

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-272

INTERNET SOLUTIONS CORPORATION,

APPELLANT,

vs.

TABATHA MARSHALL,

APPELLEE.

ON QUESTION CERTIFIED BY THE UNITED STATES COURT OF
APPEALS, ELEVENTH CIRCUIT, CASE NO.: 08-12328

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This brief is filed on behalf of Internet Solutions Corporation, a Nevada corporation with its principal place of business in Florida, which was the Plaintiff before U.S. District Court for the Middle District of Florida and the Appellant in the Eleventh Circuit Court of Appeals. Internet Solutions Corporation will be referred to herein as “ISC” or the Appellant. Tabatha Marshall, the Defendant before U.S. District Court for the Middle District of Florida and the Appellee in the Eleventh Circuit Court of Appeals, will be referred to herein as “Marshall” or Appellee.

The citations to the record (Doc.) are those to the Docket Entries in the District Court for the Middle District of Florida. Citations to the Eleventh Circuit's certification order are cited "C.O.".

In the underlying trial court action in the U.S. District Court for the Middle District of Florida, ISC sued MARSHALL alleging multiple causes of action for intentional torts including defamation, trade libel and tortious interference with business relationships, resulting from Marshall's alleged defamatory postings about ISC on her Internet Web site. (Doc. 1 – Complaint) ISC asserted that MARSHALL entered into the State of Florida through her on-line postings and alternatively acted outside of the State of Florida to cause an injury in Florida. (Doc. 1 - Complaint) Thereafter, Marshall filed a motion to dismiss for lack of

personal jurisdiction and lack of specific jurisdiction pursuant to §48.193(1)(b), *Fla. Stat.* (2007), Florida’s long-arm statute, because she had not directed any communications “into” the state of Florida, had not targeted her Web site at a Florida audience and did not have either personal or commercial contacts with Florida; therefore, Marshall maintained, she lacked sufficient commercial or personal minimum contacts with Florida, the forum state, to bring the action within the ambit of Florida’s long-arm statute. (Docs. 4 – Motion to Dismiss and Doc. 5 - Declaration)

In its response to Marshall’s Motion to Dismiss, ISC asserted, *inter alia*, that Marshall was subject to the personal jurisdiction of the District Court by committing *intentional* torts in Florida or alternatively outside of Florida, causing harm and injury to ISC’s reputation and business in Florida. (Doc. 12 – Response to Motion to Dismiss at Pages 3-8.)

The District Court, determined that ISC sufficiently pled its intentional tort causes of action and that Marshall failed to controvert ISC’s tort allegations. (Doc. 27 – Order at Page 3.) However, the District Court ruled that personal jurisdiction over Marshall would violate the Fourteenth Amendment Due Process Clause because she lacked minimum contacts with the forum state. (Doc. 27- Order at Pages 5-8.). ISC appealed the judgment to the Eleventh Circuit Court of Appeals which deferred its ruling and certified the subject question regarding §48.193(1)(b)

of Florida's long-arm statute.

ISC is a Nevada corporation with its principle place of business in Orlando, Florida. (Doc. 1 - Complaint at ¶ 2 and Doc. 27 - Order at Page 1.) In the course of its business, ISC operates various employment-based Internet Web sites. (Doc. 1 – Complaint at ¶ 2 and ¶ 16 and Doc. 27 - Order at Pages 1-2.)

Marshall is a private individual residing in the State of Washington. (Doc. 1 – Complaint at ¶ 5 and Doc. 27- Order at Page 1.) Marshall owns and operates an Internet Web site, www.tabathamarshall.com, from the State of Washington. (Doc. 5 - Declaration at ¶ 14 and Doc. 27 - Order at Pages 1-2.) Marshall posts alleged consumer commentary about business and whether the business are engaged in consumer fraud of other unethical or unfair business practices. (Doc. 1 – Complaint, Composite Exhibit A). Marshall's Web site is of interest to members of the public, including prospective and potential clients and employees of ISC and prospective job applicants that utilize ISC's employment advertising Web sites. Marshall posts information on the site and allows third parties to post comments. (Doc. 1 – Complaint, Composite Exhibit A) Marshall comments and responds to third party commentary. (Doc. 1 – Complaint, Composite Exhibit A)

