

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

CIVIL ACTION NO:6:07-CV-1740-ORL-22KRS

INTERNET SOLUTIONS CORPORATION, )  
) **INJUNCTIVE RELIEF SOUGHT**  
) **JURY TRIAL DEMAND**  
)  
Plaintiff, )  
)  
vs. )  
)  
TABATHA MARSHALL, )  
)  
Defendant. )  
\_\_\_\_\_ )

**PLAINTIFF’S’ RESPONSE TO DEFENDANT’S MOTION TO DISMISS  
FOR LACK OF JURISDICTION AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, INTERNET SOLUTIONS CORPORATION, files this Response to Defendant’s Motion to Dismiss Complaint for Lack of Jurisdiction and Incorporated Memorandum of Law and says:

**I. INTRODUCTION**

Plaintiff filed its Complaint on November 1, 2007. Plaintiff’s Complaint asserts causes of action for multiple intentional torts including defamation, trade libel and tortious interference with business. Plaintiff’s Complaint was served on Defendant on November 3, 2007. On November 20, 2007 Defendant filed Defendants’ Motion to Dismiss. (“Motion to Dismiss”). (Doc. 4) In her Motion to Dismiss, Defendant asserts, in pertinent part, that Defendant has not directed any communications “into” the state of Florida and, therefore, this Court does not have subject matter jurisdiction over her pursuant to § 48.193(1)(b), *Fla. Stat.* (2006)1.

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1 Defendant’s Motion to Dismiss addresses general jurisdiction based on minimum business contacts with the state of Florida in addition to special jurisdiction pursuant to § 48.193(1)(b). Plaintiff concedes that it asserts that this Court’s jurisdiction over the Defendant arises from special jurisdiction by application of § 48.193(1)(b). Consequently, this response is directed toward that basis of jurisdiction.

In support of her Motion to Dismiss, on November 20, 2007 Defendant filed a Supplemental Declaration In Support Of Special Limited Appearance For The Purpose Of Challenging Personal Jurisdiction Over Defendant (“Declaration”). (Doc. 5) There are no averments in the Declaration controverting Plaintiff’s assertion that Defendant defamed Plaintiff on her website. Plaintiff alleges that Defendant is subject to the personal jurisdiction of this Court by committing intentional torts causing harm and injury to Plaintiff’s business in Florida. by posting on the Internet on her website numerous defamatory statements.

## **II. ARGUMENT**

### **A. Standard/Test For Granting Or Denying A Motion To Dismiss For Lack Of Jurisdiction.**

The Eleventh Circuit and the federal districts courts of Florida apply a two-part inquiry to determine whether a court may properly exercise personal jurisdiction over a defendant. First, a court must determine whether the exercise of jurisdiction is appropriate under the forum state’s long-arm statute. Second, a court must determine whether exercising personal jurisdiction would violate the Fourteenth Amendment Due Process Clause. *Sloss Industries Corp. v. Eurisol*, 488 F.3d 922, 925 (11<sup>th</sup> Cir. 2007); *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738 (11th Cir. 2006); *American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007).

In considering a motion to dismiss for lack of jurisdiction, a court must take the allegations of the complaint as true to the extent the allegations are uncontroverted by affidavits or deposition testimony of the defendant. *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738 (11th Cir. 2006). Where a court does not hold a discretionary evidentiary hearing on the motion, the defendant may file affidavits and depositions challenging the personal jurisdiction and the material allegations of the complaint. *Id.* at 741. If the defendant’s affidavits and depositions sufficiently controvert the material

allegations of the complaint and are not merely conclusory, the burden of proof shifts to the plaintiff to demonstrate prima facie evidence supporting jurisdiction. *Id.* Plaintiff's prima facie evidence must be sufficient to withstand a motion for directed verdict. *Id.*

1. The Court Has Personal Jurisdiction Over Defendant Pursuant To Section 48.193(1)(b)

a. Defendant Is Subject To The Jurisdiction Of This Court Because Defendant Committed Tortious Acts In The State Of Florida.

