UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

INTERNET SOLUTIONS CORPORATION,

Plaintiff, **Case No.6:07-CV-1740-ORL-22-KRS**

v. **DISPOSITIVE MOTION**

TABATHA MARSHALL,

Defendant.

_____/

DEFENDANT'S MOTION TO DISMISS COMPLAINT FOR LACK OF JURISDICTION AND INCORPORATED MEMORANDUM OF LAW

Defendant, TABATHA MARSHALL, (hereinafter "Defendant") hereby moves pursuant to Federal Rules of Civil Procedure 12(b)(1), (2) and (3) to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and personal jurisdiction.

I. INTRODUCTION

The Court should dismiss Plaintiff's Complaint for defamation, trade libel, and injurious falsehood for two reasons, each of which constitutes an independent ground for dismissing this action. First, Plaintiff fails to establish a proper basis for subject matter jurisdiction in a federal court, claiming "pendant jurisdiction" where none exists. Second, Plaintiff is unable to affirmatively support the Complaint's conclusory jurisdictional allegations and therefore cannot establish personal jurisdiction over Defendant. The

Declaration of Tabatha Marshall (hereinafter "Marshall Decl."), submitted herewith, demonstrates that there is no basis for the exercise of personal jurisdiction over the defendant, and even if Plaintiff was able to establish the facts necessary to confer jurisdiction, the exercise of jurisdiction over defendant by this Court would offend traditional notions of fair play and substantial justice and thereby violate due process.

II. FACTS

A. Background

On or about November 1, 2007, Plaintiff Internet Solutions Corporation, (hereinafter "Plaintiff") filed its Complaint for defamation, trade libel, injurious falsehood, and injunctive relief against Defendant. On or about November 3, 2007, Defendant was personally served in the state of Washington. Defendant is a resident of Washington, has continually lived in that state since September 2002 and has never been a resident of Florida. (Marshall Decl. ¶¶ 2-3, 6.) The Complaint cites certain defamation, trade libel, and injurious falsehood claims under Florida state law, and claims federal jurisdiction over them is proper under "pendant jurisdiction." (Compl. at ¶¶ 1, 6.) Plaintiff fails to cite proper grounds for such jurisdiction. The Complaint goes on to allege that the defendant entered into the State of Florida to commit a tortious act. (Compl. at ¶ 10.) Specifically, Plaintiff alleges that Defendant's Internet postings are continuous, substantial, and not isolated defamatory statements which the Defendant posted with the intent to lure advertisers to her site to gain income. (Compl. at ¶¶ 11-12, 24.) Further, Plaintiff alleges that because Internet Solutions Corporation's place of business is of public record, the Defendant should have known she was subject to jurisdiction within the state of Florida. (Compl. at ¶¶ 13, 14.) As discussed more fully

herein, the erroneous and conclusory assertions in the Complaint are not only defective in establishing proper jurisdiction in this court, but they also fail to allege the minimum jurisdictional requirements and are refuted by the Declaration of Tabatha Marshall. Even if Plaintiff was able to meet its burden, the court should grant Defendant's motion as a matter of Due Process.

B. Defendant's Lack of Contacts with Florida

As set forth in the Declaration of Tabatha Marshall, it is clear that the Defendant does not have sufficient contacts within the state of Florida to give rise to *in personam* jurisdiction:

- Defendant is a resident of the State of Washington and has been continually since September 2000. (Marshall Decl. ¶ 2-3.)
- Defendant has a driver's license issued by the State of Washington, is a registered voter in the County of King of the State of Washington, and does not possess a Florida Drivers' License. (Marshall Decl. ¶ 4-5.)
- Defendant is not now, nor has she ever been, a resident of the State of Florida nor has she ever owned or leased any real estate in Florida, held any bank accounts in Florida or had any investments in Florida businesses. (Marshall Decl. ¶ 6, 9.)
- Defendant has visited the state of Florida on only one occasion, for three days in 2004 as part of her duties as an employee of Linux Professional Institute; the trip was in no way related to her website "www.tabathamarshall.com" ("the Website"). (Marshall Decl. ¶ 8.)

