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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

The Internet Corporation for Assigned Names and Numbers, Plaintiff, v. RegisterFly.Com, Inc., and UnifiedNames, Inc., Defendants.	Case No. CV 07-02089 MRP (PLAx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S <u>EX PARTE</u> APPLICATION FOR TEMPORARY RESTRAINING ORDER** Date: [to be set] Time: [to be set] Judge: [to be set]

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I. INTRODUCTION

The Internet Corporation for Assigned Names and Numbers ("ICANN") comes before this Court seeking to require Defendants RegisterFly.com, Inc. and Unified Names, Inc. ("RegisterFly") to comply with its contractual obligations and to turn over all data (as described below) for the Internet domain names registered through it. This request is brought *ex parte* for a temporary restraining order because hundreds of thousands of Internet domain name subscribers are at risk. Those subscribers registered their domain names using RegisterFly's services, but RegisterFly is sinking into a corporate abyss and has been unable to comply with its obligations to its customers. RegisterFly's flagrant breaches of its contract with ICANN – the very contract that gives RegisterFly the right to register names on behalf of consumers in the first instance – is preventing ICANN from fulfilling its public mission to protect these consumers. For this and other reasons, temporary injunctive relief is necessary and appropriate.

All Internet registrars, including RegisterFly, are required to give ICANN complete access to data, particularly where consumers have alleged that the registrar is not fulfilling its obligations to the Internet community. Internet registrars (including RegisterFly) are further required to provide ICANN with an electronic copy of all registration data so that ICANN may use that data in the event the registrar cannot perform its obligations to its customers. Here, there is little doubt that RegisterFly has breached its obligations to ICANN and to its customers; RegisterFly has conceded its obligation to produce data to ICANN yet has failed to do so on multiple occasions and despite multiple promises

By this complaint and request for temporary restraining order, ICANN seeks to require RegisterFly to do that which it undoubtedly is required to do contractually so that, if RegisterFly cannot honor its obligations to its customers, those customers will be able to continue accessing and utilizing their domain names

1 on the Internet. An injunction would result in no harm to RegisterFly because it

2 would merely be doing what its contract with ICANN requires it to do.

3 　　　　The immediate turnover of this data is necessary for two additional reasons.

4 First, as explained in the declaration of Kurt Pritz of ICANN, RegisterFly appears

5 to be on the brink of bankruptcy, and its customers are complaining bitterly to

6 ICANN that RegisterFly is not honoring its commitments to its customers. Second,

7 as Mr. Pritz also explains in his declaration, ICANN is terminating RegisterFly's

8 accreditation as of March 31, 2007, meaning that it is essential for ICANN to obtain

9 the Data so that RegisterFly's customers have some protection in the event

10 RegisterFly simply goes out of business.

11 　　　　Accordingly, ICANN requests that the Court immediately order RegisterFly

12 to comply with its contract with ICANN by delivering to ICANN all data that

13 ICANN has requested (as set forth in more detail in ICANN's proposed order), and

14 by updating that data every 48 hours so that RegisterFly's customers are protected

15 from potential irreparable harm. In addition, RegisterFly has refused to comply

16 with ICANN's rightful demands to inspect and audit all of RegisterFly's Data,

17 which is another essential component in ICANN's ability to monitor RegisterFly's

18 actions and protect RegisterFly's customers. ICANN therefore requests that

19 RegisterFly be ordered to immediately provide access to ICANN for data

20 inspection.

21 **II.　STATEMENT OF FACTS**

22 **Background on ICANN.** ICANN is a not-for-profit public benefit

23 corporation that was organized under California law in 1998. ICANN's mission is

24 to protect the stability, integrity, and utility of the domain name system on behalf of

25 the global Internet community. (Declaration of Kurt Pritz in support of Temporary

26 Restraining Order ("Pritz Decl."), ¶ 2; Ex. A, (ICANN's Bylaws), § 1.)

27 **Overview of DNS Structure.** ICANN operates under a series of agreements

28 with the United States Department of Commerce ("DOC"), generic top-level

1 domain name ("gTLD") registries and registrars, ccTLD registries, regional internet

2 registries, and other Internet organizations such as the Internet Engineering Task

3 Force. Qualified companies operate what are known as "gTLD" registries pursuant

4 to contractual agreements with ICANN. A registry maintains a definitive list of all

5 second-level domain names (*i.e.*, the names with which consumers are mostly

6 familiar such as google.com or ebay.com) within that registry. Some examples of

7 gTLD registries are ".com", ".net" and ".org". (Pritz Decl., ¶ 3.)

