



## I. INTRODUCTION.

In his Opposition, Plaintiff Graham Schreiber argues that Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”), a California nonprofit corporation, subjected itself to jurisdiction in Virginia through several contracts. But there are three problems with this theory. First, Plaintiff’s Complaint does not contain any allegations relating to these purported contracts and it is well settled that a plaintiff cannot amend a complaint in an opposition to a motion to dismiss. Second, *ICANN is not a party* to four of the five contracts identified by Plaintiff; and the fifth contract – ICANN’s Memorandum of Understanding with the United States Department of Commerce – has no connection to the Commonwealth of Virginia. Third, as ICANN discussed in its Motion to Dismiss (“Motion”), the contracts ICANN does have with Defendants Verisign, Inc. (“Verisign”) and Network Solutions, Inc. (“NSI”), two Virginia residents, are not of the type that would subject ICANN to jurisdiction in Virginia, and Plaintiff’s cause of action simply does not “arise” from these agreements.

Plaintiff’s Opposition to ICANN’s Motion fails to submit fact, law or evidence that changes the conclusion that ICANN is not subject to personal jurisdiction in Virginia. It remains uncontroverted that ICANN has no office in Virginia, does not employ any individuals to work in Virginia, does not solicit any business in Virginia, does not sell any goods or services in Virginia, does not hold any licenses in Virginia, does not have any phone listings or mailing addresses in Virginia, does not directly pay any taxes in Virginia, does not own any real estate in Virginia, does not hold any bank accounts in Virginia and did not commit any acts or omissions in Virginia causing injury to Plaintiff. (Declaration of Akram Atallah in Support of ICANN’s Motion to Dismiss (“Atallah Decl.”), ¶¶ 5-17.) It remains uncontroverted that the claim asserted by Plaintiff against ICANN has nothing to do with this venue. And it remains uncontroverted

that Plaintiff has failed to allege facts sufficient to establish a claim against ICANN under the Anticybersquatting Consumer Protection Act (“ACPA”), or any other statute.

Accordingly, Plaintiff’s Complaint against ICANN should be dismissed under Federal Rules of Civil Procedure 12(b)(2), 12(b)(3) and 12(b)(6).

**II. NEITHER THE CONTRACTS IDENTIFIED IN PLAINTIFF’S OPPOSITION, NOR ANY OTHER, SUBJECT ICANN TO JURISDICTION IN VIRGINIA.**

As set forth in ICANN’s Motion, ICANN does not have the necessary “minimum contacts” with Virginia to satisfy the State’s long-arm statute or the Due Process Clause of the Constitution. (Motion at 5-17.) In his Opposition, Plaintiff argues that ICANN subjected itself to jurisdiction in Virginia through several agreements “for other parties,” some of which contain Virginia-based forum selection and choice of law provisions. (Opp. at p. 34-42.) But these newly-introduced agreements – most of which ICANN is not party to – simply do not support jurisdiction over ICANN.

As a preliminary matter, the contracts that Plaintiff lists in his Opposition are not referenced in any way in his Complaint; and “it is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.” *Rossmann v. Lazarus*, 2008 U.S. Dist. LEXIS 68408 (E.D. Va. Sept. 3, 2008); *Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F. Supp. 2d 909, 917 n.9 (E.D. Va. 2004) (quoting *Morgan Distrib. Co., Inc. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989)); *Davis v. Cole*, 999 F. Supp. 809, 813 (E.D. Va. 1998) (refusing to consider additional allegations offered in response to motion to dismiss). As such, the contracts referenced in Plaintiff’s Opposition should not be considered by the Court in assessing ICANN’s Motion to Dismiss.

But if the Court decides to consider these documents, it will become readily apparent that these purported contracts are not the jurisdictional lynchpin Plaintiff claims them to be. In fact,

