

The Court has reviewed and considered Plaintiff's Motion for Temporary Restraining Order and brief, as well as the supporting affidavits and exhibits and the argument presented at both the March 14 and March 20 hearings. The issuance of a temporary restraining order is an extraordinary remedy to be applied in the limited circumstances in which irreparable harm will result if the court does not take immediate action. The Court weighs four factors in deciding whether to grant a temporary restraining order: (1) the plaintiff's likelihood of success on the merits of the underlying dispute; (2) the likelihood of irreparable harm to the plaintiff if the relief is denied, (3) the likelihood of harm to the defendant if the requested relief is granted, and (4) the public interest. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg Co.*, 550 F.2d 189, 195 (4th Cir. 1977).

In weighing these factors, the Court notes that the most important among them are the potential harm to the plaintiff and the potential harm to the defendant. *Id.*; *Hughes Network Sys., Inc. v. Interdigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994). The required irreparable harm to the plaintiff must be neither remote nor speculative, but actual and imminent. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991). If the plaintiff is able to make a "clear showing" that irreparable harm will result without the requested injunctive relief, the Court then balances the likelihood of that harm against the likelihood of harm to the defendant if the injunction is granted. *Id.* If the balance of the harm to each party tips decidedly in favor of the plaintiff, injunctive relief will be granted if the plaintiff raises substantial questions as to the merits of the underlying case.

Id. However, as the balance tips away from the plaintiff, a stronger showing on the merits is required. *MicroStrategy, Inc. v. Motorola, Inc.*, 245 F.3d 335, 340 (4th Cir. 2001).

Plaintiff in this proposed class action seeks relief from a number of defendants. Generally, Plaintiff alleges that Defendant RegisterFly and affiliated entities and officers have committed fraud and mismanagement in connection with domain names registered through RegisterFly, and that ICANN, the entity that is contractually obligated to oversee the conduct of domain name registrars, has failed in its fiduciary duty to protect registrants from potential loss of domain names and/or service that may result from the actions of RegisterFly. Plaintiff seeks immediate injunctive relief to prevent the loss of access to critical subscriber information and to allow transfer of domain names from RegisterFly to another company.

The Court finds that although the named Plaintiff, Anne Martinez, has shown some likelihood of success on her claims against RegisterFly, she has failed to show an imminent threat of irreparable harm that requires immediate prohibitive or mandatory injunctive relief by this Court. It has been shown to the satisfaction of the Court that ICANN, the entity contractually charged with oversight of domain name registrars, has been following contractually mandated steps to address the concerns of individuals and entities (such as Plaintiff and the putative class) with domain names registered through RegisterFly. ICANN has obtained most of the data necessary to protect Plaintiff and similarly situated registrants from losing their domain names, and has set closely approaching deadlines and threatened

to seek injunctive relief in the contractually mandated venue should RegisterFly fail to meet those deadlines. Although there is some legitimate concern over potential loss of service by registrants with RegisterFly, ICANN, acting within the boundaries of its contract with RegisterFly, has obtained the majority of information necessary to protect the putative class members from losing their registered domain names or suffering possible interruptions of service. With the exception of a small number of domain names registered under proxy, ICANN has gathered the information necessary to protect the putative class members.

The Court finds that with respect to that information not yet provided to ICANN, Plaintiff has made an insufficient showing that either RegisterFly, its controlling owner or its affiliates are withholding the information with malicious intent or in bad faith. Without such a showing, the degree of potential harm to Plaintiff and others like her is greatly diminished. Plaintiff points to a single statement in a multi-page document in support of her argument that Defendant Medina has an improper motive or may be inclined to act vindictively toward registrants with RegisterFly. (Pleading No. 1, Ex. 10 (filed under seal).) However, viewed in its entirety, the document relied upon by Plaintiff does not sufficiently corroborate Plaintiff's concern so as to mandate immediate intervention by this Court, and there is other evidence that indicates substantial compliance by RegisterFly in cooperating with ICANN in safeguarding the data that is important to Plaintiff.

Accordingly,

IT IS RECOMMENDED that Plaintiff's Motion for Temporary Restraining Order (Pleading No. 5) be denied. Such a denial would be without prejudice, of course, to Plaintiff's right to return to this Court if contractual deadlines currently set by ICANN related to the preservation of data are not met by RegisterFly.

Further, **IT IS ORDERED** that all filings and recordings of in camera hearings held in this matter remain under seal until a ruling on this Recommendation is entered by a district judge, at which time, absent a contrary order, all filings and recordings (except as provided herein as to proprietary information disclosed by ICANN) shall be unsealed by the Clerk. The exception to this unsealing is that a separate tape recording of proprietary and confidential information given by ICANN at the hearing of March 20, 2007 shall remain, **IT IS ORDERED**, under seal indefinitely in this case.

Finally, in view of the need for expedited treatment of Plaintiff's motion for temporary relief, **IT IS ORDERED** that any objections by Plaintiff or ICANN shall be filed by 1:00 p.m., Thursday, March 22, 2007. Notice of this Recommendation shall immediately be given by the Clerk to counsel appearing for Plaintiff and counsel for ICANN.



P. Trevor Sharp, U.S. Magistrate Judge

March 21, 2007