IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL CASE NO.: 08-12328-FF

INTERNET SOLUTIONS CORPORATION,

APPELLANT,

v.

TABATHA MARSHALL, individually,

APPELLEE.
_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

APPELLEE'S ANSWER BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, Appellee files this Certificate of Interested Persons and Disclosure Statement listing the partiers and entities interested in this appeal, who are:

The Honorable CONWAY, ANNE C., United States District Judge

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STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that oral argument in this case is unnecessary and would not materially assist the Court in its review, as the issues before the Court are predominantly issues of settled law.

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OTHER AUTHORITIES

CITATIONS TO THE RECORD

The following symbols will be used when citing to the record:

Doc. _ - _ Record pleadings reflecting document and page number as shown in the Appellant's Record Excerpts.

I.B. - Appellant's Initial Brief and page number.

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Appellee hereby adopts the following portions of the Appellants Initial Brief:

I. Nature of the Case

II. Course of the Proceedings Below (with slight modifications as discussed, *infra*)

III. Statement of Jurisdiction

I. STATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court erred in holding that a single allegedly defamatory statement about a Nevada Corporation by a Washington resident, absent so much as an allegation that the statement was read in Florida, satisfies the Florida Long-Arm statute.

2. Whether the trial court was correct in holding that even if such a statement satisfies the Long-Arm statute, it does not satisfy the Fourteenth Amendment to the United States Constitution.

II. STATEMENT OF THE CASE

A. Nature of the case

Appellee, (hereinafter "MARSHALL" or "Defendant") adopts Appellant's (hereinafter "ISC" or "Plaintiff") statement of the nature of the case.

B. Course of the Proceedings Below

ISC's statement of the course of the proceedings below is generally accurate, but it begs a few corrections. Plaintiff states that the Declaration of Tabatha Marshall (Doc. 4) contained no averments other than a general denial that she had not committed any torts in Florida (I.B. at p. 3).

However, the Declaration contains a litany of sworn statements supporting MARSHALL's status as a resident of the State of Washington with no contacts whatsoever to the forum state. (Doc. 4, *generally*). The Declaration also contains averments that MARSHALL has never targeted the forum state, nor has she committed any tortious act in Florida. *Id*. The Plaintiff elected not to file its own declaration, instead relying solely upon the factual allegations in the Complaint to sustain its jurisdictional claim. (Doc. 6 at p. 8).

III. STATEMENT OF THE FACTS

Defendant offers the following statement of the facts as a more accurate recounting of the Record below. MARSHALL is a private blogger residing in the State of Washington. (Doc. 4 at ¶ 2). MARSHALL owns and operates a blog, tabathamarshall.com, from the State of Washington. *Id.* MARSHALL posts consumer reviews of various businesses, including that of Plaintiff's business. MARSHALL allows third parties to post comments and the particular posting complained of by Plaintiff was just such a third party posting. (Doc. 2, Ex. A). ISC's Statement of Facts claims *"MARSHALL uses her website for the specific purpose of defaming ISC."* (I.B. at p. 6). However, that is an unsubstantiated allegation and is contradicted elsewhere by the Plaintiff itself:

> MARSHALL posts alleged consumer comments about business [sic] and whether the business [sic] are engaged in consumer fraud or other unethical or unfair business practices. *Id.*

Additionally, Composite Exhibit A to the Complaint shows that MARSHALL's blog discusses many other companies (Doc. 2, Ex. A).

Plaintiff's single exhibit shows that SixQ, Braxton-Bains, US NMA, Monster.com, Administrative Solutions, Advanced Management Associates, and the Almada Company are all discussed on MARSHALL's blog. There

is nothing in this record to show that any of these other companies are Florida residents or do business in Florida. The record also shows that Plaintiff was only mentioned in a single blog posting on August 1, 2007. (Doc. 2, Ex A).

Plaintiff also speculates that:

> Certainly, MARSHALL in this cause knew that her statements were damaging and designed to harm ICS[sic]'s business interests and reputation, both of which were plainly based in Orlando, Florida. (I.B. at p. 30).

However, this unsupported and self-serving statement ignores the fact that ISC is a Nevada corporation. There is nothing in this record to support the aforementioned allegation, and, in fact, Plaintiff has such strong ties to other states that its own motion to dismiss for lack of personal jurisdiction in a California case recently failed. *See Breakdown Services, Ltd. v. Internet Solutions Corporation, d/b/a Too Spoiled*, United States District Court for the Central District of California, Case No. 2:08-cv-00615-FMC-PLAx (June 2, 2008), (ISC determined to conduct sufficient business in California to subject it to jurisdiction in that state). Accordingly, very little about ISC could be characterized as "plain."