8 **Registrar Accreditation.** In order for a consumer to register a second-level

9 domain name in a gTLD registry, he or she must do so through an ICANN-

10 accredited registrar. (Pritz Decl., ¶ 4.)

11 ICANN requires every registrar to complete a published accreditation

12 process. Through the accreditation process, each registrar provides assurances that

13 it has certain financial and technical capabilities and that it will follow contractual

14 requirements and consensus-based policies (regarding, among other things the

15 collection and maintenance of a substantial amount of data for all second-level

16 domain name registrations (the "Data")). These obligations are recorded in the

17 Registrar Accreditation Agreement ("RAA") between ICANN and, separately, each

18 registrar, as well as ICANN Board approved consensus policies such as the Inter-

19 Registrar Transfer Policy ("Transfer Policy") that are incorporated as an obligation

20 of each registrar under the RAA. All accredited registrars sign an RAA with the

21 same language. (Pritz Decl., ¶ 4 and Ex. D (Registrar Accreditation Agreement

22 ("RAA")) and Ex. C (Transfer Policy) thereto.) RegisterFly is one of ICANN's

23 accredited Registrars.[1] (Pritz Decl., ¶ 13; Ex. B (RegisterFly RAA).)

24

25 _____

   [1] On September 13, 2004, ICANN entered into a registrar accreditation

26 agreement with "Top Class Names, Inc." On or around November 22, 2004, Top

   Class Names, Inc. filed a Certificate of Amendment of Certificate of Incorporation

27 with the State of Delaware, changing its name to RegisterFly.Com, Inc. (Pritz

28 Decl., ¶ 13; Ex. B (RegisterFly RAA).)

In order to register gTLD names, accredited registrars must also enter into agreements with each gTLD registry in which they wish to register names. For each registry, each registrar maintains an account with the registry from which a per-name fee is deducted upon completion of registration. If these accounts are not funded, some registries will not allow a domain name to be registered or renewed. (Pritz Decl., ¶ 8.)

The Data Requirements. The Data collection and maintenance requirements are found primarily at Sections 3.2, 3.3, and 3.4 of the RAA. These provisions specifically obligate each registrar to maintain an electronic database containing the following information for each domain name under the registrar's sponsorship:

(1) the Registered Name;

(2) the names of the primary nameserver and secondary nameserver(s) for the Registered Name;

(3) the identity of registrar (which may be provided through registrar's website);

(4) the original creation date of the registration;

(5) the expiration date of the registration;

(6) the name and postal address of the Registered Name Holder;

(7) the name, postal address, e-mail address, voice telephone number, and (where available) fax number of the technical contact for the Registered Name;

(8) the name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the Registered Name;

(9) the name and (where available) postal address, e-mail address, voice telephone number, and fax number of the billing contact; and

(10) any other Registry Data that registrar has submitted to the registry or placed in the Registry Database.[2] (Pritz Decl., ¶ 5.)

In addition, each registrar must maintain: (a) the submission date and time, and the content, of all registration data (including updates) submitted in electronic form to the Registry Operator(s); (b) all written communications constituting registration applications, confirmations, modifications, or terminations and related correspondence with Registered Name Holders, including registration contracts; and (c) records of the accounts of all Registered Name Holders with registrar, including dates and amounts of all payments and refunds. (Pritz Decl., ¶ 5.)