Marshall posted information on her Web site stating that ISC's businesses and Web sites are engaged in "phishing", "scamming" or identity theft of consumers. (Doc. 1 - Complaint at ¶ 21 and Composite Exhibit A.) The posts

remain perpetually accessible on-line to Internet users. Marshall uses her Web site for the specific purpose of defaming ISC. (Doc. 1 - Complaint at ¶¶ 18-223, and 55.) Marshall targeted ISC, a business which maintains and operates its principal place of business in Florida. (Doc. 1 - Complaint at ¶¶ 11-13.) As a result of Marshall's Web site posts, ISC's reputation and business interests have been damaged. (Doc. 1 – Complaint at ¶ 36.)

QUESTION CERTIFIED

On February 10, 2009, the Eleventh Circuit issued an opinion deferring its decision on ISC's appeal pending the certification of the following question to this Court:

Does posting allegedly defamatory stories and comments about a company with its principal place of business in Florida on a non-commercial Web site owned and operated by a nonresident with no other connections to Florida constitute commission of a tortious act within Florida for purposes of Fla. Stat. §48.193(1)(b)? (C.O.)

SUMMARY OF THE ARGUMENT

Marshall has sufficient continuous minimum contacts with the State of Florida as a result of her posting of defamatory information about a Florida resident, to permit the U.S. District Court for the Middle District of Florida to assert personal jurisdiction over Marshall in the underlying action. Although Marshall operates her Web site in the State of Washington, the defamatory postings on the Web site constitute continuous minimum contacts “into” Florida

based on the perpetual availability of the defamatory statements on-line to the general public utilizing Internet search engines. Marshall directed her defamatory communications “into” Florida by posting false information on her Web site searchable by any entity or individual interested in ISC. By continuously leaving the posts on-line, thereby making them continuously available to anyone using an Internet search engine, Marshall has continuously defamed ISC, a Florida resident.

Even if this Court determines that Marshall’s Internet posts and commentary do not constitute continuous defamatory communication directly “into” Florida sufficient to establish minimum contacts either under the long-arm statute or under the general minimum contacts test, the defamatory actions resulted in an uncontroverted injury in Florida sufficient to support a determination of foreseeability for due process purposes as a result of the effect Marshall’s actions had on ISC in Florida, its state of residence, and the resulting foreseeability of being haled into court in Florida as a result thereof.

ISC alleged in its Complaint that it suffered an injury to its business in the State of Florida. (Doc. 1 - Complaint at ¶¶ 36, 44, 51 and 59.) ISC asserted that it suffered an interference with its business relationships and lost clients. (Doc. 1 - Complaint at ¶ 59). Even if the tortious acts are deemed to have occurred outside of the forum, ISC suffered an injury in Florida which injury occurred as a result of

Marshall's actions.

The District Court has jurisdiction over Marshall based on minimum contacts with the State of Florida and based on Marshall causing a tortious injury to ISC in the State of Florida.

STANDARD OF REVIEW

The question of law certified by the Eleventh Circuit regarding personal jurisdiction is reviewed *de novo*.

ARGUMENT

FLA. STAT. §48.193(1)(B) PERMITS A FLORIDA COURT TO EXERCISE LONG-ARM JURISDCITION OVER AN OUT-OF-STATE TORTFEASOR, WITH NO OTHER CONNECTIONS TO FLORIDA, WHO CAUSES INJURY TO A FLORIDA RESIDENT BY POSTING DEFAMATORY AND HARMFUL STATEMENTS REGARDING SAID FLORIDA RESIDENT ON AN INTERNET WEB SITE.

Determining the propriety of the exercise of Florida's long-arm jurisdiction over a non-resident defendant requires a two-prong analysis. *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla. 1989). The first step is to determine if the plaintiff has established sufficient jurisdictional facts to subject the defendant to Florida's long arm jurisdiction. *Id.* at 502. Second, the Court must consider whether the defendant possesses sufficient minimum contacts with the State of Florida to satisfy due process requirements. *Id.* at 500.