The federal court must construe a forum's long-arm statute as the forum state's highest court would construe the long-arm statute. *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738 (11th Cir. 2006). Where the forum state's highest court has not addressed an issue directly, a federal district court must follow federal circuit courts of appeal precedent. *See American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007) citing *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209 (11<sup>th</sup> Cir. 1999) and *Mehlenbach v. Jitaru*, No. 04-cv-1118, 2005 U.S. Dist. Lexis 42007, 2005 WL 4585859, at \*11 (M.D. Fla. June 6, 2005).

Although the Supreme Court of Florida in *Wendt* ruled that physical presence is not necessary for personal jurisdiction if a communication is directed "into" Florida, the Supreme Court did not address in *Wendt* the definition of the term "into" as it relates to posting on the Internet defamatory information targeting an individual in a foreign state. Additionally, the Florida Supreme Court does not otherwise have a controlling opinion on the issue. *See Wendt v. Horowitz*, 822 So. 1252 (Fla. 2002). Consequently, this Court should look to federal court precedent in determining the issue.

Plaintiff's counsel has been unable to locate any Eleventh Circuit opinion stating the Eleventh Circuit's position on whether posting defamatory information on the Internet for general public access and viewing constitutes publication of the statements in a forum state for the purposes of jurisdiction. In *Whitney Information Network, Inc.*, 199 Fed. Appx 738, the Eleventh Circuit did address alleged Internet defamation based on alleged defamatory postings

on a website. However, the issue the court dealt with was whether the provisions and protections of the Digital Millennium Copyright Act removed the matter from the court's jurisdiction. *Id.* at 744. The court did not in its opinion address due process and fairness issues such as minimum contacts, the location of the postings, or whether the posting had been directed into the state of Florida in any fashion, whether generally or specifically. *Id.*

The federal courts for the state of Pennsylvania have addressed the issues substantially, but in a commercial or negligence context. See *Pierce, et al. v. Hayward Industries, Inc., et al.*, 2006 U.S. Dist LEXIS 16472 (Pa. 2006); *Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W. Pa. 1993); *Mar-Eco, Inc. v. T & R and Sons Towing and Recovery, Inc. et al.*, 937 A.2d 512 (P.A. 2003). In *Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W. Pa. 1993), the *Zippo* district court acknowledged that courts have difficulty with determining personal jurisdiction arising out of Internet/website causes of action because of the changing communication environment resulting from the explosion and growth of the Internet, saying:

**The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on the Internet use is in its infant stages. The cases are scant.**

*Id.* at 1123-1124.

*Zippo* established a sliding scale for determining whether personal jurisdiction should exist in commercial causes of action<sup>2</sup>. The *Zippo* sliding scale balances the level of interactivity and targeting of the forum to determine whether in commercial business context Internet use can subject a non-resident defendant to personal jurisdiction in a foreign forum based the defendant's Internet contact. Basically the more an entity does business over the internet and the more

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<sup>2</sup> The *Zippo* case provides an excellent overview and consideration of cases involving various district court rulings relating to a determination of personal jurisdiction in various Internet-related circumstances. However, *Zippo* addresses the issue from a commercial perspective rather than from a tort perspective.

interactive the website is, the more likely the chance that the foreign forum will be able to exercise jurisdiction over the Internet defendant. *Id.* at 1123-1124. Even if a business entity does not specifically direct communications to a forum, but rather creates an environment and accessibility for a foreign forum to access and use the website, the Internet user is likely to be subject to the foreign jurisdiction. If an Internet user merely posts information without target any particular entity or forum, then the Internet user is far less likely to be subjected to personal jurisdiction in a foreign forum.