- Defendant does not own or operate a business of any kind nor has she ever sold any products or services and she has not received any income or compensation in connection with the Website. (Marshall Decl. ¶ 10-11, 16.)
- Defendant has never placed any advertisements on the Website nor has she ever solicited or received any business, advertising, or donations within or from Florida in connection with the Website. (Marshall Decl. ¶ 12-13.)
- Defendant has never contracted with an internet service provider (ISP) located within Florida and she has never provided a capability on the Website to distinguish or target Florida individuals or companies. (Marshall Decl. ¶ 13, 15.)
- Defendant has never directed any communication, telephonic or written, into the state of Florida for business purposes in connection with the Website and has never had any direct contact with Plaintiff's business associates, vendors, customers, or advertisers. (Marshall Decl. ¶ 17-18.)

III. ARGUMENT

A. Plaintiff's Complaint Fails to Establish Proper Grounds for Federal Subject Matter Jurisdiction

Original jurisdiction in a federal court may rest on any number of different statutory and Constitutional grounds. Plaintiff claims that "[t]his Court has jurisdiction over the claims brought under Florida law by virtue of the doctrine of pendant jurisdiction." (Compl. ¶ 6.) Pendant jurisdiction is defined as

> A court's jurisdiction to hear and determine a claim over which it would not otherwise have jurisdiction, because the claim arises from the same transaction or occurrence as another claim that is properly before the court. For example, if a plaintiff brings suit in federal court claiming that the

> defendant, in one transaction, violated both a federal and a state law, the federal court has jurisdiction over both the federal and the state claim (under federal question jurisdiction) and also has jurisdiction over the state claim that is pendant to the federal claim. Pendant jurisdiction has now been codified as supplemental jurisdiction.

Black's Law Dictionary 870 (8th ed. 2004) (emphasis added). By virtue of claiming pendant jurisdiction (which has not technically existed in the federal courts since 1990, having been codified as supplemental jurisdiction under 28 U.S.C. § 1367), Plaintiff must allege valid grounds for proper subject matter jurisdiction in order to bring the case in federal court. Fed. R. Civ. P. 8(a)(1). Otherwise, this Court must dismiss the case. Fed. R. Civ. P 12(b)(1). Whether a federal question is present or not in a complaint is governed by the "well pleaded complaint" rule, which provides that federal jurisdiction exists only when a federal question is present on the face of the Plaintiff's complaint. *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998). The Plaintiff cannot frame its action under state law and omit federal claims that are essential to recovery. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). Plaintiff claims actions for defamation, trade libel and injurious falsehood. (Compl. ¶ 1.) These causes of action are state law claims. Plaintiff's suit implicates no provision in the U.S. Constitution, the federal law, nor any international treaty. As federal courts are courts of limited jurisdiction and may only hear cases authorized by the Constitution and statutes enacted by Congress, this Court should dismiss Plaintiff's suit for failing to assert proper subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

B. The Court Lacks Personal Jurisdiction Over Defendant

Prior to taking any other action, a court must first decide whether it can exercise personal jurisdiction over a defendant. *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 n. 6 (11th Cir. 1999). Federal courts must "construe the Florida long-arm statute as would the Florida Supreme Court." *Walack v. Worldwide Mach. Sales, Inc.*, 278 F. Supp. 2d 1358, 1365 (M.D. Fla. 2003). A plaintiff bears the burden of alleging "specific, ultimate facts that bring the action within the ambit of the applicable long arm statute." *Id.*; *see also Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir. 2000). If the plaintiff satisfies his prima facie burden, the defendant may submit an affidavit or other competent proof to show that personal jurisdiction is lacking. *Walack*, 275 F. Supp. At 1364-65; *see also Response Reward Sys. L.C. v. Meijer Inc.*, 189 F. Supp. 2d 1332, 1335 (M.D. Fla. 2002) (setting forth the standard for court's review of personal jurisdiction).