Plaintiff also claims that *"MARSHALL posted information on her website stating that ISC's businesses are engaged in 'phishing,' 'scamming,' or identity theft."* (I.B. at p.6) However, Exhibit A to ISC's Complaint shows that MARSHALL's blog posting ends on the third page of that Exhibit. The allegedly defamatory language clearly appears under the "comments," section posted by third parties. These comments by third parties appear to be the source of the complained-of statements rather than any statements made by MARSHALL, herself. (Doc. 2, Ex. A).[1]

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[1] While this issue is not before this Court, it appears that MARSHALL would be, even if jurisdiction were proper, immune from liability under 47 U.S.C. § 230 for these third-party statements.

IV. SUMMARY OF THE ARGUMENT

ISC asks this Court to establish a novel rule of law that is inconsistent with the Florida Long-Arm statute, § 48.193, *Fla. Stat.* (2007) (hereinafter "Long-Arm statute" or "§ 48.193"), the due process clause of the Fourteenth Amendment to the United States Constitution (hereinafter "due process"), and an extensive body of case law. Plaintiff claims that, if an author residing anywhere in the world writes about a Florida subject, and that Florida subject is displeased with the author's writing, that author is *per se* subject to Florida jurisdiction – even if the author has no minimum contacts with Florida as traditionally understood by the courts.

The Record below shows that MARSHALL is a Washington resident without any contacts with the State of Florida. The Plaintiff, a Nevada corporation, has made no attempt to allege any regular contacts between MARSHALL and the forum state (Florida), nor has any evidence thereof been offered. ISC claims that no such contacts are necessary since an alleged injury to a plaintiff is a sufficient "minimum contact" without considering any other factor. (I.B. at p. 9).

No reported decision supports this expansive and unconstitutional view of personal jurisdiction. If this Court decides to fashion such a rule,

then any journalist or novelist who writes about anyone or anything in Florida will be subject to personal jurisdiction in Florida's federal courts. Florida's federal courts will become as popular a destination for libel plaintiff tourists as its beaches are for snowbirds in winter, and the Eleventh Circuit will have fashioned a unique and unprecedented rule.

The trial court recognized the absurdity of this position and dismissed the case on traditional due process grounds. Given the lack of allegations of minimum contacts, the trial court could well have dismissed this case without reaching the constitutional issues. In any case, the decision below is clearly correct and should be affirmed by this Court.

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V. ARGUMENT

A. Standard Of Review

A district court's dismissal for lack of personal jurisdiction under *Fed.R.Civ.P.* 12(b)(2) is reviewed *de novo. See Sculptchair, Inc. v. Century Arts, Ltd.,* 94 F.3d 623, 626 (11th Cir. 1996).

B. Plaintiff's Complaint was properly dismissed for lack of personal jurisdiction.

Under Florida law: "[a] plaintiff has the burden of proving its right to proceed under Florida's Long-Arm statute against any out-of-state defendant." *Westwind Limousine, Inc. v. Shorter*, 932 So.2d 571, 573 (Fla. 5th DCA 2006) (citing § 48.193 and *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla.1989)). The Plaintiff failed to meet its burden of demonstrating the existence of personal jurisdiction.

If a defendant challenges the plaintiff's jurisdictional allegations, the plaintiff must provide evidence supporting the exercise of jurisdiction. *Westwind Limousine*, 932 So.2d at 573; *Maschinenfabrik Seydelmann v. Altman*, 468 So.2d 286, 288 (Fla. 2d DCA 1985) ("The obligation of the plaintiff is not simply to raise a possibility of jurisdiction, but rather to establish jurisdiction with affidavits, testimony or documents.") (quoting

Hyco Mfg. Co. v. Rotex Int'l Corp., 355 So.2d 471, 474 (Fla. 3d DCA 1978)). If a plaintiff must present extraneous information to buttress the complaint's allegations of jurisdiction, the plaintiff bears a heavy burden of proving jurisdiction. "After a defendant raises a meritorious challenge to the jurisdiction of the court by the use of affidavits, documents or testimony, the burden is upon the plaintiff to prove jurisdiction by affidavits, testimony or documents." *Voorhees v. Cilcorp, Inc.*, 837 F. Supp. 395, 398 (M.D. Fla. 1993) (emphasis added) (citing *Jet Charter Service, Inc. v. Koeck*, 907 F.2d 1110, 1112 (11th Cir. 1983)).

Even if the Plaintiff in the instant case overcomes its burden of proving the applicability of the Long-Arm statute, the Plaintiff's job is not complete. The Plaintiff must then demonstrate that the exercise of jurisdiction comports with the due process clause. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, (1945); *Venetian Salami Co.*, 554 So. 2d at 502.

