Substantial Justice**

Having determined that ICANN lacks the minimum contacts necessary to support personal jurisdiction, the court also finds that considerations of “fair play and substantial justice” cannot support personal jurisdiction over ICANN in this action. *International Shoe Co.*, 326 U.S. at 316. This inquiry requires the court to examine the nature of ICANN’s contacts with the forum in light of additional factors, including the burden on ICANN of litigating in Alabama, Alabama’s interest in adjudicating and overseeing the dispute, Plaintiffs’ interest in obtaining convenient and effective relief, “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.” *Burger King*, 471 U.S. at 476-77 (quoting *World-Wide Volkswagen*, 444 U.S. at 292). “This is essentially a reasonableness inquiry.” *Sloss*, 488 F.3d at 933. These additional factors may be used to bolster a conclusion that the exercise of personal jurisdiction is actually proper when fewer than the otherwise sufficient number of minimum contacts are present. *Burger King*, 471 U.S. at 477. That is simply not the case here, however.

The court concludes that hauling a non-profit organization - with no employees or facilities in Alabama, no license to do business in Alabama, no agreements with registries or registrars that reside in Alabama, nor any other significant contact with Alabama (save one reply e-mail to Plaintiff who initiated the contact) - into an Alabama court would offend traditional notions of fair play and substantial justice. While it is true that “modern transportation and communication have made it much less burdensome for a party sued to defend himself in a [distant] State,” the difficulties of geography still impose a not insubstantial burden on a defendant - and particularly a nonprofit organization - seeking to mount an effective defense against a potentially substantial claim in a remote jurisdiction to which that party has no real ties. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). This and the other considerations outlined above lead the court to conclude that the principles of fairness and substantial justice do not favor an assertion of personal jurisdiction over ICANN by this court.

#### IV. Conclusion

Plaintiffs’ failure to establish that this court has personal jurisdiction over ICANN is fatal to their claims against it as this court has no power to bind ICANN with a ruling on the merits of those claims. Accordingly, a separate order dismissing ICANN from this case will be entered.

**DONE** and **ORDERED** this 9th day of November, 2007.



**R. DAVID PROCTOR**  
UNITED STATES DISTRICT JUDGE

# **EXHIBIT F**

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA

**Case Number: 11-14052-CIV-MARTINEZ/LYNCH**

JOHN ZUCCARINI,

Plaintiff,

vs.

NETWORK SOLUTIONS, LLC, *et al.*,

Defendants.

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**ORDER ON INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS'**  
**MOTION TO DISMISS**

THIS CAUSE came before the Court upon Defendant Internet Corporation For Assigned Names and Numbers' ("ICANN") Motion to Dismiss Complaint (D.E. No. 19). Plaintiff John Zuccarini ("Zuccarini" or "Plaintiff") brought the above-captioned action alleging that ICANN was negligent in auctioning 14 domain names which resulted in damages to Plaintiff.

**I. Background**

Zuccarini filed his Amended Complaint "as a beneficiary of the receivership appointed by the California District Court in, *Office Depot, Inc. v. Zuccarini.*" See (Am. Compl. ¶ 6). In *Office Depot, Inc. v. Zuccarini*, 621 F. Supp. 2d 773 (N.D. Cal. 2007), the Court entered an order requiring Network Solutions and other domain name registrars to transfer control of the Zuccarini domain names to Michael Blacksborg as receiver. *Id.* at 778. The receiver entered into a servicing agreement with a domain name registrar, Network Solutions. (Am. Compl. ¶¶ 35-36). Registration of 14 of the domain names were not renewed by the receiver and, pursuant to the servicing agreement with Network Solutions, these domain names were auctioned through



NameJet LLC's ("NameJet") auction platform and transferred to successful bidders. *Id.* at 35-40.

