UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHN ZUCCARINI, Plaintiff, v. NETWORK SOLUTIONS, LLC, a Delaware limited liability company; NAMEJET, LLC, a Delaware limited liability company; INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, INC., a California non-profit corporation, Defendants.	)	CASE NO. 11-14052-CIV-MARTINEZ/LYNCH

DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, INC.'S MOTION TO STAY DISCOVERY PENDING RULING ON ITS MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

I. INTRODUCTION

Defendant Internet Corporation for Assigned Names and Numbers, Inc. ("ICANN") hereby moves this Court for an order staying discovery pending resolution of ICANN's motion to dismiss plaintiff's amended complaint for lack of personal jurisdiction, improper venue, and for failure to state a claim against ICANN ("motion to dismiss") (Dkt. No. 19). Discovery should be stayed for two independent reasons.

First, ICANN is a California corporation with no contacts with the State of Florida. As such, ICANN moved to dismiss plaintiff's amended complaint on the ground that it is not, as a matter of constitutional due process, subject to jurisdiction in this forum. Because a favorable resolution of ICANN's motion to dismiss on this basis would eliminate the need for discovery, good cause exists to stay discovery pending resolution of ICANN's motion to dismiss.

Second, ICANN also moved to dismiss plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim against ICANN. The law is undisputed: "Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved ***before*** discovery begins." *Chudasama v. Mazda Motor Corp*., 123 F.3d 1353, 1367 (11th Cir. 1997) (emphasis added) ("*Chudasama*"). Clear Eleventh Circuit precedent requires a stay pending resolution of ICANN's dispositive motion to dismiss.

Pursuant to Local Rule 7.1(a)(3), on August 31, 2011, counsel for ICANN met and conferred with plaintiff in a good faith effort to resolve the issues presented in this motion, but plaintiff would not agree to stay discovery pending resolution of ICANN's motion to dismiss.

II. PROCEDURAL BACKGROUND

Plaintiff John Zuccarini filed his amended complaint for negligence against Defendants ICANN, Network Solutions, LLC, and NameJet, LLC on February 14, 2011. ICANN was served with the amended complaint on March 1, 2011.[1]

On March 22, 2011, ICANN moved to dismiss plaintiff's amended complaint for lack of personal jurisdiction, improper venue, and for failure to state a claim against ICANN. (Dkt. No. 19).[2] Plaintiff filed his opposition to ICANN's motion to dismiss on April 8, 2011 (Dkt. No. 32) and ICANN filed its reply brief on April 18, 2011. (Dkt. No. 40). ICANN's motion to dismiss is still pending before this Court.

On August 27, 2011, plaintiff served ICANN with 25 special interrogatories. Each interrogatory is directed to the merits of plaintiff's negligence claim against ICANN. *See* Exhibit 1 (25 Special Interrogatories Directed to ICANN). None of the interrogatories is tailored in any fashion to seek jurisdictional discovery or otherwise address the merits of ICANN's pending motions to dismiss.

III. DISCUSSION

A. The Court Has The General Power To Stay Discovery.

Pursuant to the Federal Rules of Civil Procedure, a court has the discretion to stay discovery for "good cause shown." Fed. R. Civ. P. 26(c)(1). A party shows good cause for a stay of discovery where disposition of a motion could "entirely eliminate the need for such discovery." *McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006) (internal quotation omitted); *see also Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad

[1] ICANN was never served with plaintiff's original complaint, as Plaintiff filed and served his amended complaint before effectuating service of the original complaint on ICANN.

[2] Defendants NameJet, LLC and Network Solutions, LLC likewise filed motions to dismiss plaintiff's amended complaint. *See* Dkt. Nos. 13 and 14, respectively.

discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."); *Anderson v. United States Attorneys Office*, No. CIV. A. 91-2262, 1992 WL 159186, at *1 (D.D.C. June 19, 1992) ("It is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending."); *Chavous v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) ("A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.").

Courts have routinely held that it is appropriate to stay discovery where personal jurisdiction is at issue. *See, e.g., Mvisible Techs., Inc. v. Mixxer, Inc.*, No. 06-61792-CIV-COHN, 2007 WL 809677 (S.D. Fla. March 15, 2007 ("*Mvisible Techs.*") (granting defendants' motion to stay discovery pending resolution of motion to dismiss for lack of personal jurisdiction, subject to order permitting limited discovery on issues relevant to jurisdictional inquiry); *see also Amerital Inns v. Moffat Bros. Plastering, L.C.*, No. CV 06-359-S-EJL, 2007 WL 1792323 (D. Idaho June 20, 2007) (stay of discovery is appropriate until resolution of defendant's motion to dismiss for lack of personal jurisdiction). A stay pending resolution of a motion to dismiss for lack of personal jurisdiction is particularly appropriate because the basis of the motion is that the lawsuit should not proceed in this forum as a matter of constitutional due process.

In addition, the district court is given broad discretion to stay discovery pending its decision on a motion challenging the legal sufficiency of a claim. The Eleventh Circuit has repeatedly instructed:

> Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for

> relief, should . . . be resolved ***before*** discovery begins. Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true. Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion.