A court must conduct a two-part inquiry when making a determination of personal jurisdiction:

> (1) the complaint must allege sufficient facts to bring the action within the ambit of one of the various jurisdictional criteria contained in Florida's long-arm statute found in Section 48.193, Florida Statutes[; and]
> (2) if the complaint properly alleges long-arm jurisdiction, sufficient minimum contacts must be demonstrated that satisfy the requirements of federal due process.

Miller v. Berman, 289 F. Supp. 2d 1327, 1335 (M.D. Fla. 2003) (citations omitted). Only if both prongs of the due process analysis are satisfied may a court exercise personal jurisdiction over a nonresident defendant. *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 256 (11th Cir. 1996) (citing *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990)). A court's analysis of federal due process must inquire into whether a defendant has established

sufficient "minimum contacts" with the state of Florida, and whether exercise of personal jurisdiction over the defendant would offend traditional notions of "fair play and substantial justice." *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 630-31 (11th Cir. 1996) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)); *Future Tech. Today, Inc.*, 178 F. 3d at 1247. If the conditions of personal jurisdiction under *Miller* are not met, then the court should dismiss the case for lack of personal jurisdiction. 258 F. Supp. 2d. at 1335; Fed. R. Civ. P. 12(b)(2).

1. Defendant's Conduct Does Not Give Rise to Personal Jurisdiction Under Florida's Long Arm Statute.

Florida's long-arm statute, Section 48.193 of the Florida Statutes, provides for both specific (§ 48.193(1)) and general (§ 48.193(2)) jurisdiction. "Florida's long-arm statute must be strictly construed, and the burden of proving facts that justify the use of the statute is on the plaintiff." *Response Reward*, 189 F. Supp. 2d. at 1336. Plaintiff's Complaint sets forth general, erroneous and conclusory assertions in an attempt to establish a reasonable inference of personal jurisdiction over the Defendant. However, conclusory allegations are insufficient to establish a prima facie case of personal jurisdiction. *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1318 (11th Cir. 2006) (plaintiff's conclusory allegations in complaint held insufficient to establish prima facie case of jurisdiction over defendant (citing *Posner*, 178 F.3d at 1217-18)). The Declaration of Tabatha Marshall clearly refutes Plaintiff's allegations and shows that there is no basis for personal jurisdiction over her. (Marshall Decl. 1-3.)

a. There Is No "Specific" Jurisdiction Over Defendant Under Section 48.193(1), Florida Statutes.

Two circumstances give rise to specific personal jurisdiction over a non-resident defendant under Florida's long-arm statute. Specific personal jurisdiction over a non-resident defendant is appropriate when the defendant conducts or carries on business activities that establish sufficient forum-related contacts with Florida. Fla. Stat. § 48.193(1)(a) (2007). Specific personal jurisdiction over a non-resident defendant is also appropriate under the long-arm statute when the defendant commits a tortious act in Florida. Fla. Stat § 48.193(1)(b). Plaintiff fails to allege facts sufficient to establish the Court's jurisdiction over Defendant under either of these provisions.

i. Section 48.193(1)(a)

In order to establish specific jurisdiction under Section 48.193(1)(a), a complaint must "set forth specific facts which indicate that defendant has operated, conducted, engaged in, carried on a business, or had an office or agency in this state." *Response Reward*, 189 F. Supp. 2d at 1336 (emphasis added). To establish that a defendant is carrying on a business for the purposes of the long-arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in Florida for pecuniary benefit. *Sculptchair, Inc.*, 94 F.3d at 627 (citing *Dinsmore v. Martin Blumenthal Assocs., Inc.*, 314 So. 2d 561, 564 (Fla. 1975)). The allegations in Plaintiff's complaint do not satisfy this provision.