ICANN is not party to *four out of the five* contracts listed by Plaintiff. (Declaration of Eric P. Enson (“Enson Decl.”) at ¶¶ 3-6.) Rather, two of the documents referenced in Plaintiff’s Opposition are purported contracts between Verisign and/or NSI and third-party entities that assist consumers and businesses in obtaining the right to use Internet domain names; and two others are model, unexecuted agreements between NSI and third parties. (*Id.*) The fact that Verisign and NSI, both of whom are Virginia residents, may have selected Virginia law and Virginia courts to govern their agreements with third parties cannot be imputed to ICANN for purposes of asserting personal jurisdiction over ICANN. Rather, as the Supreme Court has held, “[e]ach defendant’s contacts with the forum State must be assessed individually.” *Calder v. Jones*, 465 U.S. 783, 790 (1984) (refusing to impute an employer’s forum state contacts to its employees); *Balsly v. W. Mich. Debt Collections, Inc.*, 2012 U.S. Dist. LEXIS 24839, \*16 (E.D. Va. Feb. 27, 2012) (“The mere fact that its client — WMDC — made sufficient contact with Virginia to exercise personal jurisdiction does not necessarily subject the Law Firm to jurisdiction here.”); *Am. Ass’n of Blood Banks v. Boston Paternity, LLC*, 2009 U.S. Dist. LEXIS 65184, \*11-12 (D. Md. July 28, 2009) (declining to impute one defendant’s forum-state contacts to the other defendants). This is even more the case in a circumstance such as this – where there exists no corporate or agency relationship between ICANN, on the one hand, and Verisign or NSI, on the other. *PBM Prods. v. Mead Johnson Nutrition Co.*, 2009 U.S. Dist. LEXIS 93312, \*9 (E.D. Va. Sept. 28, 2009) (noting that imputing contacts from an instate entity to an out-of-state entity may be proper *only* where there is an agency or fictitious corporate relationship between the entities that led to the contacts). As the Eastern District of Virginia has previously ruled, “blanket conclusory allegations as to multiple defendants” does not satisfy a plaintiff’s burden of establishing personal jurisdiction over each individual defendant. *Id.* at \*4-5. Yet

blanket allegations are precisely what Plaintiff has offered by seeking to assert jurisdiction over ICANN based on the contracts of other Defendants.

And while ICANN is a party to the fifth agreement listed in Plaintiff's Opposition – ICANN's 1998 Memorandum of Understanding ("MOU") with the United States Department of Commerce, which essentially created ICANN – this agreement has no connection to Virginia whatsoever. (Opp. at pp. 36-42.) Rather, Plaintiff seems to be arguing that ICANN's contacts with Washington D.C., the location of the attorneys representing ICANN and the Department of Commerce in connection with the MOU, translate into ICANN contacts with Virginia given Virginia's geographic proximity to Washington D.C. (*Id.* at 41) This, however, is not the law. The scope of Virginia's Long Arm Statute is limited to contacts with the Commonwealth of Virginia, not its neighbors. *See* Va. Code Ann. §§ 8.01-328.1 *et seq.*

Finally, and although Plaintiff does not address them in his Opposition, the only potentially-relevant contracts – ICANN's agreements with Verisign and NSI – are not of the type that could subject ICANN to jurisdiction in this matter. (Motion at 7-11.) As this Court has previously held, "a contract 'between a resident of the forum state and a non-resident defendant does not, by itself, provide sufficient minimum contacts for personal jurisdiction.'" *Decision Insights, Inc. v. Quillen*, No. 05-0335, 2005 U.S. Dist. LEXIS 27482, \*13-14 (E.D. Va. 2005) (*quoting Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 493 (E.D. Va. 2003)). Instead, the jurisdictional analysis must focus on the circumstances of the contract's negotiations, the contract's execution, and the relationship the contract has to the forum state. *Decision Insights*, 2005 U.S. Dist. LEXIS 27482 at \*16-\*17 (ruling that a contract with a Virginia resident does not support jurisdiction in Virginia over a non-resident defendant "because the agreement does not require [the Defendant] to perform any acts in Virginia.");

*Affinity Memory & Micro, Inc. v. K & Q Enter., Inc.*, 20 F. Supp. 2d 948, 952-53 (E.D. Va. 1998) (finding that a contract between a non-resident defendant and the Virginia Plaintiff does not support jurisdiction in Virginia because the contract was negotiated by the defendant in Minnesota and the defendant performed the obligations under the contract in Minnesota); *Processing Research, Inc. v. Larson*, 686 F. Supp. 119, 121-22 (E.D. Va. 1988) (same); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391, 396 (E.D. Va. 1984) (same). Here, the evidence establishes that: (i) ICANN negotiated and executed the agreements with Verisign and NSI in California; (ii) ICANN has performed its duties and obligations under these contracts in California; and (iii) California is a focal point of the agreements as all litigation relating to the agreements must be resolved in the “jurisdiction and exclusive venue” of a court located in Los Angeles, California. (Atallah Decl., ¶¶ 4, 6; Ex. A, ¶ 5.1(b); Ex. B, ¶ 5.6.)