Chudasama, 123 F.3d at 1367; *see also Cheshire v. Bank of America, NA*, No. 09-10099, 2009 WL 3497732, at *1 (11th Cir. Oct. 30, 2009) ("[A] plaintiff has no right to discovery upon the filing of a motion to dismiss that raises a purely legal question . . . . Defendants' motions to dismiss raised only legal questions and, therefore, [plaintiff] had no right to discovery.") (Citation omitted). The Eleventh Circuit encourages the district courts to stay discovery in such cases because "[a]llowing a case to proceed through the pretrial processes with an invalid claim that increases the costs of the case does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system." *Chudasama*, 123 F.3d at 1368.

In short, the Eleventh Circuit has (1) clearly indicated that a pending facial attack on a complaint is sufficient grounds to stay discovery, and (2) encouraged district courts to exercise their discretion to resolve facial attacks to a complaint before discovery begins in order to reduce costs to the parties and the Court and to increase efficiency. *See, e.g., Moore v. Potter*, 141 F. App'x 803, 807 (11th Cir. July 8, 2005) (ruling that district court's order staying discovery until ruling on a motion to dismiss was not an abuse of discretion); *Redford v. Gwinnett Cnty. Judicial Circuit*, 350 F. App'x 341, 346 (11th Cir. Sept. 25, 2009) (same). Accordingly, district courts routinely stay discovery under such circumstances. *See, e.g., Staup v. Wachovia Bank, N.A.*, No. 08-60359-CIV-COHN, 2008 WL 1771818, at *1 (S.D. Fla. April 16, 2008) (granting motion to stay discovery pending resolution of motion to dismiss "because discovery is not needed for the resolution of this Motion and requiring discovery would impose an undue burden on the

Defendant"); *Carcamo v. Miami-Dade Cnty*., No. 03-20870-CIV, 2003 WL 24336368 (S.D. Fla. Aug. 1, 2003).

B. Good Cause Exists To Stay Discovery In This Case.

1. ICANN's Motion To Dismiss Demonstrates That This Court Lacks Personal Jurisdiction Over ICANN.

A party shows good cause for a stay of discovery where disposition of a motion could "entirely eliminate the need for such discovery." *McCabe*, 233 F.R.D. at 685. In its motion to dismiss, ICANN demonstrated that there is no connection between Plaintiff's claims and this forum, or between ICANN and this forum. In particular, ICANN has no employees, assets, bank accounts, real property, personal property, offices, or other facilities in Florida. *See* Declaration of Akram Atallah In Support of ICANN's Motion to Dismiss, ¶¶ 4, 6-8 (Dkt. No. 19-1). ICANN is not licensed to do business in Florida, does not have a registered agent for service of process in Florida, and has no phone numbers or mailing addresses in Florida. *Id*. at ¶¶ 5, 9-10. ICANN does not collect fees directly from domain name registrants, such as plaintiff, and has no contracts with plaintiff. *Id*. at ¶¶ 3, 13. Finally, ICANN's website, which is operated from web servers physically located in Southern California and Virginia, does not offer anything for sale. *Id*. at ¶ 14.

As set forth in the motion to dismiss, ICANN could not reasonably anticipate being haled into court in Florida, and to do so would offend the traditional notions of fair play and substantial justice. Under these circumstances, this Court should not require ICANN to participate in overly burdensome discovery concerning the substance of plaintiff's claims pending its decision on the dispositive motion to dismiss. Indeed, if granted, ICANN's motion to dismiss will dispose of all claims against ICANN. That said, it makes little sense for the parties to engage in time consuming and expensive – yet potentially unnecessary – discovery when the ruling on

ICANN's motion to dismiss could render those efforts a nullity.[3] In this case, "'[a] stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.'" *Chavous*, 201 F.R.D., at * 2 (D.D.C. 2001); *see also McCabe*, 233 F.R.D. at 685 (A party shows good cause for a stay of discovery where disposition of a motion could "entirely eliminate the need for such discovery.").

Moreover, plaintiff will suffer no harm or prejudice from a stay of discovery pending the outcome of ICANN's motion to dismiss. A delay in discovery would not prejudice plaintiff's ability to respond to the motion to dismiss because that motion has been fully briefed. Moreover, a stay of discovery will benefit plaintiff for many of the same reasons it will benefit ICANN. Specifically, the stay will prevent both parties from incurring potentially unnecessary costs and from expending unnecessary effort.