When a defendant raises a meritorious challenge to personal jurisdiction through the use of affidavits, documents, or testimony, the burden shifts to the plaintiff to prove jurisdiction through the same means. *See Jet Charter Service, Inc.*, 907 F.2d at 1112. It is unnecessary, however, for the parties to submit additional materials concerning jurisdiction if the

complaint fails to allege sufficient facts to support the allegations of jurisdiction. *See Miami Breakers Soccer Club, Inc. v. Women's United Soccer Ass'n,* 140 F. Supp. 2d 1325, 1327 (S.D. Fla. 2001). There are no facts in the record to show that MARSHALL had any contacts with Florida at all – minimal or otherwise, and as will be discussed *infra*, ISC failed to allege sufficient jurisdictional facts to support its cause of action in the first place.

MARSHALL was under no obligation to file a declaration in order to challenge personal jurisdiction. However, MARSHALL elected to do so. (Doc. 4). Plaintiff did not challenge any of the factual statements in MARSHALL's Declaration. Once those unrefuted factual statements were presented to the Court, the question of jurisdiction was necessarily resolved in MARSHALL's favor. *See e.g.*, *Washington Capital Corp. v. Milandco, Ltd.*, 695 So. 2d 838, 841 (Fla. 4th DCA 1997) (plaintiff may not merely rely upon factual allegations in the complaint to sustain a claim of personal jurisdiction; "The failure of the plaintiff to refute the allegations of the defendant's affidavit requires that a motion to dismiss be granted"); *Cosmopolitan Health Spa, Inc. v. Health Indus., Inc*., 362 So. 2d 367, 368 (Fla. 4th DCA 1978).

C. The Florida Long-Arm Statute does not Reach Statements Published in Washington, by a Washington Resident Merely Because Those Statements Refer to a Florida Subject

Even a liberal construction of the Florida Long-Arm statute would require that this Court affirm the lower court's dismissal of this case. That conclusion is even more apparent here because the law requires a strict construction of the Long-Arm statute in favor of non-resident defendants. *See Blumberg v. Steve Weiss & Co*., 922 So. 2d 361, 364 (Fla. 3d DCA 2006); *Wendt v. Horowitz*, 822 So.2d 1252, 1256 (Fla. 2002); *Venetian Salami Co.*, 554 So.2d at 502; *Pluess-Staufer Indus. v. Rollason Eng'g & Mfg.*, 635 So. 2d 1070, 1072 (Fla. 5th DCA 1994) ("Long-Arm statutes are to be strictly construed"); *Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V.*, 701 F.2d 889, 890 (11th Cir. 1983)).

Plaintiff fails to satisfy the fundamental requirement of §48.193(1)(b), which requires the Plaintiff to show that this cause of action arises out of MARSHALL'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 and that the Defendant actually transmitted that communication into Florida by some

affirmative act. It is not sufficient to allege that the communication merely found its way into the Plaintiff's hands in Florida. *See Casita, L.P. v. Maplewood Equity Partners, L.P.,* 960 So.2d 854, 857 (Fla. 3d DCA 2007):

> A…communication is deemed 'published' in Florida, subjecting the publisher [to Long-Arm jurisdiction] if the communication was made *into* this State by a person *outside* the State...
> (emphasis added).

A plaintiff alleging personal jurisdiction must plead facts in the complaint that support the existence of personal jurisdiction over the defendant. *See Id. See also Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1248 (11th Cir. Fla. 2000). In this case, the Plaintiff has not even pled the requisite jurisdictional facts to support the underlying cause of action. *See e.g.*, *Valencia v. Citibank Int'l,* 728 So.2d 330 (Fla. 3d DCA 1999) (outlining elements of a defamation action in Florida).

To state a cause of action for defamation, a plaintiff must allege that (1) the defendant published a false statement, (2) about the plaintiff, (3) to a third party, and (4) that the falsity of the statement caused injury to the plaintiff. *Valencia*, 728 So.2d at 330. The Plaintiff's Complaint fails as a matter of law because it does not even allege the jurisdictional requirements for a defamation action in this state. An examination of the Complaint will

show that the Plaintiff has never alleged that anyone in Florida has read the website (Doc. 2, *generally*). In fact, at no time has the Plaintiff even alleged that anyone, anywhere, has *read* the website except the Plaintiff. *Id.*[2]

Even if the Complaint alleged sufficient elements, the Long-Arm Statute would still not apply to MARSHALL.

> 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 "were essential to the success of the tort."

