

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.,)
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, INC., and)
ICANN,)
)
Defendants.)

Civil Action No 07-cv-00188

**PLAINTIFF’S BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

(Fed. R. Civ. P. 65(a))

STATEMENT OF ISSUE

The matter before the Court is the Plaintiff’s Motion for a Preliminary Injunction pursuant to Rule 65(a), Fed. R. Civ. P., against Defendant RegisterFly, requesting RegisterFly turn over to ICANN and Plaintiff’s counsel for escrow all domain names, full “whois” information, and authorization codes for all domain names which ICANN demanded receipt of by March 12th 2007.

FACTS

This action arises out of RegisterFly, Inc.’s unlawful attempts to systematically accept payment for registration or renewal of domain names without registering or renewing the

domains, among other unlawful acts and the failure of ICANN to properly escrow the data to protect individuals from the unlawful acts of RegisterFly.

Named Plaintiff, Anne Martinez, owns and operates an internet business based on one of several domains she registered through ICANN certified Registrar, RegisterFly (Complaint 47). Ms. Martinez's domain, GoCertify.com is set to expire and her attempts to renew her registration through RegisterFly have failed, as have her attempts to transfer the domain to another Registrar (Complaint 35 – 48). The fraudulent practices of RegisterFly and its owner, Kevin Medina, are a proximate cause of Ms. Martinez's inability to renew or transfer her domain (Complaint 33). If Ms. Martinez is unable to renew her registration or transfer her domain, she will lose the domains' association with her host where the website is located (Affidavit of James N. Smith, Jr. in Support of Preliminary Injunction).

Ms Martinez's business depends on continued connectivity with her domain name. *Id.* RegisterFly's fraudulent behavior has precluded her, and thousands of others, from taking steps necessary to protect themselves (Complaint 33).

During the hearing before Judge Sharp on March 20th 2007, ICANN appeared and made representations to the Court regarding the content, or lack thereof, of the data escrow which RegisterFly delivered to ICANN on March 12th 2007. Prior to and during the pendency of this action, Anne Martinez has made every possible effort to transfer her domain name to GoDaddy.com and/or renew her domain names, to assure that they continue to be owned by her, and continue to point to her host server. As of this date, one domain name GoCertify.com was up for renewal on March 18th 2007, but it cannot be renewed, nor transferred.

QUESTIONS PRESENTED

WHETHER THE COURT SHOULD GRANT A TEMPORARY PRELIMINARY INJUNCTION AGAINST DEFENDANT REGISTERFLY

- I. WHETHER THE BALANCE OF HARDSHIPS WEIGH IN FAVOR OF THE PLAINTIFFS.
- II. WHETHER PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS
- III. WHETHER A PRELIMINARY INJUNCTION WOULD SERVE THE PUBLIC INTEREST

ARGUMENT

WHETHER THE COURT SHOULD GRANT A PRELIMINARY INJUNCTION AGAINST DEFENDANT REGISTERFLY

In determining whether to grant a preliminary injunction pursuant to Rule 65(a), Fed. R. Civ. P., the Court should consider: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction were denied; (2) the likelihood of injury to the defendants if the request were granted; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co. Inc.*, 550 F.2d 189, 193 (4th Cir. 1977); *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). When considering harm to the parties, the first step for the Court is "to balance the 'likelihood' of irreparable harm to the plaintiff against the likelihood of harm to the defendant." *Direx*, 952 F.2d at 808 (quoting *Blackwelder*, 550 F.2d at 195 n.3). If the "balance of hardship" tilts decidedly in the plaintiff's favor, "the plaintiff need not show a likelihood of success" for the Court to grant a preliminary injunction. *Microstrategy, Inc. v. Motorola, Inc.*, 245 F.3d 335, 339-340 (4th Cir. 2001); *Blackwelder* at 196. However, if the Court finds "there is no imbalance of hardship in favor of the plaintiff, then 'the probability of success begins to assume real significance,' and

interim relief is more likely to require a clear showing of a likelihood of success.” *Direx*, 952 F.2d at 808 (quoting *Blackwelder*, 550 F.2d at 195 n.3). Finally, the public interest should be considered a “reason for the more lenient interlocutory relief standards” as the court should attempt to preserve the *status quo ante litem* through the conclusion of litigation. *Blackwelder* at 197.

I. THE IRREPARABLE HARM TO PLAINTIFF FAR OUTWEIGHS ANY POTENTIAL HARM TO DEFENDANT REGISTERFLY

In the instant case, the potential irreparable harm to the plaintiffs is real and outweighs the paucity of harm that the defendant might suffer. Consequently, on the merits of the irreparable harm alone, it is appropriate for this Court to grant the plaintiff’s Motion for Preliminary Injunction.