Registration Process. The basic process for registering a domain name is as follows. A potential registrant first contacts a registrar or consults a publicly available "Whois" service (for example, www.whois.com) to determine whether a desired domain name is available for registration. If the domain name is available, the registrant provides required information to the registrar (including the registrant's name and contact information) and pays a fee. The registrar then submits the registration to the registry, then the registry deducts a fee from the registrar's account and completes the registration of the domain name. At that point, the consumer can use the domain name on the Internet for a website, email, or to otherwise interact with the online public. (Pritz Decl., ¶ 9.)[3]

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[2] Section 3.4.3 of the RAA requires that "[d]uring the Term of this Agreement and for three years thereafter, Registrar shall make [the] records [described in this paragraph] available for inspection and copying by ICANN upon reasonable notice." (Pritz Decl., ¶ 7.)

[3] Some consumers retain the services of third party "proxy" registration companies (which are usually affiliated in ownership with the registrar or a reseller of the registrar's services) in order to prevent their personal contact data from being displayed publicly through Whois services. Proxy companies generally request and maintain the consumer's contact information in the same way the registrar would, but the proxy company becomes the public registrant of record for the domain name so that the consumer's information is kept private. (Pritz Decl., ¶ 10.)

1   Domain names may generally only be registered for fixed terms of 1 to 10

2   years, and the registration must be renewed if the registrant wishes to continue use

3   of the name after the end of the initial registration term. At the time of renewal, the

4   registry again deducts a fee from the registrar's account. If a domain name is not

5   renewed, the registration expires and, after a grace period where the name can

6   generally be redeemed for a fee, it is deleted from the registry. It then becomes part

7   of a pool of unregistered names available to any registrar to offer to a new

8   registrant. (Pritz Decl., ¶ 11.)

9   **RegisterFly's Actions.** As stated above, RegisterFly is currently an ICANN-

10 accredited Registrar. (Pritz Decl., ¶ 13; Ex. B (RegisterFly RAA).) As presented in

11 detail in the Pritz declaration, RegisterFly has been ICANN's most difficult

12 registrar for the past year, and RegisterFly's customers have been inundating

13 ICANN with complaints. (*See* Pritz Decl., ¶¶ 15-18.)

14   RegisterFly is currently the sponsoring registrar for approximately 900,000

15 domain names. (Pritz Decl., ¶ 15.) During the past several months, ICANN has

16 received (by far) more complaints from RegisterFly's customers than any other

17 registrar, and ICANN has devoted an enormous amount of attention trying to assist

18 RegisterFly in solving its problems. Nevertheless, RegisterFly has not been able to

19 resolve many of the complaints made, and the company appears at this point to be

20 insolvent and on the brink of bankruptcy. For example, ICANN has been informed

21 that the majority of RegisterFly's registry accounts are unfunded (or have negative

22 balances) and, therefore, names are not being registered or renewed. (Pritz Decl.,

23 ¶ 15.)[4]

24   Over the past several weeks, ICANN has received in excess of 100

25 complaints *each and every day* from RegisterFly's customers regarding a variety of

26 different issues. This has forced ICANN literally to create a customer service

27 _____
    [4] RegisterFly's bankruptcy entitles ICANN to immediately terminate the
28 RAA. (Ex. E to Pritz Decl. (RegisterFly RAA) at § 5.3.7.)

1   department that is dedicated almost entirely to RegisterFly; ICANN has had over 10

2   people at times spending most of their day attempting to assist RegisterFly's

3   customers. (ICANN has less than 80 employees, three of whom are generally

4   assigned to registrar liaison functions – to meet the need of 865 registrars.) (Pritz

5   Decl., ¶ 16.)

6   The nature of the complaints from RegisterFly's customers varies, but there

7   are two recurring themes. First, domain names are expiring and customers cannot

8   use their domain names, despite paying RegisterFly for those names (and

9   sometimes paying RegisterFly multiple times). In these situations, the customers

10   need to renew domain names that are about to expire, but the customers have been

11   unable to do so and, thus, are threatened with the possibility that their domain

12   names will become "deleted" and taken over by a different consumer, even though

13   the current registrant already has paid RegisterFly for the renewal. Second,

14   registrants in large numbers are attempting to transfer their domain names to a new

15   registrar and cannot obtain the authorization codes or release of the names from