Williams Electric Co. v. Honeywell, Inc., 854 F.2d 389, 394 (11th Cir. 1988) (citations omitted). Plaintiff does not dispute that MARSHALL is a non-resident of Florida, and that she resides in the State of Washington. (I.B. at 6). In addition, Plaintiff acknowledges that MARSHALL operates her website from the State of Washington. MARSHALL has no computer server, router or other physical presence of any kind in the State of Florida. *Id.*

[2] The Plaintiff brought repetitive counts for defamation, a sanctionable count for injunctive relief, which would equal an unlawful prior restraint if granted, and a bizarre count for "False Light Invasion of Privacy." Whether the tort of "False Light" exists in Florida at all is highly doubtful. See *Gannett Co. v. Anderson,* 947 So.2d 1, 7 (Fla. 1st DCA 2006) ("with the exception of [*Heekin v. CBS,* 789 So.2d 355 (Fla. 2d DCA 2001)] no Florida appellate court has upheld a complaint on the ground that it states a cause of action for invasion of privacy based on a false light theory"). Even if False Light exists as a tort in Florida, it is a claim that is only available to individuals, not corporations.

The only statement in the entire Complaint suggesting the propriety of Florida jurisdiction is this confusing and conclusory statement: *"MARSAHLL [sic] has entered into the Sate [sic] of Florida to commit a tortuous [sic] act."* (Doc. 2 at ¶ 10). As a matter of law, this allegation is insufficient to establish a *prima facie* case of personal jurisdiction. *See Snow v. Direct TV, Inc.*, 450 F.3d 1314, 1318 (11th Cir. 2006) (conclusory allegations do not establish personal jurisdiction).

For reasons not apparent on this record, the trial court assumed – at least for purposes of argument – that the paucity of tortious conduct allegations could be overlooked: *"The court assumes for the purpose of deciding the instant motion that the tortious conduct element of the Long-Arm statute has been satisfied."* (Doc.6 at p.4). However, the court then held that MARSHALL *"has not adequately rebutted ISC's allegation of Long-Arm jurisdiction based on the claim that the tort was committed in Florida and that injury resulted in Florida."* Id. On Appeal, Plaintiff has conceded that the defamatory statements were published in Washington. (I.B. at p. 6). Plaintiff also must acknowledge that it made no allegations suggesting that any third party in Florida ever read or viewed those statements. *Id.* Regardless of the logic or stated justification for the lower

court's decision, the Plaintiff itself has conceded the central facts which completely undermine and refute its claims. The decision below must be affirmed.

(1) Claimed Injury in Florida is Insufficient to Support Long-Arm Jurisdiction

Florida courts have recognized that, even in the case of intentional torts,[3] the existence of injury in Florida, standing alone, is insufficient to establish jurisdiction pursuant to the "commission of a tort" provision of the Florida Long-Arm statute when all of the defendant's allegedly tortious conduct occurred outside of the state. *See Casita,* 960 So.2d at 854 (injury within Florida insufficient to support Long-Arm jurisdiction for allegedly defamatory statement published outside Florida by non-Florida residents); *Consol. Energy, Inc. v. Strumor,* 920 So.2d 829 (Fla. 4th DCA 2006).

> [E]ven in the case of intentional torts, the existence of an injury in Florida, standing alone, is insufficient to establish jurisdiction pursuant to section 48.193(1)(b) when all of the defendant's tortious conduct occurred outside the state"

Homeway Furniture Co. of Mt. Airy v. Horne, 822 So.2d 533, 539 (Fla. 2d DCA 2002); *See also*, *Thompson v. Doe*, 596 So.2d 1178, 1179 (Fla. 5th

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[3] MARSHALL does not concede that the complained-of conduct constitutes an intentional tort. Certainly this record shows that there are evidentiary hurdles to any such claim on Plaintiff's part.

DCA 1992) (decision approved by *Doe v. Thompson,* 620 So.2d 1004 (Fla. 1993).

No Florida court has ever upheld the exercise of personal jurisdiction over a nonresident defendant based solely upon the publication of an allegedly defamatory statement outside of Florida, simply because the statement refers to a Florida resident. *See Id.* Contrary to Plaintiff's position, "it is not [ ] enough that the actions of a defendant committed outside of Florida ultimately have consequences in Florida." *Blumberg*, 922 So. 2d at 364 (citing *Korman v. Kent*, 821 So. 2d 408, 411 (Fla. 4th DCA 2002)). "Instead, his actions must *directly* cause injury or damage within the state." *Id.*

Section 48.193(1)(b) of the Florida Statutes is not satisfied even when an intentional tort is *directed* at a Florida resident if all of the actions taken to commit the tort occur outside the state. *See Phillips v. Orange Co.*, 522 So. 2d 64 (Fla. 2d D.C.A. 1988); *Freedom Sav. & Loan Ass'n v. Ormandy & Assocs.*, 479 So.2d 316 (Fla. 5th DCA 1985) (tortious interference). Given the facts as presented by Plaintiff, there is no basis to conclude that MARSHALL took any actions at all in the State of Florida not did she direct any actions to or for any resident of the State of Florida.