*Pierce* establishes a two-part test: (1) the “interactivity” sliding scale of *Zippo*; (2) and a direct causal connection between the use of the website and the cause of action or injury. *Pierce, et al. v. Hayward Industries, Inc., et al.*, 2006 U.S. Dist LEXIS 16472 (D. PA 2006). The *Pierce* Court distinguished personal injury cases from commercial cases based on the lack of connection between an injury and the use of a website, but only refers to personal injury based on negligence or product liability; it does not address intentional torts. The *Pierce* Court stated that personal injury cases unrelated with no causal connection to the website should not confer personal jurisdiction based on the existence of the website. *Id.*

The instant case meets the *Pierce* and *Zippo* tests, even though those cases considered the internet problems in a commercial context. First, it falls between the extremes of the *Zippo* scale. Defendant’s website is interactive. By Defendant’s admission, it is weblog/website “hosted” by Defendant. (Doc. 5 at ¶. 14). The website allows third-parties to post comments and further derogatory statements concerning Plaintiff and others. (Comp., Composite Ex. “A”) Additionally, Defendant responds to individuals who post on her site, commenting on the posts. (Comp., Composite Ex. “A”) Additionally, Defendant did not merely post information on the website. She posted specific derogatory information specifically relating to an identified entity in a foreign forum. Consequently, Defendant should be subject to the foreign forum’s personal jurisdiction.

Second, there is a direct causal connection between Plaintiff's asserted causes of actions and injuries and Defendant's use and maintenance of her website. Plaintiff has alleged that Defendant uses its website for the specific purpose of defaming Plaintiff. (Comp. ¶¶ 18-223, and 55). Plaintiff asserts that Defendant has targeted Plaintiff, a business which maintains and operates its principal place of business in the state of Florida. Defendant's defamatory statements are specifically directed toward a Florida entity to cause an injury to the entity and its business interest operated from its principal offices located in Orlando, Florida. The causes of action asserted by Plaintiff are directly and proximately related to Defendant's postings on her website.

As noted by the *Zippo* Court, the Internet is a new and evolving frontier. The "into" requirement of the *Wendt* decision is not viable in the Internet/website/weblog world. Unlike send a letter or making a phone call directly to someone, which is a one-time publication act generally, Internet posters do not need to direct their defamatory communication anywhere to accomplish goal of injury a party in their business in their home state. With the availability of Internet search engines such as "Google" and "Yahoo," an individual seeking to defame an entity need not post directly to any individual or any state. The defamer may simply post on any website and the post will be available continuously to any party in any forum who does an Internet search of the defamed entity. The defamatory statement remains available on the Internet perpetually and is published every time a search is conducted of the defamed entity. *Compare Inset Systems, Inc. v. Instructions Set*, 937 F. Supp 161, 165 (D. Conn. 1996)(holding that Internet advertisements were continuous and substantial contact because "...unlike television and radio advertising, the advertisement is available continuously to any Internet user. The traditional rules for defamatory publications for the purposes of personal direct jurisdiction simply do not apply to the Internet; now the third-party to whom the defamatory poster publishes comes to the publisher, rather than the publisher having to forward it to someone. As a matter of public policy, it makes sense to have jurisdiction lie in the forum state where the

defaming party resides or is located rather than where the defamer resides or is located. If the latter is applied, a defamer can defame across the world with impunity and force the aggrieved party to enforce their property right and reputation in the defamer's home forum.

By virtue of Defendant maintaining a website to post her defamatory statements to the general public, Defendant has directed communications "into" Florida by posting generally on her website. This Court should adopt the reasoning of *Zippo* and *Pierce*, apply it to the instant circumstances, and maintain personal jurisdiction over the Defendant.

b. Defendant Is Subject to the Jurisdiction Of This Court Because Defendant Committed Tortious Acts Resulting In An Injury In The State of Florida.

Even if this Court determines that Defendant's Internet posts and commentary do not constitute a communication directly "into" the State of Florida sufficient to subject Defendant to personal jurisdiction under §48.193(1)(b), the Eleventh Circuit, other federal circuits, and some district courts of appeal of Florida have ruled that personal jurisdiction exists where the tort act is committed outside of the forum state but the resulting injury occurs in the forum state.<sup>3</sup> Here again, the Florida Supreme Court has no direct ruling on this point. Therefore, this Court should again look to federal precedent.