In the instant case, because ISC alleged that Marshall committed her tortious

acts within Florida, the U.S. District Court determined that ISC met its burden under the first prong. (Doc. 27 – Order at Pages 3-5) (“The court assumes for the purposes of deciding the instant motion that the tortious conduct element of the long-arm statute has been satisfied.”) However, the U.S. District Court granted Marshall’s Motion to Dismiss after determining that the exercise of personal jurisdiction in the instant case would offend traditional notions of fair justice and fair play, thereby constituting a violation of the Fourteenth Amendment Due Process Clause. (Doc. 27 - Order at Pages 5-8.)

The due process prong that must be satisfied in order for a Florida court to exercise jurisdiction over a nonresident defendant addresses the foreseeability of the nonresident defendant’s conduct and connection with the forum state such that he should “reasonably anticipate being haled into court” in the subject forum.” *World Wide Volkswagen Corp. v. Woodson*, 44 U.S. 286, 295, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980). The United States Supreme Court has established two types of standards or tests to determine whether the defendant has sufficient contacts with the forum state to satisfy due process in the forum. The tests are: (1) the “minimum contacts test”; and (2) the “effects test”. By application of either test, an out-of-state tortfeasor, who, via postings on an Internet Web site, defames a Florida resident and causes that resident injury in Florida, has sufficient contact with Florida, through such Internet communications, so that she should reasonably

foresee the likelihood of being haled into court in Florida to answer for her tortious acts against the Florida resident.

- A. Where a nonresident of Florida commits a tortious act within the State of Florida by posting defamatory publications about a Florida resident on an Internet Web site, which Web site is accessible in Florida, such defamatory postings constitute continuous minimum contacts into Florida and, therefore, the tortfeasor submits herself to jurisdiction of the courts of Florida.

Fla. Stat. §48.193(1)(b) provides as follows:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(b) Committing a tortious act within this state.

This Court, in *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002), held that a tortfeasor need not be physically present in the State of Florida to “commit a tortious act”. Furthermore, in *Wendt* this Court established that telephonic, electronic or written communications into Florida may form the basis for personal jurisdiction under Fla. Stat. §48.193(1)(b), for purposes of Florida’s long-arm statute, so long as the alleged cause of action arises from those communications. *Id.* at 1260. However, in *Wendt* this Court did not address specifically the definition of the term “into” as it relates to posting on the Internet defamatory information about an individual or entity resident in the forum state. *Id.*

In *Becker v. Hooshmand* (Fla. 4th DCA 2003) 841 So.2d 561, the plaintiff, a Florida resident, filed a defamation action against an Internet “chat room” moderator who resided in Pennsylvania. In his complaint, the plaintiff, a physician, alleged that the defendant made numerous defamatory comments about him that were targeted to Florida residents or people who were likely to seek medical care in the State of Florida, which resulted in injury to his reputation and business. *Id.* The defendant filed a motion to dismiss in which she alleged the trial court could not exercise jurisdiction over her. *Id.* at 561-562. The trial court denied her motion and the 4th DCA affirmed, holding that committing a tortious act, when deciding the applicability of Florida’s long- arm statute, does not require that the tort occur in the state. *Id.* The court also noted that it had previously held that making a defamatory statement over the telephone, (*Achievers Unlimited, Inc. v. Nutri Herb, Inc.*, 710 So.2d 716 (Fla. 4th DCA 1998)) as well as mailing a letter into the State of Florida, (*Silver v. Levinson*, 648 So.2d 240 (Fla. 4th DCA 1994)) sufficient to find that tortious conduct occurred in the state. *Id.* In noting the *Silver* and *Achievers Unlimited* cases, the *Becker* court held that the communications (internet chat room activities) that formed the basis of the plaintiff’s allegations were analogous to cases previously decided by the court, including the court’s previous holdings in *Silver and Achievers Unlimited. Becker* at 563. As a result, the plaintiff satisfied the initial burden under *Venetian Salami. Id.* at 563. It should be

noted that, because the defendant did not timely file her affidavit contesting factual allegations of the complaint, the *Becker* court and underlying trial court could only consider the four corners of plaintiff's complaint and defendant's motion to dismiss and, therefore, did not address the due process prong regarding the exercise of long-arm jurisdiction pursuant to this Court's ruling in *Venetian Salami. Id.*

