

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Anne Martinez, individually and)
on behalf of all other persons)
similarly situated,)
)
Plaintiffs,)
v.)
)
RegisterFly, Inc.,)
Unifiednames Inc.)
Hosting Services Group Inc.)
Kevin Medina, in his personal capacity and)
as an agent of RegisterFly, Inc. and)
as an agent of Unifiednames Inc.)
John Naruszewicz, in his capacity as an agent)
of both Unifiednames and RegisterFly,)
eNom, and)
ICANN,)
)
Defendants.)

Civil Action No 07 _____

**PLAINTIFF'S
MOTION FOR TEMPORARY
RESTRAINING ORDER**

Plaintiff, Anne Martinez, individually and on behalf of all other persons similarly situated, by her undersigned attorney, moves the Court for a Temporary Restraining Order. In support of said motion, Plaintiff shows unto the Court the affidavit of James N. Smith, Jr's as if fully incorporated herein by reference, and the following:

1. Plaintiff has paid valuable consideration for the domain names she purchased from Defendants. (Complaint Exhibit 4)

2. Plaintiff has had the use of these domains names confiscated by the Defendant RegisterFly, Kevin Medina, and eNom. (Complaint Exhibits 3, 5, 6, 7, 8, & 9)

3. Defendants' unilateral and arbitrary confiscation of the Plaintiff's domain names deprives Plaintiff of the use, benefit and enjoyment of a valuable property interest and constitutes unlawful conversion.

4. Upon information and belief, from at least February 2005 and continuing through at least the filing of this motion, RegisterFly, Medina, and eNom, and systematically took control of the Plaintiff's registration ownership as a battle between the two companies, with no lawful authority.

5. RegisterFly and Medina have shown a systematic disregard for meeting the obligations to the Plaintiff and those similarly situated.

6. RegisterFly has unilaterally and arbitrarily refused to cooperate with ICANN, and ICANN has systematically refused to require RegisterFly and Medina to comply with contractual and regulatory agreements. Plaintiff maintain that such refusals are against public policy and unlawful. (Complaint Exhibit 10, 11, 12, 13, 14, 15, and 16)

7. ICANN has now put the Defendants RegisterFly and Medina on notice that they will file for a TRO by posting this information on ICANN's web site at <http://www.icann.org/announcements/announcement-02mar07.htm> (Complaint Exhibit 15).

The relevant portion is quoted below:

- RegisterFly's continuing breaches of the RAA are serious and will be pursued.
- ICANN's primary concern is to do what it can to protect registrant and related data.
- ICANN has provided notice that it will file a suit against RegisterFly in the United States District Court for the Central District of California seeking a temporary restraining order (TRO) requiring RegisterFly to turn over the data requested and to compel an emergency audit of its books and records.

8. In response to this, and to further placate ICANN, and allow RegisterFly additional time to secret assets and destroy evidence RegisterFly turned over encrypted data that ICANN on March 5th 2007:

On March 5, 2007, RegisterFly provided a copy of domain name registration data in response to ICANN's request pursuant to RAA section 3.4.3. ICANN is analyzing the data for integrity and completeness. ICANN will respond to RegisterFly with questions regarding aspects of the material provided. This material represents a portion of the material requested in [ICANN's letter of February 21, 2007](#) [PDF, 104K].

9. However now it appears that “Data escrow may be insufficient for ICANN to protect the Data.” It is also unclear whether ICANN can even verify that they have the correct data.

We have provided additional questions to RegisterFly regarding how that data can be maintained in a manner that would permit access in the event that RegisterFly remains unable to fulfill its role as a registrar. If a name is hidden through a service of this kind, it is possible that no one aside from the provider of the privacy service can identify the customer, therefore data escrow may be insufficient for ICANN to protect that data. In making a choice to use a proxy/privacy service, customers should be aware of balancing privacy against access to data.

10. Pursuant to the verified complaint between the feuding owners of RegisterFly (Complaint Exhibit 20 UNI Complaint) and the findings of ICANN (Complaint Exhibit 10 20070221 Letter Re: RegisterFly Breaches) RegisterFly and Medina pose an immediate risk of absconding with any funds left to pay monetary damages, and the access codes to allow the Plaintiff access to her domains.

11. This Court should grant an immediate restraining Order along the lines of the March 2, 2007 order of the Honorable Peter G. Sheridan (Complaint Exhibit 25 – Order dissolving Injunction) to preserve the financial assets of RegisterFly and Medina.

12. This Court should further grant an immediate restraining Order for the appointment of a Court Receiver to work in conjunction with an appropriate representative from ICANN, but giving the Receiver full power to seize all assets of RegisterFly and Medina where ever located, including the hard drives which host the critical data to protect millions of people from immediate and irreparable harm.

13. Even if, ICANN did receive all the correct data, which is dubious, then there is still the risk if the original data is left in the hands of Medina. On the other hand, if in fact ICANN still does not have complete or accurate data, it is critical that a Court Appointed Receiver be given authorization to seize assets to preserve the data.

14. This Court should grant an immediate Injunction requiring eNom to make all “security codes” available to the rightful owner as directed by ICANN, and Ordering ICANN to fulfill its regulatory commitment in order to protect the Plaintiff from immediate and irreparable harm.

15. This Motion and TRO should be sealed until such time as the Court Appointed Receiver is able to secure the hard drives and the digital data of Defendant RegisterFly.

16. The affidavit of James N. Smith, Jr. in support of TRO file simultaneously herewith if fully incorporated by reference.

17. James N. Smith, Jr. is a voting member of American Registry for Internet Numbers (ARIN) which provides services related to the technical coordination and management of Internet number resources in its respective areas of Canada, the United States, and several islands in the Caribbean Sea and North Atlantic Ocean. ARIN provides management of the Internet numbers used in these areas and is not responsible for the names associated with these numbers. It is the Number equivalent to ICANN's management of the Names.