As discussed previously, Defendant has had very limited contact with the State of Florida. She is a resident of Washington. (Marshall Decl. ¶ 2.) She has not now, nor has she

ever, been a resident of the state of Florida. (Decl. ¶ 6.) The Defendant does not now, nor has she ever, owned or operated a Florida business, owned Florida real estate, or held Florida bank accounts. (Decl. ¶¶ 9-10.) The Website is not associated with any business activity; Defendant has received no remuneration in connection with the Website. (Decl. ¶¶ 11-13, 16.) Defendant is clearly not involved in any business activity. In fact, Plaintiff makes only a single, speculative, and erroneous allegation that Defendant engaged in business-related activities that would subject her to jurisdiction under Section 48.193(1)(a). Plaintiff alleges that the Defendant "posted the false statements to lure advertisers to advertise on her site." (Compl. ¶ 24.) Plaintiff does not allege nor make any showing of facts to identify any activity by the Defendant that would show a general course of business undertaken for pecuniary gain in Florida. On the contrary, the Defendant's declaration indicates that she is not engaged in any business in relation to the Website, and does not carry on business in Florida or elsewhere. (Marshall Decl. 2.) Personal jurisdiction is thus inappropriate under Fla. Stat. § 48.193(1)(a).

ii. Section 48.193(1)(b)

Plaintiff fails to establish personal jurisdiction over the Defendant arising from the commission of any tortious acts within the state. "For personal jurisdiction to attach under the 'tortious activity' provision of the Florida long-arm statute, the plaintiff must demonstrate that the non-resident defendant committed a substantial aspect of the alleged tort in Florida by establishing that the activities in Florida 'w[ere] essential to the success of the tort.'" *Williams Electric Co. v. Honeywell, Inc.*, 854 F.2d 389, 394 (11th Cir. 1988) (citations omitted). While the defendant's physical presence is not required in order to commit a

tortious act in Florida, Section 48.193(1)(b) does require that the non-resident defendant's tortious act results from telephonic, electronic, or written communication directed into Florida. *Wendt v. Horowitz,* 822 So. 2d 1252, 1260 (Fla. 2002).

Plaintiff alleges that "MARSAHLL (*sic*) has entered into the Sate (*sic*) of Florida to commit a tortuous (*sic*) act." (Compl. ¶ 10.) Plaintiff claims that the Defendant has entered into Florida and defamed Internet Solutions Company through her Internet website postings. (Compl. ¶¶ 10, 11.) Plaintiff also alleges that Defendant authored and posted statements that Plaintiff was, and is, engaged in on-going criminal activity, illegal activity such as "phishing", "scamming", and identity theft, with knowing falsity. (Compl. ¶¶ 19-23.) Defendant denies these erroneous allegations. (Marshall Decl. ¶ 19.) Defendant only visited Florida on one occasion, prior to the establishment of the Website. (Decl. at ¶ 8.) Defendant has not made any written or telephonic transmissions into Florida. (Decl. at ¶ 17.) Neither has Defendant initiated any electronic transmissions directed into the state of Florida. (Decl. at ¶ 17.) Defendant maintains the Website for a general worldwide audience, and clearly indicates in her Declaration that she has not and does not direct the Website specifically at Florida, or make provisions for a user to narrow content to focus on any particular state or company. (Decl. at ¶ 15.)

Plaintiff fails to satisfy the predicate connexity requirement of Fla. Stat. § 48.193(1)(b), which requires the Plaintiff to show that a cause of action arises out of Defendant's transmissions into Florida. *Wendt,* 822 So. 2d at 1260. To do so would require an allegation that some person in Florida has actually received a communication or transmission from the Defendant. No such allegation has been made. Nor does Plaintiff

allege or cite information that shows any person in Florida has actually read Defendant's postings, that any information posted on the Website actually came from Florida, or that the any person identified as being from Florida in any posting is actually from Florida. Given that Plaintiff fails to establish connexity between any alleged harm and the state of Florida, Plaintiff fails to state a cause of action based on the requirement of *Wendt* and Florida Statutes. *Id.*; Fla. Stat. § 48.193(1)(b).