ISC maintains that when an out-of-state individual, such as Marshall in the instant case, posts a defamatory publication regarding a Florida resident on an out-of-state Internet Web site that is available to Florida residents, such defamatory postings on the Web site constitute continuous minimum contacts **into** Florida based on the availability of the defamatory statements on-line to the general public, particularly to individuals in Florida.

This Court has yet to address the issue of whether the posting of defamatory publications on an Internet Web site satisfy the "minimum contacts" prong set forth by this Court in *Venetian Salami*. As a result, this Court should look to other courts' precedent in determining the issue of whether posting defamatory comments on an Internet Web site that is available to the general public constitute continuous publications to a forum state sufficient to support jurisdiction under the State of Florida's long-arm statute or the minimum contacts test.

In *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed. 790 (1984), the Supreme Court established the "minimum contacts" test to be

applied by the court to help determine foreseeability. Under this test, the more contact a defendant has with a state by reaching out to the state, the greater the likelihood that jurisdiction will lie.

The federal district courts for the state of Pennsylvania have addressed the Internet jurisdictional issues substantially, but in commercial or negligence contexts rather than the intentional tort 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/Web site 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 Internet use is in its infant stages. The cases are scant.

Id. at 1123-1124.

The *Zippo* Court established a sliding scale for determining whether

personal jurisdiction should exist in the use of commercial Web sites. 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. Under *Zippo*, in the commercial use of a Web site, the more an entity conducts business via the Internet and the more interactive the Web site 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 Web site, the Internet user is likely to be subject to the foreign jurisdiction. If an Internet user merely posts information without targeting any particular forum or entity in the forum, then the Internet user is far less likely to be subjected to personal jurisdiction in a foreign forum.

Pierce specifically addressed jurisdiction based on the use of the Internet and negligence actions. *Pierce* established a two-part test: (1) the "interactivity" sliding scale of *Zippo*; (2) and a direct causal connection between the use of the Web site 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 Web site. *Id.* However, *Pierce* only refers to personal injury based on negligence or product liability and it does not address intentional torts.

The *Pierce* Court stated that personal injury cases with no causal connection to the use of the Web site should not confer personal jurisdiction based on the mere existence of a Web site. *Id.* ISC agrees that personal jurisdiction should not lie when injury occurs but such injury is unrelated to a Web site owned or utilized by a potential defendant. However, in cases where the tortfeasor's intentional, wilful and malicious posting of false and misleading defamatory "information" on an Internet Web site is the basis for the tort action, there can be no doubt as to the casual connection of the alleged injury and Web site and, therefore, the exercise of long-arm jurisdiction is proper.

Utilizing either the *Pierce* or *Zippo* tests, both of which only considered tortious acts via the Internet in a commercial or negligence contexts, exercising Florida's long-arm jurisdiction would be proper where a nonresident tortfeasor, such as Marshall in the instant case, intentionally posts defamatory material on an Internet Web site regarding a Florida resident. First, it cannot be disputed that a Web site that allows individuals to post comments, author stories and communicate with other individuals is an interactive Web site such as that discussed in *Zippo*. Furthermore, how can it be argued that posting defamatory misinformation about

another individual, who is a resident of another forum, is not intended to target the victim's forum when the tortfeasor knows, or should know, the majority of the harm will be suffered in the home forum by the individual who is the subject of the defamatory postings? As discussed *infra*, this Court in *Wendt*, held that telephonic, electronic or written communications into Florida may form the basis for personal jurisdiction under Fla. Stat. §48.193(1)(b), for purposes of Florida's long-arm statute, so long as the alleged cause of action arises from those communications. *Wendt* at 1260.