The common denominator in the preceding cases is the requirement of some communication specifically directed and specifically transmitted *into Florida.* The "publication" element of a defamation claim must be aimed at Florida by the defendant, not brought into Florida by the plaintiff himself. *See Casita, L.P.*, 960 So.2d at 857:

> A…communication is deemed 'published' in Florida, subjecting the publisher [to Long-Arm jurisdiction] if the communication was made *into* this State by a person outside the State… *(Emphasis added).*

No such fact is present in this case. At most, the evidence suggests that MARSHALL published an allegedly defamatory statement in Washington and that it was accessed by Plaintiff (and apparently no one else) in Florida. Plaintiff claims injury in Florida by virtue of Plaintiff's presence in this state, and *Plaintiff's* act of reaching into *Washington* by computer and downloading the complained-of statements in Florida. Publication in Florida was caused by the Plaintiff, not by MARSHALL.

MARSHALL's website is entirely passive (Doc. 2, Ex. A). There is no activity directed from this site which is interactive enough to constitute tortious activity in this State as required by § 48.193(b). The Plaintiff does not appear to question whether the website is interactive or not, but rather

relies solely upon the alleged injury caused in Florida for the basis of alleging jurisdiction under the Long-Arm Statute. The Plaintiff has not specified what conduct on the part of MARSHALL, if any, actually occurred in Florida. Neither has the Plaintiff demonstrated that any of MARSHALL's activities in Florida were essential to the success of the alleged tort, as required under *Williams*. *Williams Electric Co.,* 854 F.2d at 394. The absence of any such allegations makes it clear that § 48.193(1)(b) does not confer specific jurisdiction over MARSHALL.

D. **Due Process Forbids the Exercise of Personal Jurisdiction Over this Defendant Under these Facts**

Even if one assumes that the Florida Long-Arm statute is applicable, the Court must determine whether sufficient minimum contacts exist between Florida and the Defendant to satisfy due process requirements. *Wendt*, 822 So. 2d at 1256 ; *Venetian Salami*, 554 So. 2d at 502. *See also Cable/Home Communication Corp. v. Network Productions, Inc.,* 902 F.2d 829 (11th Cir. 1990*)* (stating that "mere proof" of proper jurisdiction under the applicability of the Florida Long-Arm statute does not automatically satisfy the due process requirement of the Fourteenth Amendment). This is not a radically new concept or one created *ad hoc* to deal with the Internet

age. Rather, these principles have existed for generations and are a central feature of Federal jurisprudence.

In order to satisfy the due process requirements of the Fourteenth Amendment, the Plaintiff must first show that MARSHALL has established "minimum contacts," with Florida, the forum state; and second, the Plaintiff must show that exercising personal jurisdiction over MARSHALL in Florida would not offend traditional notions of fair play and substantial justice. *Id.* (citing *Williams,* 854 F.2d at 392).

(1) MARSHALL Lacks Minimum Contacts with Florida

The U.S. Supreme Court has held that, before a court has the power to exert jurisdiction over a nonresident defendant, that defendant must "purposefully avail himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The Fourteenth Amendment requires certain "minimum contacts" between a nonresident defendant and the forum state in order that "traditional notions of fair play and substantial justice," are not offended. *See Int'l Shoe Company*, 326 U.S. at 316. This "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. This test protects a defendant from being hauled into another state's court solely by virtue of attenuated or sporadic contacts, or by the unilateral activity of another party or a third person. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980)).[4]

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." *See World Wide Volkswagen Corp.*, 444 U.S. at 292. ISC seeks exactly what the due process clause prohibits, a discard of any notion of federalism in order to punitively subject MARSHALL to jurisdiction in this improper venue.

[4] In the instant case, a third party posted the controversial message on MARSHALL's website and Plaintiff purposefully retrieved that information. The actual publication in Florida was accomplished unilaterally by the Plaintiff and not by MARSHALL.

(2) Due Process and First Amendment Considerations in an Internet Context

Despite the Plaintiff's claim that "the Internet is a new and evolving frontier," (I.B. at p. 25) the issue at bar is rather well-worn legal ground. 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*, 357 U.S. at 250-51 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)); *see also Int'l Shoe Company*, 326 U.S. at 310. Traditional constitutional principles must be applied to resolve this case.