16   RegisterFly necessary to effect the transfer. Those two steps are required by

17   ICANN's Transfer Policy that RegisterFly is required to follow. (Pritz Decl., ¶ 17.)

18   As a result (and following numerous efforts to work with RegisterFly to try,

19   mostly unsuccessfully, to cure these problems), on March 16, 2007, ICANN

20   notified RegisterFly that RegisterFly's accreditation would be terminated pursuant

21   to Section 5.3 of the RAA, effective March 31, 2007. (Pritz Decl., ¶ 14; Ex. E

22   (March 16, 2007 Notice of Termination of Registrar Accreditation Agreement for

23   Top Class Names, Inc. [RegisterFly] ("Notice of Termination").)

24   **What ICANN is Seeking.** Under the RegisterFly RAA, RegisterFly is

25   obligated to provide an electronic copy of the complete Data[5] for all of its domain

26

27   [5] For the purposes of Section 3.6, the Data is comprised of the 10 fields of

28   information detailed in Section 3.4 of the RAA, as described *supra* at 4:7-5:2.
Under Section 3.6, ICANN is entitled to a complete copy of this Data and to verify

names. (Pritz Decl., ¶ 6; Ex. B (RegisterFlyRAA) at § 3.6.) ICANN is seeking an order requiring RegisterFly *immediately* to provide a complete copy of this Data to ICANN, and to then require RegisterFly to provide a rolling update of this Data every 48 hours, in order to assure that ICANN has a complete and current copy of the Data, and to give ICANN the opportunity to assess whether the situation is getting even worse. (*See* Pritz Decl., ¶ 25.) ICANN is also seeking an order requiring RegisterFly to immediately provide ICANN access to inspect and audit all Data under Section 3.4.3 of the RAA to further monitor RegisterFly's actions. (Ex. B to Pritz Decl. (RegisterFly RAA) at § 3.4.3.)

ICANN has been working tirelessly to attempt to obtain this Data and access to audit without resort to the Court. On February 21, 2007, ICANN sent RegisterFly a notice of breach of the RegisterFly RAA. (Pritz Decl., ¶ 28; Ex. G ("First Breach Letter").) In the First Breach Letter, ICANN detailed RegisterFly's failure to comply with ICANN's Data provisions in the RAA, including RegisterFly's refusal to provide ICANN access to the Data it is entitled to under the RegisterFly RAA.[6] (Ex. G to Pritz Decl. (First Breach Letter).) As provided for in the RAA, RegisterFly had 15 working days to cure this breach and to provide ICANN with access to inspect and copy all request Data and to cure all other breaches identified. (Ex. B to Pritz Decl. (RegisterFly RAA) at § 5.3.4.) On the same day, ICANN sent RegisterFly a Notice of Audit notifying RegisterFly that, in accordance with Sections 3.4.3 and 3.6 of the RAA, it was obligated to make its records available to ICANN for inspection and copying and to also provide ICANN

(continued...)

that it is complete. Here, ICANN does not have the right to use this Data until necessary to facilitate the transfers of RegisterFly's customers.

[6] The First Breach Letter detailed additional breaches by RegisterFly, such as failing to follow ICANN's Transfer Policy, thereby blocking RegisterFly customer attempts to transfer domain names away from RegisterFly. (Ex. G to Pritz Decl. (First Breach Letter).)

with a complete copy of all Data for all domain names under its sponsorship as Registrar. (Pritz Decl., ¶ 29; Ex. H ("February 21 Notice of Audit").)

RegisterFly failed to comply with the February 21 Notice of Audit, as it did not make the Data available to ICANN for audit or did RegisterFly ICANN a copy of the Data. (*See* Pritz Decl., ¶ 30.) On February 28, 2007, ICANN sent RegisterFly *another* audit letter, again demanding the Data under Section 3.6 as well as accesss to all requested information for audit under Section 3.4. (Pritz Decl., ¶ 30; Ex. I ("February 28 Notice of Audit").) RegisterFly was required to comply by March 1, 2007. (*Id.*) It did not. (*See* Pritz Decl., ¶¶ 31-32.)