By virtue of Marshall maintaining a Web site to post her defamatory statements perpetually for access by the general public, Marshall directed communications "into" Florida by posting generally on her Web site. By leaving the posts on-line continuously, thereby making them continuously available to anyone using an Internet search engine, Marshall has continuously maintained contact with Florida.

Marshall argues that posting comments on an out-of-state based Internet server through an out-of-state Internet service provider does not meet the "into" requirement under *Wendt* because the subject Web site posts were made in her home state of Washington and not specifically directed into Florida. Instead, she argues, that in order for a Florida resident to read the injurious defamatory posts, and, therefore, the victim to suffer an injury in his or her home forum as a result

thereof, the Florida resident had to purposefully **leave** the State of Florida, via an Internet search engine, clicking a link or entering an internet address, in order for the defamatory publication to be considered “published” for purposes of a defamation action. Therefore, Marshall argues, the communication was not made “into” Florida. Using a similar analogy, it could be argued that an out-of-state author of a defamatory letter addressed to a Florida resident, placed his letter in his out-of-state mailbox but did not specifically enter “into” Florida because the recipient of the letter had to affirmatively go to his or her mailbox to obtain the letter in order for it to be considered “published” in Florida for the basis of a defamation action; therefore, the exercise of Florida’s long-arm jurisdiction would be improper. Of course, the tortfeasor’s letter in this fictional scenario would be specifically addressed to Florida; however ISC maintains the factual differences are negligible and irrelevant when asserting long-arm jurisdiction against a tortfeasor who posts defamatory comments about a Florida resident on an Internet Web site, which Web site is knowingly and easily accessible by the general public in Florida without leaving the comfort of their home or office. As such, internet communications and Web site postings regarding a Florida resident are analogous to the electronic communications this Court discussed in *Wendt* and should be deemed as targeted into the State of Florida for purpose of applying Florida’s long-arm statute.

Secondly, pursuant to *Pierce*, there is a direct causal connection between a Florida resident's asserted causes of actions and injuries as a result of defamatory online postings and the Web site the tortfeasor utilized to publish the subject defamatory material. In the instant case ISC alleged that Marshall uses her Web site for the specific purpose of defaming ISC. (Doc. 1 - Complaint at ¶¶ 18-223, and 55.) ISC asserted that Marshall targeted ISC, a business which maintains and operates its principal place of business in Florida. (Doc. 1 - Complaint at ¶¶ 16-23.) Marshall's defamatory statements specifically related to a Florida entity to cause an injury to the entity and its business interests operated from its principal offices located in Orlando, Florida. The causes of action asserted by ISC are directly and proximately related to Marshall's postings on her Web site.

As noted by the *Zippo* Court, the Internet is a new and evolving frontier. A strict and literal interpretation of the "into" requirement of the *Wendt* decision is not viable in the modern Internet world. Unlike sending a letter or making a phone call directly to someone as a method of publication of a defamatory statement, which is a one-time publication act requiring specific direction of the communication to a designated recipient, Internet posters do not need to direct their defamatory communications anywhere to accomplish a goal of injury to a party's reputation or business interests in their home state or abroad. 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 Web site 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. *See 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 publication for the purposes of personal jurisdiction simply do not apply to the Internet instead of the publisher having to forward the damaging material directly to the recipient, now the third party to whom the defamatory poster publishes comes to the publisher. As noted by the *Zippo* Court, a defamer can engage in willful misconduct “... throughout the world from his desktop [computer]”.

Prior to entering into personal or business relations, many individuals and businesses conduct Internet searches to learn information about potential future partners, vendors, clients, etc. Since the Internet posts are in writing, many individuals or entities treat the information on the Internet as more credible than if the statements were made orally or in a less accessible medium to the public.