Moreover, Plaintiff’s claim relating to an abusive domain name registration by Defendant Loraine Dunabin, an individual allegedly living in the United Kingdom, does not “arise from” ICANN’s agreements with Verisign and NSI, as required by Virginia’s long-arm statute. In this Court’s words: “The Virginia General Assembly used the phrase ‘arising from’ to require that there be a causal link between the alleged business activity relied upon to establish personal jurisdiction and the injury alleged in the cause of action.” *Pearson v. White Ski Co.*, 228 F. Supp. 2d 705, 708 (E.D. Va. 2002). “This causation element is more than a mere ‘but, for’ causation; this element requires causation that is more akin to proximate cause.” *Id.*; *Village Lane Rentals, LLC v. The Capital Fin. Grp.*, 159 F. Supp. 2d 910, 916 (W.D. Va. 2001) (ruling that a non-resident defendant’s contacts with the forum state must be the proximate or legal cause of the plaintiff’s claim in order to establish personal jurisdiction). Here, this causal link is

missing with respect to ICANN's agreements and the registration of a single domain name by a third party. (Motion at 9-10.)

In sum, ICANN has no meaningful contacts with Virginia that would support the exercise of jurisdiction over ICANN in this matter. Plaintiff's Opposition does not alter this conclusion.

**III. PLAINTIFF'S OPPOSITION OFFERS NO JUSTIFICATION FOR VENUE IN THE EASTERN DISTRICT OF VIRGINIA.**

Plaintiff's Opposition fails to address ICANN's argument that venue in the Eastern District of Virginia is improper. (Motion at 17.) As such, it remains undisputed that: (1) the alleged improper registration of Plaintiff's domain name occurred outside this District (Compl., pp. 1, 3), the alleged harm was suffered outside this District, (*id.*, Compl. Cover Letter), and, as set forth above, ICANN has no significant contacts with this District. Moreover, the essence of the Plaintiff's dispute is between himself, a Canadian citizen, (*id.*, Compl. Cover Letter), and Defendant Dunabin, an alleged citizen of the United Kingdom. (*Id.*, p. 1, 3.) Accordingly, Plaintiff's claims are unrelated to this District and should therefore be dismissed under Rule 12(b)(3) of the Federal Rules of Civil Procedure.

**IV. PLAINTIFF'S OPPOSITION OFFERS NO SUPPORT FOR HIS ACPA CLAIM AGAINST ICANN.**

ICANN's Motion sets forth the many reasons why Plaintiff has failed to state a substantive claim against ICANN under the ACPA. (Motion at 18-19.) Plaintiff's Opposition does not address these arguments in any fashion. It therefore remains uncontroverted that: (1) Plaintiff has failed to properly allege that he truly possesses any trademark rights in the Internet domain name he claims to have registered; (2) Plaintiff has not alleged any facts demonstrating that ICANN has used Plaintiff's trademark in any way; and (3) Plaintiff has not alleged that ICANN had a bad faith intent to profit from the use of Plaintiff's purported trademark. In sum,

Plaintiff's substantive claim under ACPA is wholly deficient and should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

**V. CONCLUSION**

Nothing in Plaintiff's Opposition changes the fact that Plaintiff has sued the wrong defendant in the wrong court – ICANN has no meaningful contacts with Virginia that would support personal jurisdiction or venue in the Eastern District of Virginia and Plaintiff cannot maintain a claim under the ACPA against ICANN. For these reasons, Plaintiff's entire Complaint should be dismissed with respect to ICANN.

Dated: December 18, 2012

Respectfully submitted,

*/s/ Walter D. Kelley, Jr.*

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**CERTIFICATE OF SERVICE**

As Plaintiff Graham Schreiber is proceeding *pro se* in the above entitled action, he is not registered with the ECF system and cannot be served electronically. I certify that on December 18, 2012, a copy of the foregoing was filed electronically with the Clerk of Court using the ECF system, which will send notifications to any ECF participants, and was served via First Class Mail on the following:

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