The Eleventh Circuit Court of Appeal has recognized that personal jurisdiction over an out-of-state defendant may exist "in circumstances where an out-of-state defendant commits a tort that produces an injury in Florida." See *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, and 421 F.3d 1162, 1168 (11th Cir. 2005) As noted by the court in *American Color*

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<sup>3</sup> See *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, and 421 F.3d 1162, 1168 (11th Cir. 2005) *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209 (11<sup>th</sup> Cir. 1999)(out-of-state tortious act affected contracts insuring property in Florida); *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7<sup>th</sup> Cir. 1997)(injury occurred in Illinois against Illinois corporation where tortious act resulted in customer canceling an order); *Williams v. Goldsmith*, 619 So. 2d 330, 332 (Fla. 3d DCA 1993)(venue in tortious interference claim proper in the forum state where plaintiff was injured by a loss of clients); *American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007).

*Graphics, Inc.*, the Florida Supreme Court does not have a controlling ruling on the issue of whether an injury in Florida alone creates personal jurisdiction over an out-of-state defendant and the various state district courts of appeal have conflicting decisions. *American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007) citing *Casita v. Maplewood Equity Partners*, 960 So. 2d 854, 856-57 (Fla. 3d DCA 2007); *Williams v. Goldsmith*, 619 So. 2d 330, 332 (Fla. 3d DCA 1993). The Eleventh Circuit has broadly interpreted §48.193 (1)(b) to confer jurisdiction where the injury resulting from a tort occurs in the forum state.

Plaintiff has alleged in its complaint that it suffered an injury to its business in the state of Florida. (Comp. At ¶¶ 36, 44, 51 and 59). Plaintiff asserts that it has suffered an interference with its business contracts and has lost clients. (Comp. At ¶ 59) Consequently, Plaintiff has pled sufficient facts, which if taken as true, demonstrate that Plaintiff has suffered an injury in Florida to its reputation and business interests and that the injury occurred as a result of Defendant's actions. Consequently, Plaintiff has pled a prima facie case establishing this Court's jurisdiction over the Defendant.

1 . This Court Exercising Personal Jurisdiction Over The Defendant Will Not Violate The Fourteenth Amendment Due Process Clause.

The second prong of the long-arm determination is whether the exercise of jurisdiction over the defendant "will offend traditional notions of fair play and justice." *Whitney Information Network, Inc.*, 199 Fed. Appx 738 at 741. The issue is the foreseeability of the eventuality of a potential suit against the defendant. The Supreme Court of the United States has stated the foreseeability issue very simply, saying "The foreseeability that is critical to the due process analysis is...that the defendant's conduct and connection with the forum state are such that he should reasonably expect to be haled into court there." *World Wide Volkswagen Corp. v. Woodson*, 44 U.S. 286, 295, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980).



Applying that basic standard to the instant case, can any prospective defendant not reasonably expect to be sued where the plaintiff's business is located or lives and works if the defendant has engaged in activity specifically designed to disparage and damage the plaintiff's business? Certainly, Defendant in this cause knew that her statements were damaging and designed to harm Plaintiff's business interests and reputation, both of which were plainly based in Orlando, Florida. Plaintiff has sufficiently pled facts supporting an exercise of jurisdiction over the defendant in compliance with due process grounds. Any exercise of personal jurisdiction over the Defendant by this Court should not surprise Defendant nor be unfair to Defendant considering the nature of Defendant's alleged misconduct.

3. Defendant's Declaration Is Legally Insufficient To Shift To Plaintiff The Burden Of Proof As To Personal jurisdiction.