(3) The "Zippo Test"

The Plaintiff urges this Court to adopt the sliding scale test established in *Zippo Mfg. Co. v. Zippo DOT Com, Inc.,* 952 F.Supp. 1119 (W.D. Pa. 1997). MARSHALL acknowledges that *Zippo* appears to be the most widely embraced test in Florida for personal jurisdiction in the website context, and has been met with extensive approval in Florida's Federal courts. *See e.g.*, *Miller v. Berman,* 289 F.Supp.2d 1327 (M.D. Fla. 2003) (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 and rejecting previous analysis of personal jurisdiction accepting that emails or telephone communications from out of state may support personal jurisdiction under the Florida Long-Arm statute as inapplicable in a simple website case); *Hartoy, Inc. v. Thompson*, 2003 WL 21468079 (S.D. Fla. 2003) (unpublished opinion recognizing and applying the *Zippo* Test); *Miami Breakers Soccer Club, Inc.*, 140 F.Supp.2d at 1325 (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 e-mail questions to the defendant, download demonstrations from the defendant, and receive free information about day trading from the defendant). *See also Revell v. Lidov*, 317 F.3d 467, 471-72 (5th Cir. 2002) (interactive online bulletin board that was "directed at the entire world…not directed specifically at Texas" held insufficient to establish minimum contacts).

In *Zippo*, the court 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." *Zippo* 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 with the forum state over the Internet. Nothing in the Record would suggest that MARSHALL's website is found within this end of the interactivity spectrum.

At the opposite end of the spectrum are passive websites like MARSHALL's, which are merely accessible by users in other 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* at 1124 (citing *Bensusan Rest. Corp. v. King*, 937 F.Supp.295 (S.D.N.Y. 1996). *See also Loftan 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 of the scale 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 itself accessible generally. Mere interactivity, standing alone, does not tip 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).

> 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 hauled into the courts of the forum state.

Hy Cite Corp. v. BadBusinessBureau.com, LLC, 297 F.Supp.2d 1154, 1161 (W.D. Wis. 2004).

Florida law concerning jurisdiction over websites is clear. Mere maintenance of a website accessible in Florida is not enough to create jurisdiction. 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 at 414); *Miller*, 289 F.Supp. at 1335; *Hartoy,* 2003

WL 21468079 (applying *Zippo* test); *Instabook Corp. v. Instantpublisher.com*, 469 F.Supp.2d 1120 (M.D. Fla. 2006) ("In the jurisdictional context, there is no critical difference between operating a toll-free, nationwide telephone number capable of accepting purchase orders, on the one hand, and operating a website capable of accepting purchase orders.").

The law in other jurisdictions essentially mirrors the law in Florida. *See e.g.*, *Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275 (Fed. Cir. 2005) (defendant's website "not directed at customers in [forum], but instead is available to all customers throughout the country who have access to the Internet"); *Vinten v. Jeantot Marine Alliances, S.A.,* 191 F.Supp.2d 642, 647 (D.S.C. 2002) (noting trend in case law); *see also Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) (use of web server in forum is *de minimus* contact).

The purposeful availment requirement is only established if the defendant purposefully creates sufficient minimum contacts with Florida in order to create "a substantial connection" with this state. *See Burger King Corp.*, 471 U.S. at 475-76; *Becker v. Hooshmand,* 841 So.2d 561 (Fla. 4th DCA 2003) (defendant was a moderator of an Internet chat room, with

power to exclude members from the room, who posted numerous defamatory comments about the plaintiff that were "targeted to Florida residents, or *people likely to seek medical care in the State of Florida,"* resulting in injury to the plaintiff's reputation in business, which only existed in Florida) (emphasis added). The constitutional raison d'être for the "purposeful availment" requirement is so that the decisions of all states have some measure of predictability and citizens may be on notice that they may be subject to suit in a foreign jurisdiction. *See World Wide Volkswagen Corp.*, 444 U.S. at 297. If citizens believed that the risk of litigation in another forum is too great, citizens of other states may sever any connection to unfavorable forum states. *Id*. at 297.

It is not reasonable to believe that MARSHALL could limit where in the United States, (in fact, where in the world) her page would be accessed. This is so because MARSHALL is technologically unable to limit access to her site to particular locations. The Plaintiff's pre-Internet conception of jurisdiction does not reflect the realities of the World Wide Web. If this Court accepts the Plaintiff's proffered rule, then a Florida plaintiff who makes a single phone call to an out-of-State resident could create jurisdiction in Florida from that single contact. This result is simply illogical and would

undoubtedly throttle the free expression and free commerce which the Constitution and our Federal system are designed to protect.

(4) The "Effects Test"

Plaintiff relies on pre-Internet test for jurisdiction, known as the *effects test* which was set forth in *Calder v. Jones,* 465 U.S. 783 (1984). However, the Plaintiff does not seem to understand that *Calder* did not do away with the "minimum contacts" test, nor did it invalidate the Fourteenth Amendment.

In *Calder*, the plaintiff brought suit in California against a national magazine with its highest circulation in California and where the alleged defamation was published. *Id.* at 785

> [The Enquirer] publishes a national weekly newspaper with a total circulation of over 5 million. *About 600,000 of those copies, almost twice the level of the next highest State, are sold in California.* (emphasis added).