18. James N. Smith, Jr. qualifies as an expert in Internet protocol and management.

19. There is good cause to believe that Defendants RegisterFly, Inc. and Kevin Medina violated multiple sections of federal and state law, as well as basic Internet protocol. (Affidavit of James N. Smith, Jr.)

20. There is good cause to believe that immediate and irreparable harm will result to thousands of customers with thousands of domain names registrations at risk from Defendants' ongoing violations of their contractual obligations with ICANN unless the Defendants are restrained and enjoined by an order of this Court. (Affidavit of James N. Smith, Jr.)

21. According to ICANN's updates on their own web site, ICANN has repeatedly breached its own policies regarding RegisterFly, and continues to allow RegisterFly to put the public at risk of further harm by continuing to allow RegisterFly to operate. (Affidavit of James N. Smith, Jr.)

22. ICANN was established to be the guardian of domain names and Registrars with an obligation to accredit these Registrars and has an ongoing duty to maintain stability of domain owner's interest. (Affidavit of James N. Smith, Jr.)

23. ICANN has breached its fiduciary duty to those end consumers who have registered domain names, as a portion of each domain registration fee is paid to ICANN to provide accreditation of and supervision of the Registrars. (Affidavit of James N. Smith, Jr.)

24. It is abundantly clear based upon common sense and reason that based upon the Order by the Honorable Peter G. Sheridan dissolving the prior Consent Order, that RegisterFly and its affiliates, and its sole owner Kevin Medina, pose an immediate and substantial risk of both, not complying with ICANN's requests, but also in destroying evidence, destroying data, and doing irreparable harm to the public, and the Plaintiff in this case. (Affidavit of James N. Smith, Jr.)

25. Good cause exists for this Court to appointment a Receiver to protect the data, and other assets of RegisterFly.

26. The Court should notify any and all institutions or entities who currently have funds of the Defendant RegisterFly Inc., Unifiednames Inc., Hosting Services Group Inc. or Defendant Kevin Medina and restrain them from distributing any funds until such time as the Order is amended, or this Court appoints a Financial Receiver. To whit, but not limited to:

- 1) Valley National Bank, 637 eagle rock Avenue West Orange, New Jersey with account number ending in 1710 which account is in the name of Hosting Services Group Inc. an affiliate of Unifiednames.

- 2) Humbolt Merchant Services which held approximately 280,000.00 as of March 2nd
- 3) Such other institutions as are in possession of any asset of Defendant RegisterFly Inc., Unifiednames Inc., Hosting Services Group Inc. or Defendant Kevin Medina

27. It is critical that a Data Receiver be appoint by the Court and vested with the immediate power to enlist the aid on the federal marshals to enforce this order, to seize and protect the digital and hardware assets of both Defendants RegisterFly.com Inc., Unifiednames Inc., and Defendant Kevin Medina where ever located. (Affidavit of James N. Smith, Jr.)

28. It is so easy for RegisterFly staff, management or owners to destroy this data, or corrupt the data, that the Court should act with no notice to RegisterFly, keeping this Order under seal. It is customary and acceptable industry standards to cut off access to and control of the data prior to the custodian knowing that their control is to being changed.

29. ICANN's public announcement that they intent to seek a TRO has caused the situation to become even more explosive, and created an even great risk of corruption, alteration, transfer, or destruction the data. (Affidavit of James N. Smith, Jr.)

30. The Court to appoint a Receiver who shall provide professional services to properly seize the assets of the defaulting defendants with the cooperation of ICANN and the top level domain Registries. (Affidavit of James N. Smith, Jr.)

31. The Receiver needs to be able to contract with such others as is necessary to transfer these domain names to a reputable Registrar.

32. The Receiver should, after the data is secured, and as soon there after as possible, negotiate for the most effective and smooth transition of these domain names to a reputable Registrar to most effectively protect the goodwill and value associated with the customer's domain names, and cause the slightest possible interruption in the domain owner's use of the Internet.

33. It is in the interests of justice that any Order to seize assets must remain under seal until such time as the Receiver has secured the digital data. (Affidavit of James N. Smith, Jr.)

34. Based upon James N. Smith, Jr.'s review of the assets of the Defendants as of March 2nd 2007 as listed in Honorable Peter G. Sheridan consent Order, along with the probable continued cash flow for RegisterFly based upon the number of domain names they claim, it is anticipated that assets frozen of Defendants should cover the initial costs of protecting the data, however it would be proper for the Court to tax such additional costs against ICANN since it has breached it's duty to protect these registrants.

35. ICANN should be well equipped to monitor and audit any independent receiver the Court may appoint to further assist the Court.

WHEREFORE, Plaintiff prays:

1. This Court grant equitable and injunctive relief as requested in this complaint, and in this accompanying motion for TRO.

2. Defendants collectively be ordered to return the domain name SearchCertification.com which expired and was unable to be renewed due to the actions of RegisterFly, to the Plaintiff

Anne Martinez, and order all similarly situated plaintiffs be restored the domain names which were lost due to the actions of the Defendants.

3. All defendants, including eNom be ordered to immediately provide the authorization codes necessary to complete the transfers of any and all domain names which were registered by from RegisterFly to a third party of the rightful owners choosing.

4. This Court award Plaintiffs all costs and attorneys fees incurred in connection with this litigation.

5. Grant the receiver the Powers the Court deems just and proper to preserve the assets of the innocent victims (namely their domain names) which will result in irreparable harm if they are wrongfully taken from the Plaintiffs, even if later returned to the rightful owners.

6. This Court grant such other relief as it determines to be just and equitable.

This the 13th day of March 2007.

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