In a similar case where jurisdiction was found, the court based its finding that Section 48.193(1)(b) applied to the case on several factors, none of which are present here. *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 347 F. Supp. 2d 1242, 1243-44 (M.D. Fla. 2004). In *Whitney*, the website "allowed consumers to target an individual state by inviting them to 'Pick any state!' for information", to contact persons if a law suit was filed against them, email other persons interested in class actions against the plaintiff, ran at least nine specific reports on Florida, sold advertising space, referred to advertising business in Florida, and accepted actual donations from Florida residents. *Id*. In the instant case, the Defendant did not focus her Website on Florida, did not provide a capability to allow the website visitor to narrow his or her focus on Florida or any particular business, did not advertise, did not offer to contact third parties, and received no pecuniary benefit whatsoever in connection with her Website. (Marshall Decl. 2.)

Based on the complete absence of communications directed specifically at Florida, the lack of connexity between any alleged action on the part of the Defendant and any harm suffered in Florida, and the failure to satisfy any of the factors in *Whitney*, the Plaintiff fails to satisfy the Florida long-arm statute under Section 48.193(1)(b).

b. There Is No "General" Jurisdiction Over Defendant Under Section 48.193(2), Florida Statutes.

Given that Plaintiff has failed to establish sufficient minimum contacts necessary to support specific jurisdiction, any claim of general jurisdiction should necessarily fail as well. *See Miller*, 289 F. Supp. 2d at 1327 ("[I]n fact, general jurisdiction requires a more rigorous showing than specific jurisdiction."). "General personal jurisdiction arises from a party's contacts with the forum state that are unrelated to the litigation." *Walack*, 278 F. Supp. 2d at 1365-66. Florida's general jurisdiction statute provides that a court may exercise jurisdiction over a non-resident if the defendant "is engaged in substantial and not isolated activity within this state . . . whether or not the claim arises from that activity." *See* Fla. Stat. § 48.193(2). "'Substantial and not isolated activity' means 'continuous and systematic general business contact' with Florida." *Einmo v. Aecom Gov't Svcs.*, 2007 WL 2409816 at *6 (citations omitted). In the instant matter, the Plaintiff makes erroneous and conclusory allegations which fail to establish general jurisdiction over the Defendant.

Plaintiff alleges that "MARSHALL'S Internet postings are continuous, substantial, and not isolated toward Internet Solutions Company." (Compl. ¶ 12.) Plaintiff fails to allege or show that Defendant conducts continuous and systematic business activity in Florida. Plaintiff fails to allege that Defendant is registered to do business in Florida, that she has offices in Florida from which she conducts business, or that she is engaged in substantial business contact with the state of Florida. In fact, as attested to in Ms. Marshall's declaration, she is not in business in Florida or any other state, has not carried any advertising whatsoever on her Website, and has never received any remuneration or donations in connection with her Website. (Marshall Decl. 2.)

At most, Plaintiff may attempt to assert grounds for general jurisdiction based on postings on Defendant's Website in connection with an unsubstantiated claim that Defendant carries advertising. See (Compl. ¶ 24.) Notwithstanding Defendant's declaration to the contrary, such a theory will not suffice as a basis for general jurisdiction, because "Florida courts [have] not evince[d] a willingness or rationale to find solicitation activities alone sufficient grounds for the assertion of general jurisdiction." *Prentice v. Prentice Colour, Inc.*, 779 F. Supp. 578, 584 (M.D. Fla. 1991). Thus, the Complaint makes no assertion that Defendant is subject to general jurisdiction in the state of Florida, and there is no factual basis to assert general jurisdiction over Defendant in Florida. Fla. Stat. § 48.193(2).

2. Even if Plaintiff Could Satisfy Florida's Long-Arm Statute, Subjecting Defendant to This Court's Jurisdiction Would Violate Federal Due Process

In addition to satisfying the Florida-long arm statute, a district court must insure that jurisdiction comports with due process requirements. *Miller*, 289 F. Supp. 2d at 1335 (quoting *Meier v. Sun. Int'l Hotels, Ltd.*, 288 F.3d 1264, 1270 (11th Cir. 2002)). The Due Process Clause of the Constitution's Fourteenth Amendment "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established meaningful 'contacts, ties, or relations'." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (citing *Int'l Shoe Co.*, 326 U.S. at 319). The constitutional analysis is controlled by United States Supreme Court precedent interpreting the Due Process Clause. *Miller*, 289 F. Supp. 2d at 1335.