Zuccarini filed an action in the Southern District of Florida in July 2010 against NameJet, Network Solutions and other defendants. *See Zuccarini v. NameJet, Inc.*, 2:10-cv-14178-KMM. He alleged that during May 2010, the above-referenced 14 domain names were auctioned by NameJet in violation of California and Virginia statutes. He sought damages for auction of the 14 domain names based on breach of contract and conversion. *Id.* at (D.E. No. 20). He also sought declaratory and injunctive relief. *Id.* This Court transferred venue to the United States District Court for the Eastern District of Virginia. *See Zuccarini v. NameJet, Inc.*, 2:10-cv-14178-KMM, D.E. No. 57. The Eastern District of Virginia dismissed the action. *Id.* at (D.E. No. 13-2). In his subsequent motion for relief, Zuccarini attempted to argue a previously unasserted claim that the defendants were negligent. The Court denied the motion for relief and explained that even if those arguments had merit, they should have been raised during the litigation in the Northern District of California, or on direct appeal to the United States Court of Appeals for the Ninth Circuit. *Id.* at (D.E. No. 13-3).

## **II. Standard**

ICANN brings its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. Personal jurisdiction over a non-resident defendant depends on: (1) "whether the exercise of jurisdiction is appropriate under the forum state's long-arm statute;" and (2) "whether exercising jurisdiction over the defendant would violate the Due Process Clause of the Fourteenth Amendment, which requires that the defendant have minimum contacts with the forum state and that the exercise of jurisdiction not offend 'traditional notions of fair play and substantial justice.'" *Sloss Indus. Corp. v. Eurisol*, 488 F. 3d 922, 925 (11th Cir.

2007) (quoting *Sculptchair, Inc. V. Century Arts, Ltd.*, 94 F. 3d 623, 626 (11th Cir. 1996)). The non-resident defendant must reasonably expect to be haled into the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

The plaintiff “has the burden of establishing a prima facie case of personal jurisdiction.” *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F. 3d 1357, 1360 (11th Cir. 2006). Where “the defendant submits affidavits contrary to the allegations in the complaint, the burden shifts back to the plaintiff to produce evidence supporting personal jurisdiction, unless the defendant’s affidavits contain only conclusory assertions that the defendant is not subject to jurisdiction.” *Id.*

### **III. Analysis**

ICANN is a California non-profit corporation that conducts business in the State of Florida. (D.E. No. 7, Am. Compl. ¶¶ 14, 21; D.E. No. 19-1, Aff. of Akram J. Atallah, ¶ 2). The Amended Complaint alleges that ICANN “manages and coordinates the Internet Domain Name System, in addition to accrediting domain name registrars.” (D.E. No. 7, Am. Compl. ¶ 14). It further alleges that ICANN maintains a “Registrar Accreditation Agreement with Network Solutions” and that ICANN was negligent in not fulfilling its responsibilities in overseeing the actions of Network Solutions and in not requiring Network Solutions to “place on hold or lock status any domain name that [was] the subject of court proceedings.” *Id.* at ¶¶ 60-63. Zuccarini admits to filing the action as a “non-party to any agreement who has been harmed by ICANN’s negligent and reckless behavior.” *Id.* at ¶ 64.

#### **A. Florida’s Long-Arm Statute**

Because ICANN is a non-resident defendant, we first look to Florida’s long-arm statute to

determine if this Court may properly exercise jurisdiction. *Sloss Indus. Corp.*, 488 F. 3d at 925.

Plaintiff contends that personal jurisdiction is properly exercised pursuant to Florida's long-arm statute, Section 48.193(1)(a), which provides:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

Fla. Stat. § 48.193(1)(a); (D.E. No. 32 at 3-5).

**1. ICANN's Affidavit Supporting its Motion to Dismiss**

In support of its Motion to Dismiss, ICANN submitted the affidavit of its Chief Operating Officer, Akram J. Atallah. (D.E. No. 19-1). The Affidavit establishes that ICANN:

1. Does not have any office or other company facilities in Florida.
2. Does not have any phone number or mailing address in Florida.
3. Does not have any employee or staff member in Florida.
4. Has not applied for any loan or opened any bank account in Florida.
5. Has not owned any tangible personal property or real estate property or assets in Florida.
6. Has not appointed any agent in Florida for service of process.
7. Is not licensed to do business in Florida.
8. Has never released any advertisement to the residents of Florida, nor has it released any advertisement in any magazine

targeted at residents of Florida.