It is the long standing rule of the Fourth Circuit that if the Court finds that the irreparable harm to the plaintiff outweighs the potential harm to the defendant, the Court should grant the plaintiff’s requested preliminary injunction. *Microstrategy* at 339. Therefore, the Court must make a determination as to (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction were denied and (2) the likelihood of injury to the defendants if the request were granted. *Blackwelder* at 193.

A. Failure to Grant Preliminary Injunction Will Cause Irreparable Harm to Plaintiff

If this Court does not grant the preliminary injunction requested by plaintiffs, named plaintiff Anne Martinez will suffer irreparable harm to her online businesses as a result of even a temporary disassociation of her domain from her host server and may potentially lose permanent control or ownership of her domain if the data identifying her as registrant of the domains is not protected.

1. Temporary Loss of Domain Name Constitutes Irreparable Harm

As stated in the affidavit of James N. Smith, Jr. [Affidavit In Support Of Preliminary Injunction], the continued association between the plaintiff's domain name and her hosting site is temporary and will continue for no more than thirty days after the expiration of the domain's registration. Since the plaintiff has been unable to renew her registration through the defendant and been unable to transfer her registration to another certified Registrar, her domain name will expire and she will lose her business website's connectivity. Any disconnect between the name server and the site hosting her domains will cause not only loss of business, but plaintiff will gain a reputation as an unreliable online vendor, lose status with search engines, and be forestalled in the growth of her business. For example, named Plaintiff Anne Martinez's domain, goCertify.com, averages over 37,000 hits per day (by comparison, the average U.S. Wal-Mart has a little over 3,500 shoppers a day), illuminating the importance of uninterrupted connectivity. Zimmerman, Anne. "Managing Wal-Mart: How U.S.-Store Chief Hopes to Fix Wal-Mart," *The Wall Street Journal*, 17 April 2006.; *Corporate Profile*, Wal-Mart, July 26, 2006. The loss realized by even a temporary outage would cause immeasurable harm to her business.

Judge Learned Hand explicated the meaning of irreparable harm in *Foundry Servs., Inc. v. Beneflux Corp.*, stating that it includes the "impossibility of ascertaining with any accuracy the extend of the loss." 206 F.2d 214, 216 (2d Cir. 1952)(Hand, J., concurring). This very principal has been adopted by the Fourth Circuit in *Blackwelder*, finding that the loss of the right to resell a certain manufacturers' furniture until the conclusion of litigation constituted irreparable harm, as the potential damages were incalculable. 550 F.2d at 197.

The loss of business that will be caused by even a temporary disassociation between plaintiffs' domain names and plaintiffs' site hosting server clearly constitutes irreparable harm as

required by Rule 65(a), Fed. R. Civ. P. Issuing a preliminary injunction against the defendants compelling them to continue associating the plaintiffs' domains with respective host servers will preclude irreparable harm until the conclusion of the litigation.

2. Plaintiff is Likely to Permanently Lose Domain Registration

Without the escrow protection of the plaintiffs' domain data that permits transfer and renewal of registration, it is possible that control of the domains or the domains themselves that are owned by the plaintiffs could be permanently lost (*see* affidavit of Anne Martinez in support of TRO). As with any permanent loss, the permanent loss of the registration is irreparable. In the modern era of internet, the domain name is a business' name, store front, location, and means of transacting with customers. The permanent loss of a domain name would effectively destroy a business and the livelihoods of those persons relying on the business.

3. Plaintiff has no alternative legal recourse to protect interests

Finally, plaintiffs have no other legal recourse to protect themselves. Anne Martinez in particular, but plaintiffs in general have made every attempt to protect themselves, with no success. Plaintiffs have been forced to use avenues provided by the defendants to renew and transfer domain registrations, but those attempts have met a bog of fraud, deceit, and unanswered telephones. In his Order and Recommendation on 21 March 2007, U.S. Magistrate Judge P. Trevor Sharp indicated that "ICANN [was] acting within the boundaries of its contract with RegisterFly" in an attempt to remedy some of the problems which may cause irreparable harm to the plaintiffs. However, the contractual rights of one party against another as between ICANN and RegisterFly do not constitute any alternative legal recourse for plaintiffs, since a third party has no right to enforce the contract. Consequently, ICANN's potential contractual remedies with regard to RegisterFly do not constitute a legal recourse for the plaintiffs. And even if it did,

ICANN has not enforced the contract so as to protect the plaintiffs. *See generally Whittaker v. Furniture Factory Outlet Shops & Auto-Owners Ins. Co.*, 145 N.C. App. 169, 172 (N.C. Ct. App. 2001).