The due process component of personal jurisdiction involves a two-part inquiry: (1) whether a defendant engaged in minimum contacts with Florida; and (2) whether the exercise

of personal jurisdiction over that defendant would offend "traditional notions of fair play and substantial justice." *Madara*, 916 F.2d at 1515-16 (citing *Int'l Shoe Co.*, 326 U.S. at 316).

a. Minimum Contacts

The United States Supreme Court steadfastly maintains that the "minimum contacts" necessary to subject a nonresident defendant to the processes of the forum state must include conduct through which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State" such that "he should reasonably anticipate being haled into court there." *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see also Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 109-110 (1987). The "Purposeful Availment Test" examines whether the defendant's voluntary actions reasonably and foreseeably create liability in the forum state. *See World Wide Volkswagen Corp.*, 444 U.S. at 297. The minimum contacts constitutional requirement serves two objectives: "[I]t protects against the burdens of litigation in a distant or inconvenient forum" unless the defendant's contacts to the forum state make it just and fair to force him or her to defend a cause of action, and "it acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." *Id.* at 292. Defendant's contacts with Florida do not relate, or give rise, to Plaintiff's claims. Even if Defendant's alleged contacts with Florida arguably relate to Plaintiff's claims, her activities cannot be considered purposefully directed to Florida such that she would anticipate being haled into court here.

While changes in technology may demand constitutional standards to evolve with the rest of society, technological advances must not lead to "the eventual demise on all

restrictions on the personal jurisdiction of state courts." See *Hanson v. Denckla,* 357 U.S. 235, 250-51 (1958) (citing *Pennoyer v. Neff,* 95 U.S. 714 (1877), and *Int'l Shoe Co.*, 326 U.S. 310). To examine jurisdiction in the Internet age, the Court must recognize that the Internet is not restricted by distance or state boundaries. *See, e.g., Reno v. ACLU,* 521 U.S. 844, 851 (1997) ("Cyberspace is accessible to anyone, located anywhere, with an Internet connection"). The ubiquitous accessibility and the wide breadth of Internet use make it a unique mode of communication unlike newspapers, mail, radio, television, and other media. See *Millennium Enterprises, Inc. v. Millennium Music, LP,* 33 F. Supp. 2d 907, 914 (D. Or. 1999). Speech on the Internet targets no jurisdiction in particular and everyone in any geographic location. *See id.*

The predominant pre-Internet test for jurisdiction, occasionally relied upon in the Internet context is the *effects test* as established by *Calder v. Jones*, 465 U.S. 783 (1984). In this case, an editor and a writer for *The National Enquirer*, both residents of Florida, were sued in California for libel arising out of an article published in *The Enquirer* about Shirley Jones, a resident of California. See *Calder*, 465 U.S. 783. The United States Supreme Court upheld the determination of personal jurisdiction over the defendants because they had "expressly aimed" their conduct towards California. *Id.* at 789. Relying on the fact that *The Enquirer* had its largest circulation in California, distributing over 600,000 copies of its publication in that state, the court noted that the defendants knew the harm of their allegedly tortious activity would be felt there. *Id.* at 789-90.

A key distinction in the case at bar is that *The National Enquirer* was certainly availing itself of the privilege of operating in California, as it shipped 600,000 physical

copies into that state. *The National Enquirer* purposefully availed itself of doing business in California when it delivered subscriptions and newsstand copies with a great degree of regularity into that state and received payment for them. If *The National Enquirer* wished to avoid the likelihood of being haled into a California court, it could simply have ceased publication in California, with the option of continuing publication unfettered in the remaining 49 states.