Because the Internet allows immediate on-line anonymous commentary through web logs, blogs, etc., in a short period of time a body of reinforced defamatory material can be created with an air of legitimacy to the detriment of the aggrieved individual or entity. In very short order, a defamer can create an accessible environment which causes third parties to refuse to do business with the injured party without the defamer ever having to leave his home or to otherwise verify his/her derogatory statements. The defamation is assured to reach the targeted audience, which is any entity or business considering, or actively engaged in, an association with the defamed party. The defamatory information springs out of the Internet when the Internet search engine trip wire is activated by a third party seeking information. This is the reality, and the danger, of the Internet.

The State of Florida has an interest providing a forum for its residents whose reputations are unfairly and maliciously attacked by an out-of-state tortfeasor using the Internet, an easily accessible communications medium within the State of Florida. As a matter of public policy, it is fair for jurisdiction lie in the forum state where the defamed party resides or is located rather than where the defamer resides or is located. If the latter is applied, a defamer can defame a Florida resident in Florida and across the world with relative impunity and force the aggrieved parties to enforce their property rights and reputations in the defamer's home forum at considerable expense. This will chill the enforcement of rights by injured parties

and embolden the defamers to engage in malicious and willful misconduct.

As a result of the foregoing, this Court should establish precedent in the State of Florida which clearly states that, where an out-of-state tortfeasor posts defamatory material regarding a Florida resident on an Internet Web site, such internet posts constitute minimum contacts sufficient for the exercise of Florida's long-arm statute in order to provide Florida residents a forum in which to seek redress for tortious conduct against them.

- B. A nonresident tortfeasor who posts defamatory publications about a Florida resident on an Internet Web site, which Web site is accessible in Florida, submits to the jurisdiction of the courts of Florida when such acts cause a resulting injury in the State of Florida.

Even if this Honorable Court determines that Marshall's Internet posts and commentary do not constitute continuous defamatory communication directly "into" Florida sufficient to establish minimum contacts either under the long-arm statute or under the general minimum contacts test, the actions resulted in an injury in Florida sufficient to support a determination of foreseeability for due process purposes. In an opinion issued the same day as the *Keeton* opinion, the United States Supreme Court recognized that foreseeability for due process purposes may also be determined by the considering the in-forum effects resulting from the defendant's actions outside of the forum. In *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed. 804 (1984), the United States Supreme Court established the

“effects test” which determines jurisdiction by the resultant effect of an action as the source of the necessary minimum contact with the jurisdiction. By application of the effects test, the issue is not the amount of the minimum contacts within the forum, but rather whether the defendant could reasonably foresee being haled into court in a forum based on the particular effect or effects in the jurisdiction arising from the defendant’s acts.

In *Calder*, the Supreme Court found that the California court could exercise jurisdiction over a foreign defendant who allegedly had committed tortious acts outside of California but which were focused toward a California resident and caused an injury to the resident in the State of California. *Id.* The Supreme Court found jurisdiction existed because the “story” of the defamation and the harm was focused on the resident to occur in California. *Id.* at 789. In short, the effect of the defendant’s actions occurred in California regardless of where the acts were committed. A fair reading of the Supreme Court’s ruling is that jurisdiction would lie anywhere where the injured party resides if the tortious act “focused” on the injured party. The Supreme Court stated that it was difficult to conceive how a defendant who allegedly engaged in a focused act which inevitably results in harm to the injured party in the home forum could not have reasonably foreseen being called into court in the forum where the tortious act caused a damaging effect to the injured party. *Id.*

The District Court in this matter cited *Calder* for the proposition that a tort act requires additional minimum contacts with the forum for personal jurisdiction and treated the case as a “minimum contacts” case rather than as an “effects test” case. (Doc. 27- Complaint at Page 6.) As a result, the District Court misapplied *Calder* in reaching the decision to dismiss ISC’s Complaint.

Applying the effects test to a claim of an *intentional* tort, can any prospective defendant not reasonably expect to be sued where the plaintiff conducts business or resides if the defendant has engaged in activity specifically designed to disparage and damage the plaintiff? Certainly, Marshall in this case knew that her statements were damaging and designed to harm ICS’s business interests and reputation, both of which were plainly based in Orlando, Florida. Any exercise of personal jurisdiction over Marshall cannot be a surprise to Marshall or be unfair to her considering the intentional nature and the specific focus of Marshall alleged misconduct.