Calder specifically recognized that:

> "[the Enquirer] knew that the brunt of that injury would be felt by respondent in the State in which she lives *and in which The National Enquirer has its largest circulation*." *Id.* at 789-90 (emphasis added).

Through delivering 600,000 issues per month to the forum state, The National Enquirer magazine strongly availed itself of the privilege of operating in California. Similarly, the facts of *Keeton,* 465 U.S. at 774 are distinguishable. In that case the Supreme Court held that:

> Respondent's regular circulation of magazines in the forum state is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine. *Id.* at 773-774.

Hustler Magazine sold approximately 10,000 to 15,000 issues per month in the forum state. *Id.* at 772. The contacts between Hustler and the forum state were important enough that the exercise of jurisdiction comported with the due process clause. *Id.* at 782 (Brennan, J. concurring).

The effects test is not so broad that it allows a court to exercise jurisdiction in the absence of evidence that the Defendant expressly aimed her conduct at the forum state. *See Marten v. Godwin*, 499 F.3d 290, 297 (3d Cir. 2007) ("Even if a defendant's conduct could cause foreseeable harm in a given state, such conduct does not necessarily give rise to personal jurisdiction in that state") (citing *World Wide Volkswagen*, 444 U.S. at 297). There is nothing in the Record that supports a claim that MARSHALL has any significant Florida relationship nor that her story built upon significant Florida sources for her non-defamatory blog posting about a Nevada

Corporation. *See Ouazzani-Chahdi v. Greensboro News & Record, Inc.,* 200 Fed. Appx. 289, 292 (5th Cir. 2006) (explaining the *Calder* and *Keeton* tests); *Cadle Co. v. Schlichtmann*, 123 Fed. Appx. 675, 679 (6th Cir. 2005) (articulating 6th Circuit's application of *Calder*); *Revell*, 317 F.3d at 473 (rejecting personal jurisdiction under the *effects test* when allegedly defamatory article contained no reference to forum state, nor to forum state activities by plaintiff, nor was it expressly targeted to forum state readers any more than readers in all other states); *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002) (rejecting Virginia jurisdiction in defamation action since story, posted on the Internet, did not expressly target Virginia readers); "[A]pplication of *Calder* in the Internet context requires proof that the out-of-state defendant's Internet activity is expressly targeted or directed to the forum state"); *GTE New Media v. Bellsouth Corp.*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000) (same).

If this Court were to accept a simplistic interpretation of *Calder* or *Keeton* in an Internet context, a nonresident defendant would *always* be subject to jurisdiction in Florida simply because a plaintiff's complaint alleged defamation of a Florida resident, regardless of any contacts established by the defendant. Accordingly, given the nature of the Internet,

the only way to avoid jurisdiction in any forum state would be to remain silent on matters critical of any entity in the forum state. The end result would chill free speech to an extent that the First Amendment would be rendered meaningless. This would, in effect, result in this Court licensing "one side of a debate to fight free style, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992). This is a position which runs against the protections of free speech enshrined in the First Amendment. *See Id*. Even if this Court chooses to apply the effects test and not the *Zippo* test, jurisdiction in this case would still fail due to the strong distinction between the print medium evaluated in *Calder* and *Keeton* and the Internet medium in the case at bar. MARSHALL does not have the option of banning readers in Florida or anywhere else. *See ACLU v. Reno*, 31 F.Supp.2d 473 (E.D. Pa. 1999), *affirmed by ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), *cert. granted by Ashcroft v. ACLU*, 532 U.S. 1037 (2001), *vacated by Ashcroft v. ACLU*, 535 U.S. 564 (2002), *remanded to ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *cert. granted by Ashcroft v. ACLU*, 540 U.S. 944 (2003), *aff'd and remanded to Ashcroft v. ACLU*, 542 U.S. 656 (2004), *remanded to ACLU v. Gonzales*, 478 F.Supp.2d 775 (E.D. Pa. 2007). Assuming that the effects test still has

continuing relevance to the Internet, one must still conclude that jurisdiction fails here because there is no purposeful availment of Florida as a forum for commerce, communications, nor targeting Florida readers with any specificity.

E. Permitting this Action to Proceed in Florida Would Offend Traditional Notions of Fair Play and Substantial Justice

Maintenance of this suit against MARSHALL would offend traditional notions of fair play and substantial justice. In determining whether traditional notions of fair play and substantial justice will be served, a court may consider: (1) the burden on the defendant, (2) the forum's state interest in adjudicating the dispute, (3) plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the efficient resolution of the matter and (5) the shared interest of the several states in furthering fundamental substantive social policies. *See Future Tech.*, 218 F.3d at 1251.