If this court were to accept a simplistic interpretation of *Calder* in an Internet context, a nonresident defendant would always be subject to jurisdiction in Florida simply because the plaintiff's complaint alleged defamation of Florida residents regardless of any contacts established by the defendant. *See, e.g., Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865 (5th Cir. 2001). Accordingly, given the nature of the Internet, the only way to avoid jurisdiction in any forum state would be to not speak on matters critical of any entity in the forum state, an end result that would chill free speech to an extent impermissible by the First Amendment. Accordingly, if this Court chose to apply the effects test, this case should most certainly fail due to the strong distinction between the print medium evaluated in *Calder* and the Internet medium in the case at bar. Here, if Defendant sought to avoid jurisdiction in a certain state, there is little to nothing that she could do in order to limit her Website's accessibility in a selected state where the publisher may wish to avoid jurisdiction. Accordingly, if Defendant wished to speak, over the World Wide Web, in a solely intrastate manner, she could not do so with a limitation in the geographic location of the reader.

The most commonly used approach to determine whether purposeful availment exists in a website context is the so-called "*Zippo* Test." This test was originally articulated in

Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). In this case, the Western District of Pennsylvania concluded that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* at 1124. The court described a sliding continuum for the evaluation of whether jurisdiction should attach. At one end of this spectrum are defendants that *clearly* conduct business over the Internet. For example, a defendant that may knowingly and repeatedly transmit computer files over the Internet into a forum state, thus creating jurisdiction. *Id.* (citing *CompuServe, Inc. v. Patterson,* 89 F.3d 1257 (6th Cir. 1996). This test has been met with extensive approval in Florida. *See, e.g.*, *Miller*, 289 F. Supp. 2d at 1327 (applying the *Zippo* Test and rejecting jurisdiction in circumstances where the defendant published a web page accessible in Florida, but did not regularly conduct business in the state of Florida); *Hartoy, Inc. v. Thompson,* 2003 WL 21468079 (S.D. Fla. 2003) (unpublished opinion recognizing and applying the *Zippo* Test); *Miami Breakers Soccer Club, Inc. v. Women's United Soccer Ass'n*, 140 F. Supp. 2d 1325 (S.D. Fla. 2001) (applying the *Zippo* Test to a passive Website and rejecting jurisdiction); *J.B. Oxford Holdings, Inc. v. Net Trade, Inc.*, 76 F. Supp. 2d 1363 (S.D. Fla. 1999) (applying the *Zippo* Test and rejecting jurisdiction over a website that provided the ability for readers to email questions to the defendant, download demonstrations from the defendant, and receive free information about day trading from the defendant).

At the opposite end of the spectrum are simple passive websites which are merely accessible by users in all jurisdictions. These passive websites do little more than make information available to any who may be interested in receiving the information and do not

create sufficient minimum contacts for personal jurisdiction to attach. *See Zippo*, 952 F. Supp. at 1124 (citing *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996). *See also Lofton v. Turbine Design, Inc.*, 100 F. Supp. 2d 404, 409 (N.D. Miss. 2000) (publication of allegedly defamatory material on a website, under the due process clause, does not create sufficient contacts with the forum state since the site was passive and not designed to attract business); *Cybersell, Inc. v. Cybersell, Inc.* 130 F.3d 414 (9th Cir. 1997) (web page accessible in the forum state, causing potential harm in the forum state does not create liability in the forum state).

In the middle are interactive websites where users can exchange information with the host site. In all but the clearest cases, an evaluating court must make a finding that the defendant is somehow expressly targeting Internet users in the forum state and not just making a website accessible to everyone. Mere interactivity, without more does not slide the scale toward establishment of minimum contacts. *See, e.g., Bancroft and Masters, Inc. v. Augusta National, Inc*., 223 F.3d 1082, 1087 (9th Cir. 2000) (Interactivity is insufficient by itself, there must be "express aiming" at forum state); *Hy Cite Corp. v. BadBusinessBureau.com, LLC,* 297 F. Supp. 2d 1154, 1161 (W.D. Wis. 2004). "However the ultimate question remains the same, that is, whether the defendant's contacts with the state are of such quality and nature such that it could reasonably expect to be haled into the courts of the forum state." *Id.* It is clear that the law in this state is that mere maintenance of a website accessible in Florida is not enough to create jurisdiction, and that the contacts that tie the defendant to Florida must be particular and specific and not merely contacts that link

the defendant with equal strength to all states. *See J.B. Oxford Holdings, Inc.*, 76 F. Supp. 2d at 1367 (citing *Cybersell, Inc.*, 130 F.3d 414).