Although Defendant filed an affidavit in opposition to this Court's personal jurisdiction over her, the affidavit is insufficient to shift the burden of proof to Plaintiff to make a prima facie showing of jurisdiction through opposing affidavits or deposition testimony. Defendant's affidavit must present more than mere conclusory denials and must controvert the material allegations of the complaint. See *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738, 743-744 (11th Cir. 2006). Defendant's affidavit presents mere conclusory denials and does not address the material allegations of the complaint.

In Defendant's affidavit, as to Plaintiff's claims of commission of a tort as the basis of jurisdiction, Defendant avers as follows:

**7. I am the owner and host of a website, [www.tabathamarshal.com](http://www.tabathamarshal.com) (hereinafter called the "Website"), from my home in Seatac, Washington. (Doc. 5 at ¶. 14)**

**14. I have never contracted with an internet service provider (ISP) located in Florida. (Doc. 5 at ¶. 14)**

**15. I have never provided a capability on the Website to distinguish or target Florida individuals or companies (Doc. 5 at ¶. 15)**

**17. I have never directed any communication, telephonic or written, into the state of Florida for business purposes in connection with the website. (Doc. 5 at ¶. 17)**

**18. I have never had direct contact with Plaintiff's business associates, vendors, customers, or advertisers. (Doc. 5 at ¶. 18)**

**19. I have not committed any tort within the state of Florida. (Doc. 5 at ¶. 19)**

These allegations are mere conclusory denials and do not address any of the specific material allegations of Plaintiff's Complaint. Also, the averments do not controvert the material allegations of the Complaint as to Plaintiff's claims that Defendant authored and posted on her website defamatory statements regarding Plaintiff's businesses. Defendant's Declaration does not controvert material allegations of the Complaint such as: (1) Defendant authored and posted defamatory statements about Plaintiff's businesses (Comp. at ¶¶ 18-23, 55); (2) Defendant knew that Plaintiff that the business were abused in Florida (Comp. at ¶ 13); (3) Defendant authored and posted the information about Plaintiff's businesses with the expressed purposes of holding Plaintiff up to ridicule and to dissuade persons from conducting business with Plaintiff (Comp. at ¶¶ 32, 35, 37); (4) Defendant accused Plaintiff of criminal and fraudulent activities in the conduct of Plaintiff's businesses (Comp. at ¶¶ 19, 40, 49); (5) and Defendant caused injury to Plaintiff. (Comp. at ¶¶ 23, 35).

In *Whitney Information Network, Inc.*, the Court ruled that the defendant's affidavits in support of a motion to dismiss for lack of jurisdiction were insufficient because the defendant website owner did not controvert the provider's allegations that the website owner tailored complaints submitted by other individuals adding words such as "scam," ripoff," dishonest." *Whitney Information Network, Inc. v. Xcentirc Ventures, LLC*, 199 Fed. Appx 738 (11th Cir. 2006). Because the defendant did not controvert these material allegations specifically, the court ruled that the party moving to dismiss did not shift the burden to the plaintiff to prove personal jurisdiction over the defendant, vacated the ordered dismissing the case, and remanded the matter to the district court. *Id.* at 743-744.

Similar to the defendant in *Whitney Information Network, Inc.*, the Defendant in this matter has failed to controvert the material allegations of the Complaint and, therefore, failed to shift to plaintiff the burden of proving jurisdiction.

III. RELIEF REQUESTED.

WHEREFORE, Plaintiff respectfully requests this Honorable Court deny Defendant's Motion to Dismiss.

Respectfully submitted,

/s/ Alex Finch

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**CERTIFICATE OF SERVICE**

I CERTIFY that on November 30, 2007, I electronically filed the foregoing with the Clerk of the U.S. District Court via CM/ECF. I further certify that I mailed a true and correct copy of the foregoing to Matthew T. Farr, Esquire and Jennifer Bowen Pinto, Esq., Law office of Farr & Bowen, P.L., Attorneys for Defendants, at 189 S. Orange Ave. Ste 1850S, Orlando, Florida 32801.

/s/ Alex Finch

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