

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 CV 188

JAMES N. SMITH, JR.'s
AFFIDAVIT IN SUPPORT OF
PRELIMINARY INJUNCTION

After being duly sworn I do hereby depose, affirm, and swear to the following, in addition to the facts I stated in the prior "Affidavit in Support of Temporary Restraining Order," I hereby show the Court the following:

I. The Burden of Compliance:

1. I was present for the sealed hearing conducted before the Honorable Judge Trevor Sharp on March 20, 2007, and heard the representations made to the Court by ICANN's Attorney Samantha Eisner.

2. During the hearing, Ms. Eisner represented to the Court that ICANN was required to wait 15 days when they requested Data escrow, however the Contract which she turned over at the conclusion of the hearing states:

3.2.3 In order to allow reconstitution of the Registry Database in the event of an otherwise unrecoverable technical failure or a change in the designated Registry Operator, within **ten days** of any such request by ICANN, Registrar shall submit an electronic database containing the data elements listed in Subsections 3.2.1.1 through 3.2.1.6 for all active records in the registry sponsored by Registrar, in a format specified by ICANN, to the Registry Operator for the appropriate TLD.

3. It is my expert opinion, and I therefore advise the Court that ICANN should have, and would have, had the capabilities – based upon the records being turned over pursuant to section 3.2.3 of ICANN’s RAA with RegisterFly “in a format specified by ICANN” – to determine in a matter of hours that RegisterFly had given NEITHER the full number of “all active records in the registry sponsored by Registrar” NOR the actual identity of the true owners of the domain names. Therefore, ICANN had the knowledge necessary to proceed with the TRO (which they had publicly stated they would seek), when ICANN was not given the proper data for escrow on March 12th 2007.

4. ICANN knew, or should have known, within hours that RegisterFly was non-compliant and should have acted in the public interest as is ICANN’s duty. ICANN should have taken the additional steps to have a court order RegisterFly to convey the data pursuant to the RAA. The registrants, as well as the public and internet service providers rely on the enforcement of the RAA for the every day functioning of the Internet.

5. Requiring RegisterFly to transfer a copy of the ownership data, which is already required in the RAA contract, is simple and a matter of normal business for RegisterFly.

6. It is my expert opinion, and I therefore advise the Court that the issuance of a preliminary injunction requiring RegisterFly to comply with section 3.2.3 of ICANN’s RAA

with RegisterFly will not cause RegisterFly nor ICANN any inconvenience nor loss, let alone an undue inconvenience or loss.

7. It is my expert opinion, and I therefore advise the Court that the issuance of a preliminary injunction requiring RegisterFly to send a copy of the data to the plaintiff's Attorney will not cause RegisterFly any undue inconvenience or loss.

II. Loss from a breakdown in the Name Server Function

8. A name server is a computer server that implements a name services protocol. It will normally map a computer-usable identifier of a host to a human-usable identifier for that host. For example, a Domain Name System (DNS) server might translate the domain name `ncmd.uscourts.gov` to the Internet Protocol (IP) address `192.234.522.94` .

9. When a domain name is registered with a registrar, one or more (usually 2) name servers are associated with the domain name.

10. If a registrant wants to move its website to another physical location i.e. host server, that host server would have a unique IP address different from the old one.

11. The person who has access to the name server would simply change a record at the name server to point to a new IP.

12. Some registrants use their own name servers, hosted on their own computer. But they must provide those name server names (such as `ns.anventure.com`) to the registrar, who associates them with the domain name.

13. Some registrants do not have the facility for managing their own name server, so they use the one provided by the registrar, such as `ns.registerfly.com`.

14. Regardless of whether a registrant uses its own name server or RegisterFly's name server, if RegisterFly allows the registrant's account to lapse, and RegisterFly's servers stop pointing at the specific IP address, then no one on the internet will be directed to the web site host computer, and the web site will effectively disappear. Additionally, email servers will no longer be able to deliver email to the destination email account for the registrant's domain name.