As previously set forth herein, and as established by the Marshall Declaration, since Defendant is technologically unable to limit the geographic location where the page would be accessed, and further did not attempt to distinguish or target Florida companies or individuals, she did not engage in substantial activity in Florida and therefore she does not have sufficient minimum contacts with Florida and could not reasonably expect to be haled into court in Florida. Accordingly, the Court's assertion of jurisdiction over Defendant in this case would violate federal due process.

b. Subjecting the Defendant to This Court's Jurisdiction Offends Traditional Notions of Fair Play and Substantial Justice

Once a court determines that the non-resident defendant has purposefully established minimum contacts with the forum such that a defendant should reasonably anticipate being haled into court there, then the contacts are considered in light of other factors to decide whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Burger King Corp.*, 471 U.S. at 476. These other factors include the burden on the defendant in defending the lawsuit, the forum state's interest in adjudicating the dispute, the plaintiff's 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 states in furthering fundamental substantive social policies. *Madara*, 916 F.2d at 1517 (citing *Burger King*, 471 U.S. at 477).

Weighing these factors demonstrates that subjecting the Defendant to this Court's jurisdiction would not comport with "fair play and substantial justice." The Defendant would be substantially burdened if forced to defend the lawsuit in Florida. The Website is hosted out of the Defendant's home in Washington. (Marshall Decl. ¶ 7.) Virtually all of the relevant documents that Defendant would rely upon to defend this action are located in King County, Washington. Further, Florida has little interest in adjudicating this dispute. As the *J.B. Oxford Holdings* Court noted, mere maintenance of a Website accessible in Florida is not enough to create jurisdiction. *J.B. Oxford Holdings, Inc.,* 76 F. Supp. 2d at 1367. Although the Plaintiff may claim some amorphous harm that may theoretically be felt in Florida, the Defendant merely posted a webpage that is accessible anywhere in the world. That action, in and of itself does not subject her to jurisdiction to anywhere in the United States (or the world). To do so would violate federal due process and have a chilling effect on free speech. Defendant has not purposefully availed herself in the state of Florida and therefore could not anticipate that she would be haled into court here. Fed. R. Civ. P. 12(b)(2).

III. CONCLUSION

Based on all the foregoing, Defendant's Motion to Dismiss should be granted because the Court has neither proper subject matter jurisdiction nor personal jurisdiction over the Defendant. Plaintiff's complaint is facially flawed, improperly asserts "pendant jurisdiction" as a basis for its claims, and does not make a prima facie showing that jurisdiction attaches under Florida's long-arm statute. The Declaration of Tabatha Marshall makes clear that Defendant's activities do not bring it within the ambit of that statute. In the event the Court

finds jurisdiction exists under the long-arm statute, the Plaintiff still has the burden of showing that Defendant's contacts with Florida are substantial enough to satisfy the due process requirements outlined by the Supreme Court in *International Shoe* and its progeny. The assertion of jurisdiction here would not comport with federal Due Process and would have an obvious chilling effect on the constitutional right to Free Speech.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November, 2007, the foregoing has been filed with the clerk of the Court for filing and uploading to the CM/ECF system which will send a notice of electronic filing to **Alex Finch, Esq.,** at alexalgllp@yahoo.com. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to **Alex Finch, Esq.**, P.O. Box 915096, Longwood, FL 32791.

s/ Matthew T. Farr, Esq.
Matthew T. Farr