This district's decision in *Mvisible Techs., Inc. v. Mixxer, Inc.*, No. 06-61792-CIV-COHN, 2007 WL 809677 (S.D. Fla. March 15, 2007) is directly on point. In *Mvisible Techs*, Plaintiff Mvisible, a Florida company, filed suit against defendants including Mixxer, a Washington company, in the Southern District of Florida. *Id*. at *2. Mvisible alleged that the Florida court had personal jurisdiction over Mixxer based on Mixxer's website, which permitted Florida residents to engage in transactions with Mixxer from Florida. *Id*. at *1. Mixxer moved

[3] In his initial disclosures, plaintiff identified 40 individuals who he believes may have discoverable information that plaintiff may use to support his claims, 16 of whom are ICANN employees. Discovery is therefore likely to be broad and burdensome. *See Chudasama*, 123 F.3d at 1367-68 ("Discovery imposes several costs on the litigant from whom discovery is sought. These burdens include the time spent searching for and compiling relevant documents; the time, expense, aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys' fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged. . . . Finally, discovery imposes burdens on the judicial system; scarce judicial resources must be diverted from other cases to resolve discovery disputes.").

The harm to ICANN in responding to such discovery is apparent. But "[i]f the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided." *Id*. at 1368.

to dismiss for lack of personal jurisdiction. In support of that motion, Mixxer submitted the sworn affidavit of its CEO, who stated that Mixxer did not have any property, bank accounts, stores, investments, warehouses, employees, investors, or partners in Florida, did not solicit business in Florida via television or radio, and had not purchased advertising space in any Florida newspaper. *Id*. Plaintiff opposed the motion and moved for limited jurisdictional discovery. Mixxer opposed that motion and moved to stay all discovery. *Id*. The court granted Mixxer's motion to stay discovery, but ordered Mixxer to respond to four limited interrogatories crafted by the court to aid in the court's jurisdictional analysis. The court stayed discovery on all issues not directly relating to jurisdiction. *Id*. at *3.

Like the plaintiff in *Mvisible Tech*, plaintiff here seeks to base jurisdiction on ICANN's web presence and the international availability of the internet (although unlike Mvisible, ICANN's website does not permit Florida residents to engage in transactions with ICANN from Florida, as ICANN does not sell anything). Unlike *Mvisible Tech*, however, the jurisdictional issue has been fully briefed, and jurisdictional discovery is not needed. As such, this Court should follow *Mvisible Tech* and stay discovery on issues not directly relating to jurisdiction pending resolution of ICANN's motion to dismiss.[4]

2. Clear Eleventh Circuit Precedent Mandates That ICANN's Rule 12(b)(6) Challenge To The Legal Sufficiency Of Plaintiff's Claim Be Resolved Before Discovery Begins.

An order staying discovery is also appropriate pending the Court's ruling on ICANN's motion to dismiss because ICANN has challenged the legal sufficiency of the amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a

[4] Furthermore, while the general rule is that participating in required court conferences and responding to discovery does not waive the defense of personal jurisdiction, *see Matthews v. Brookstone Stores, Inc*., 431 F. Supp. 2d 1219, 1226 (S.D. Ala. 2006), discovery in this case should be stayed pending a determination of the jurisdictional issues so ICANN does not in any way risk waiving its personal jurisdiction defense by participating in discovery on the merits.

claim against ICANN. Specifically, ICANN challenged plaintiff's amended complaint as being devoid of any allegations that would establish that ICANN created a foreseeable zone of risk of harming plaintiff, which is a "minimal threshold *legal* requirement for opening the courthouse doors" to plaintiff. *Kitchen v. K-Mart Corp*., 697 So. 2d 1200, 1202 (Fla. 1997) (quoting *McCain v. Florida Power Corp*., 593 So. 2d 500, 502 (Fla. 1992)).

Thus, ICANN's motion to dismiss is a "facial challenge[] to the legal sufficiency of a claim," which "presents a purely legal question" and does not require any "discovery before the court rules on the motion." *Chudasama*, 123 F.3d at 1367; *see also Moore*, 141 F. App'x at 807 (quoting *Chudasama*); *Horsely v. Feldt*, 304 F.3d 1125, 1131 n.2 (11th Cir. 2002) (quoting *Chudasama*). Under these circumstances, ICANN's motion to dismiss "should . . . be resolved ***before*** discovery begins." *Chudasama*, 123 F.3d at 1367 (emphasis added); *Moore*, 141 F. App'x at 807; *Redford*, 350 Fed. App'x at 346.

IV. CONCLUSION

Under the circumstances of this case, the Court should follow *Chudasama* and its progeny and stay discovery pending the Court's resolution of ICANN's dispositive motion to dismiss. If the Court grants any part of ICANN's motion to dismiss, it will entirely eliminate the need for discovery. A stay might also save the Court time it would otherwise lose adjudicating discovery disputes relating to ultimately unmeritorious claims. To allow discovery in this case to go forward and then have all or part of ICANN's motion to dismiss granted would cause exactly the sort of waste that the Eleventh Circuit decisions seek to avoid.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3)(A), on August 31, 2011, counsel for ICANN met and conferred with plaintiff in a good faith effort to resolve the issues presented in this motion, but

plaintiff would not agree to stay discovery pending resolution of ICANN's motion to dismiss.

Dated: September 14, 2011

Respectfully submitted,

/s/ Maria Ruiz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail and regular mail on Plaintiff and via the Court's CM/ECF system on all remaining persons on the Service List below on September 14, 2011.

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