9. To the extent ICANN has witnesses who have knowledge of the facts alleged in the Amended Complaint, none of those witnesses are in Florida.

10. ICANN maintains a website that is operated from web servers physically located in El Segundo, California and Reston, Virginia.

(D.E. No. 19-1).

## **2. Plaintiff's Allegations Regarding ICANN's Activities Within Florida**

Because ICANN submitted an affidavit challenging Plaintiff's jurisdictional allegations, the burden shifts back to plaintiff to produce evidence supporting jurisdiction. *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F. 3d 1249, 1258 (11th Cir. 2010); *see also Walack v. Worldwide Machinery Sales, Inc.*, 278 F. Supp. 2d 1358, 1365 (M.D. Fla. 2003). In his response to Defendant's Motion to Dismiss, Plaintiff states that Florida Statute Section 48.193(1)(a) is properly applied to ICANN because:

1. ICANN maintains on its website "a list of domain name registrars that ICANN has accredited and with whom ICANN has signed a 2009 Registrar Accreditation Agreement." (D.E. No. 32 at 3). The list of domain name registrars with which ICANN conducts business includes Moniker Online ("Moniker") whose place of business and mailing address is in Pompano Beach, Florida. *Id.* at 4.

2. According to its website, in July of 2000, ICM Registry, LLC ("ICM"), whose mailing address is in Palm Beach Gardens, Florida, submitted a proposal to ICANN in response to its request for proposals regarding acquiring the rights to certain domains. *Id.* On March 30, 2011, ICANN and ICM entered an agreement that designates ICM as the "Registry Operator" of certain domains. *Id.*

3. On February 3, 2011, ICANN, along with other organizations, held a news conference in Miami, Florida. *Id.* at 5.

**3. No Jurisdiction Under Florida's Long-Arm Statute**

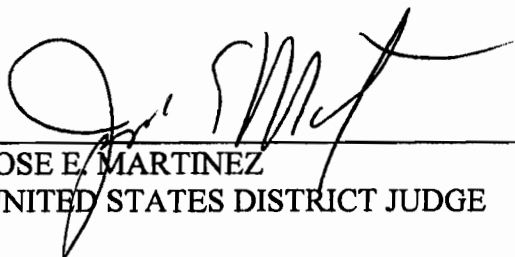
“The fact that a foreign defendant contracts with a Florida resident is not enough to establish personal jurisdiction over the foreign defendant.” *Walack*, 278 F. Supp. 2d at 1366 (finding no personal jurisdiction over defendants pursuant to Florida Statute Section 48.193(1)(a) because alleged facts did not support that defendants operated or conducted a business or business venture in Florida and did not have an office or agent in Florida). As such, even if ICANN entered into contracts with Moniker and ICM, this is not enough to establish personal jurisdiction. Additionally, attendance at a press conference held in Florida is not sufficient to establish that ICANN conducted business within Florida.

Because there is no basis for assertion of personal jurisdiction under Florida's long-arm statute, we need not address the due process implications or the remaining arguments asserted in the motion to dismiss. Accordingly, after careful consideration, it is hereby:

**ORDERED AND ADJUDGED** that

1. Defendant ICANN's Motion to Dismiss Complaint (D.E. No. 19) is **GRANTED**.
2. This case is **CLOSED** and all pending motions are **DENIED as moot**.

DONE AND ORDERED in Chambers at Miami, Florida, this 7 day of December, 2011.

  
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JOSE E. MARTINEZ  
UNITED STATES DISTRICT JUDGE

Copies provided to:  
Magistrate Judge Lynch  
All Counsel of Record