Additionally, ICANN represented in the double secret portion of the hearing, that it knows it does not have proper data escrow. The double secret number is only a fraction of the estimated domain names under the control of RegisterFly [affidavit of James N. Smith, Jr. in Support Of Preliminary Injunction]. In light of the fact that ICANN has only received data for what an expert estimates as a fraction the domains controlled by RegisterFly, ICANN's perceived ability to protect the plaintiffs from harm is significantly diminished. *Id.*

B. No Substantial or Serious Harm Would Come to Defendant RegisterFly if a Preliminary Injunction is Issued

If this Court grants a preliminary injunction as requested in the accompanying Motion, the harm to the defendants would be nearly non-existent. Providing a copy of the data requested in the Motion is a simple process and is part of the normal course of business as required by the RAA [affidavit of James N. Smith, Jr. in Support Of Preliminary Injunction]. As a term of its ICANN certification, RegisterFly is contractually obligated to maintain these records and have the records readily available as a matter of course. Per the affidavit of James N. Smith, Jr. [in Support Of Preliminary Injunction], providing the requested data would not require any action by the defendants that substantially deviates from their current business relationship.

Second, an order requiring that the defendant RegisterFly maintain each registrant's domains' association with the assigned hosting web server will not place any significant burden on the defendant. Even more so than compiling the requested data, this order requires the defendant to do little outside those activities that would be done in the normal course of business

and should have been done pursuant to the defendant RegisterFly's obligation to the registrant. Maintaining domain association with web site servers is a necessary part of any registrar's regular duties and can not be considered a substantive burden [affidavit of James N. Smith, Jr. in Support Of Preliminary Injunction].

Plaintiffs' requests for relief will not impose any significant burden on the defendants as the requests would not be detrimental to the defendants' business nor would it require any special skill or ability that might harm the defendant. In short, any claim of harm by the defendants based on the requested relief would be entirely disingenuous.

C. Balancing Scales Elucidate Gravity of Plaintiff's Harm in Comparison to Harm to Defendant

The stark juxtaposition of the irreparable harm facing the plaintiffs and the chance of a slight inconvenience to the defendants tilts in favor of the injunctive relief. The irreparable harm to the plaintiffs clearly outweighs any burden to the defendants. It is difficult to conceive any serious, or even minor economic damage to the defendants caused by their compliance with the requested preliminary injunction, as they are already contractually bound to each of the duties in the normal course of business. Consequently, it is appropriate for this Court to grant the plaintiffs' motion for preliminary injunction to preclude irreparable harm to the plaintiffs.

II. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF THE CASE

The weight given to the plaintiff's likelihood to succeed on the merits of the case is to be determined by the plaintiff's demonstration of irreparable harm. *Blackwelder* at 197. This Court has already noted the plaintiff's likelihood of succeeding on the merits of the instant case. (See U.S. Magistrate Judge P. Trevor Sharp's Recommendation and Order, 21 March 2007).

However, it is prudent to also note that the allegations contained herein are supported by the findings of ICANN in the exhibits attached to the plaintiff's complaint.

The plaintiff's likelihood of succeeding on the merits of the case is strong and should be properly balanced according to *Blackwelder* and *Microstrategy* in the Courts consideration of the plaintiff's Motion for Preliminary Injunction.

III. PRELIMINARY INJUNCTION WOULD SERVE SIGNIFICANT PUBLIC INTEREST

The significant public interest in the preliminary Injunction is immense, as the public's confidence in the Internet as a viable resource is at stake. If individuals are no longer able to visit a website as a matter of course because of a breach of duty by an ICANN accredited Registrar, the frustration and confusion could shake many people's confidence in the Internet. This Court has a responsibility to preserve the *status quo ante litem* until this case comes to fruition. *Blackwelder* at 197. When a preliminary injunction would serve the public interest, the standard for injunctive relief should be loosened proportionately. *Id.*

In the instant case, there are thousands, if not hundreds of thousands of individuals that may be harmed by a failure to grant the requested preliminary injunction. RegisterFly boasts on its website that it has more than 900,000 paying customers, many of whom own more than one domain name and have much to lose if the domains are not protected. In addition to the injured customers of RegisterFly, many individuals may be hurt by relying on businesses that may disappear, websites that keep them in touch with family and friends, and the children who rely on the income their parents who earn their living through domains registered through RegisterFly.

Finally, the actions by the defendants, as alleged and substantiated with affidavits and admissions by other defendants, are egregious. It is in the interest of the Courts to enforce public

policy through private action. Fraud, one of many tortious acts alleged, is considered particularly malevolent across all areas of law and public policy, and the courts have an interest in protecting the public from such behavior.

Anne Martinez, similarly situated plaintiffs, and the public have a great deal at stake in seeing the *status quo* maintained throughout the process of the instant case. The only way to provide the needed stability is by granting the requested Motion for Preliminary Injunction.

This the 22nd day of March 2007.

E. CLARKE DUMMIT
Attorney for Plaintiffs
213 West Sixth Street
Winston-Salem, NC 27101
(336) 777-8081

Jonathan C. Bullock,
Certified Legal Intern
The Dummit Law Firm