Other state and federal circuits, and some district courts of appeal of Florida have followed the effects test of *Calder*, although not necessarily citing to *Calder*, and have ruled that personal jurisdiction exists where a tort act is committed outside of the forum state with a resulting injury occurring in the forum state.¹

¹ 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 (11th Cir. 1999)(out-of-state tortious act affected contracts insuring property in Florida); *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997)(injury occurred in

Here again, the Florida Supreme Court has no direct ruling on this point. The United States District Court, Middle District of Florida, in *American Color Graphics, Inc.* noted that the Florida Supreme Court does not have a controlling decision 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. See *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) and *Williams v. Goldsmith*, 619 So. 2d 330, 332 (Fla. 3d DCA 1993). Therefore, this Honorable Court should look to federal precedent for resolution of the constitutional issue of a defendant's foreseeability of being haled into court in a foreign forum.

The Eleventh Circuit Court of Appeals, without specifically referencing the *Calder* effects test, previously 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) and *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209 (11th Cir. 1999)(out-of-state

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

tortious act affected contracts insuring property in Florida) *American Color Graphics, Inc. v. Brooks Pharmacy, Inc., et al.*, 2007 U.S. Dist. LEXIS 80093 (MD. Tampa 2007 The District Court in this matter determined that as a matter of law a single tortious act alone is insufficient to establish jurisdiction without other minimum contacts with the forum showing purposeful availment. (Doc. 27 - Order at Page

6.) This statement of law is not supported by the Eleventh Circuit Court of Appeals decision in *Horizon* and other federal and state court decision. See *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Circ. 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 was proper in the forum state where plaintiff was injured by a loss of clients). In both *Horizon* and *Posner*, the Eleventh Circuit Court of Appeals held that a single tortious act resulting in an injury in the forum state constitutes a sufficient minimum contact for jurisdiction in the forum, and made no mention of the necessity for other multiple minimum contacts in addition to the forum contact created by the injury in the forum.

ISC alleged in its Complaint that it suffered an injury to its business in the State of Florida. (Doc. 1 at ¶¶ 36, 44, 51 and 59.) ISC asserted that it suffered an interference with its business relationships and lost clients. (Doc. 1 at ¶ 59).

Again, Marshall's Declaration did not controvert these factual allegations. (Doc. 5 - Declaration) Consequently, ISC pled sufficient material facts, which when taken as true because they were not controverted, demonstrate that even if the tortious act is deemed to have occurred outside of the forum, ISC suffered an injury in Florida to its reputation and business interests and that the injury occurred as a result of Marshall's actions. Consequently, ISC pled a prima facie case establishing the District Court's jurisdiction over Marshall.

As a result of the foregoing, this Court should establish precedent which clearly states that an out-of-state tortfeasor who posts defamatory material regarding a Florida resident on an Internet Web site, which Web site is accessible in the State of Florida, submits to the jurisdiction of the courts of Florida when such cause a resulting injury in the State of Florida.

CONCLUSION

For the foregoing reasons, this Court should answer the question certified by the Eleventh Circuit, "does posting allegedly defamatory stories and comments about a company with its principal place of business in Florida on a non-commercial Web site owned and operated by a nonresident with no other connections to Florida constitute commission of a tortious act within Florida for purposes of Fla. Stat. §48.193(1)(b)" – yes. Such a result is consistent with precedent established by the United States Supreme Court as well as this Court and

insures Florida residents a forum when their reputations are unfairly and

intentionally maligned by out-of-state tortfeasors who should be held accountable for their actions.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements of Fla. R. App. P. 9.210(2). It is typed in Times New Roman 14 point, proportionately spaced type.

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I HEREBY CERTIFY that on the 24th day of March, 2009 a true and correct copy of the foregoing has been served by regular U.S. Mail and/or E-mail upon the following:

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