An analysis of these factors clearly shows that justice and fairness are served by a finding that the Court lacks personal jurisdiction over MARSHALL. At least three of these factors weigh heavily in favor of finding that the exercise of personal jurisdiction over MARSHALL does not

comport with due process. First, maintenance of this suit in Florida places a significant burden on MARSHALL. MARSHALL is a resident of the State of Washington. (Doc. 4 at ¶ 2). The travel required to fully litigate this suit alone would cause MARSHALL to incur substantial financial damage as well as significantly interfere with her ability to keep her job and exercise her First Amendment rights by publishing her website.

Second, the State of Florida has no specific interest in adjudicating this dispute. The Plaintiff is a Nevada corporation that claims, without offering proof that its principal place of business is in Florida. At least one other court has found that Plaintiff operates what amounts to a nation-wide business. *See Breakdown Services, Ltd. v. Internet Solutions Corporation, d/b/a Too Spoiled*, *supra*. The Plaintiff's alleged injury may have occurred where a reader's impression of ISC was significantly changed, but there is neither an allegation nor proof that this occurred in Florida. Florida has no greater interest in the resolution of this dispute than any other potential forum state, and certainly less than Washington or Nevada.

Third, Plaintiff is still capable of obtaining effective relief by filing the action in a more appropriate forum, which has personal jurisdiction over

MARSHALL. As a result, the Court should find that maintenance of this suit offends traditional notions of fair play and substantial justice.

To lend additional weight to MARSHALL's position that fair play and substantial justice would be grossly offended by the exercise of Florida jurisdiction, this Court should be aware that the Washington Supreme Court interprets the Washington constitution to be more protective of individual rights than the United States Constitution. *See Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wn.2d 230, 238 (Wash. 1981); *State v. Coe*, 101 Wn.2d 364 (Wash. 1984). As a normal part of their daily lives, citizens and residents of Washington are permitted and accustomed to a level of freedom of speech that is greater than that found in Florida. *See e.g., State v. Globe Communications,* 622 So.2d 1066, 1075 (Fla. 4th DCA 1993) (Florida constitution affords same protections to freedom of speech as the First Amendment). Plaintiff's election to file in Florida – which is less protective of speech rights than the State of Washington – smacks of forum shopping.

A citizen of Washington, living in in Washington, expressing herself in Washington, should be entitled to the presumption that all of her speech will be equally protected under the laws of the State. A Washington resident should not need to censor herself merely because she speaks on Florida

subjects. Taken to its logical conclusion, the Plaintiff's line of reasoning would mean that citizens would no longer be governed by the law of state in which they are located when expressing themselves, but rather the law governing the *subject of that speech*. This position is unsupported by the law of this or any other state.

The Plaintiff has failed to demonstrate how MARSHALL may have so purposefully availed herself of the benefit of Florida law that she could reasonably anticipate being hauled into court in this state. MARSHALL clearly had something to say, and a right to speak under the First Amendment to the United States Constitution as well as the rights guaranteed to her under the Washington constitution. This Court would foreclose that right if it accepted Plaintiff's theory that any member of the public making use of the Internet to speak about a Florida resident is in danger of being hauled into court in this state. This would be a significant blow to the breathing room required for First Amendment freedoms to survive on the Internet. C.f. *NAACP v. Button*, 371 U.S. 415 (1963). This Court should reject that theory as violative of the Florida Long-Arm statute, the First Amendment to the United States Constitution, and Article I, Section 4 of the Florida Constitution.

CONCLUSION

There is no basis on this record for a court in Florida to assert jurisdiction over the Defendant, a resident of the State of Washington with no ties to Florida. MARSHALL did not maintain her website in Florida, did not target any persons residing in Florida as a potential recipient of her message and took no direct action to publish her message in Florida. (Doc. 4, *generally*). Indeed, this record shows no publication in Florida aside from the Plaintiff's act of downloading the materials from the Washington-based. There is no suggestion on this record that any other Florida resident read the third-party postings on MARSHALL's website or was even aware that the website existed.

When evaluating whether "traditional notions of fair play and substantial justice" would be offended by asserting jurisdiction, this Court should consider the obvious chilling effect that reversal would have on speech throughout the Internet. The *Zippo* Test, adopted in this state and many other jurisdictions, would not extend Long-Arm jurisdiction where the only activity of the Defendant was the maintenance of a passive website.

Under the standard sought by Plaintiff, any citizen of any state (or country) who spoke ill of any Florida resident would risk being hauled into

court in Florida. There is no case law to support such a position and public policy is clearly against any such expansion of the minimum contacts analysis required under concepts of due process.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations set forth in *Fed.R.App.P.* 32(a)(7)(B). This brief contains 6,969 words.

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I hereby certify that a true and correct copy of the foregoing has been filed with the Clerk of the Court of the Eleventh Circuit Court of Appeals via CM/ECF and transmitted via Federal Express on July 16, 2008 to the following:

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