15. At the Hearing on March 20, 2007, ICANN's attorney represented to the Court that ICANN had issued a directive which, depending upon the voluntary cooperation of TLD registrars could prevent a registrant's name from coming available for resale if RegisterFly allowed the name to lapse. However, Ms. Eisner specifically told the Court that ICANN had no ability to stop RegisterFly from allowing the names to lapse such that the public would no longer be directed to the registrants' host servers.

16. It is my expert opinion, and I therefore advise the Court that allowing RegisterFly to cease directing the public to the server which hosts Anne Martinez's GoCertify.com, and other similarly situated registrants, will cause immediate and irreparable harm, not only to the individual registrant, but to the public's confidence in the Internet's stability.

III. Irreparable harm to Anne Martinez

17. When a domain name expires, it is customary for a Registrar to place the domain name "on hold". This is referred to as the "Redemption Period". During this holding period that can be from 10 days to 45 days at the Registrar's discretion, the Registrar locks the domain name from allowing the owner, Anne Martinez from making any changes

including making changes to the Name Servers, changes to the ownership or the transfer of the domain to another Registrar. The Registrar in most cases points the domain name to an unrelated web site that is called a “Parking Page”. This “Parking Page” is a revenue opportunity for the Registrar. During the “Redemption Period”, the Registrar has complete control over the domain, any web site it might direct to, and any email that might be sent to this domain name,

18. During the Registrar’s “Redemption Period”, it is customary for the Registrar to charge the owner as much as 10 times the normal annual domain renewal fee (between \$100 and \$160) to remove the domain name from this “locked” status to a normal “active” status.

19. I have reviewed the usage statistics provided by Anne Martinez for her domain site GoCertify.com, and the statistics reflect that the site had over a million hits for February 2007 alone, with an average of 37,567 hits per day with an average of approximately 2800 unique visitors a day and 1,565 hits per hour.

20. While search engines generated approximately 21% of the traffic to her site in February 2007, the domain has a well established reputation with approximately 79% of the traffic generated by direct requests. When the domain name is no longer active and the search engines such as Google.com can no longer view the site, the domain name will be removed from the search engines or the page ranking will drop significantly. Reestablishing a web site in the search engines is both a timely and very costly activity for any business, and the harm it causes cannot be easily measured nor easily corrected.

21. It is my expert opinion, and I therefore advise the Court that if RegisterFly is permitted to allow the name GoCertify.com, lapse, even if ICANN at some point restored

name and number directions so that the hosting computer can be found, Anne Martinez will suffer grave and irreparable harm.

IV. Irreparable harm to the Public

22. In the portion of the March 20, 2007 hearing before the Court, in which ICANN moved to have a portion of the Sealed hearing double sealed, ICANN gave specific numbers regarding both the Double secret number of domain names which were actually turned over by RegisterFly on Monday March 12th 2007 to persuade ICANN not to seek a TRO.

23. Because the Court has sealed that number, I will not disclose it in this affidavit. However, it is my expert opinion that the number of registrations which was turned over is in obvious contradiction to the number of registrations which RegisterFly publicizes on its own web site.

24. In the portion of the March 20, 2007 hearing before the Court, in which ICANN moved to have a portion of the Sealed hearing double sealed, ICANN gave a specific double secret number of records which were turned over, without the true identity of the registrant contained in the record, on Monday March 12th 2007 to persuade ICANN not to seek a TRO.

25. Because the Court has sealed that number, I will not disclose it in this affidavit; however, it is my expert opinion that the very fact that this data is not protected by data escrow – called for in the RAA – and exposes that number of innocent domain name owners to the possible loss of their domains, poses an immediate and substantial threat to the

stability of the very system of Assigned Names and Numbers, since those registrants have no protection.

26. It is my expert opinion, and I therefore advise the Court that ICANN's inability to properly enforce the data escrow called for in the RAA has not only caused the potential for irreparable harm to occur if RegisterFly is unable to fulfill its obligations as a registrar, but has already caused irreparable harm to the public's confidence in the Internet, when the public learns the full truth about ICANN's unwillingness to act to protect the public.

This the 22nd day of March 2007.

JAMES N SMITH JR

SWORN to and subscribed

before me this the _____ day of _____, 2007

NOTARY PUBLIC

My Commission Expires: _____