On March 2, 2007, ICANN sent RegisterFly a second Notice of Breach letter to RegisterFly, detailing RegisterFly's additional breaches of the RAA. These breaches included RegisterFly's continued refusal to provide ICANN with a copy of all Data as required by Section 3.6 of the RAA, as well as RegisterFly's continued refusal to comply with ICANN's audit demand under Section 3.4 of the RAA.[7] (Pritz Decl., ¶ 31; Ex. J ("March 2 Notice of Breach").) On March 15, 2007, after RegisterFly's continued failure to comply with ICANN's demands, ICANN sent another demand letter reminding RegisterFly of its continuing breach of Section 3.6 of the RAA. (Pritz Decl., ¶ 32; Ex. K ("March 15 Demand Letter").) To date, RegisterFly has not complied with ICANN's demands. (*See* Pritz Decl., ¶¶ 33-38.)

Based upon RegisterFly's failure to cure the breaches identified in the First Breach Letter, on March 16, 2007, ICANN issued a notice of termination of the RegisterFly RAA. (Pritz Decl., ¶ 33; Ex. E (Notice of Termination).) Under Section 5.3 of the RegisterFly RAA, the Notice of Termination provides the

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[7] The March 2 Notice of Breach detailed additional breaches by RegisterFly, including RegisterFly's failure to continually maintain public access to Whois data relating to registered names (via its website and "port 43" Whois service) as required under Section 3.3 of the RAA, and RegisterFly's refusal to comply with ICANN's audit demand under Section 3.4 of the RAA. (Pritz Decl., ¶ 31.)

1   required 15-day notice, and specifies that the RegisterFly RAA will be terminated

2   as of March 31, 2007. (*Id.*) As of that date, RegisterFly will no longer be able to

3   serve as an ICANN-accredited registrar.[8] In addition, the Notice of Termination

4   demanded that RegisterFly immediately cease use of all ICANN trademarked logos

5   on its website and business materials – a demand that RegisterFly ignored until

6   March 28, 2007.[9] (*Id.*)

7   On March 20, 2007, ICANN sent RegisterFly a letter addressing the

8   continuing breaches of the RAA. While RegisterFly's RAA would be terminated

9   on March 31, RegisterFly was still obligated under Section 3.6 to provide ICANN

10 with a complete copy of all registration Data and under Section 3.4 to allow

11 ICANN access to audit the Data, RegisterFly continued to fail to respond to those

12 demands. (Pritz Decl., ¶ 34; Ex. L ("March 20, 2007 Letter").) Further,

13 RegisterFly was ordered immediately to comply with the demand to remove

14 ICANN's trademarked logos from its website, which it failed to do earlier. (*Id.*)

15   RegisterFly has purported to send the requested Data under Section 3.6 on

16 two occasions. Neither submission has been accurate, complete or otherwise

17 fulfilled RegisterFly's obligations under the RAA. On March 5, 2007, RegisterFly

18 turned over some amount of Data, but the Data (which itself was dated February 27,

19 _____

20   [8] On March 28, 2007, RegisterFly provided ICANN notice that it had filed a
    demand for arbitration under Section 5.3 of the Registrar Accreditation Agreement
21 between ICANN and RegisterFly. (*See* Ex. B to the Pritz Decl. (RegisterFly
    RAA).) Whether or not RegisterFly successfully initiated this arbitration, ICANN
22 has the right (under Section 5.6 of the RAA) to seek emergency relief in this Court
23 to protect ICANN's rights even if an arbitration is pending. (*Id.* at § 5.6 ("For the
    purpose of aiding the arbitration and/or preserving the rights of the parties during
24 the pendency of an arbitration, the parties **shall have the right to seek temporary
    or preliminary injunctive relief** from the arbitration panel or **in a court located in
25 Los Angeles, California, USA.**") (emphasis added).)
26
27   [9] The Notice of Termination also requires RegisterFly to assist in facilitating
    a bulk transfer of domains registered through RegisterFly. (Pritz Decl., ¶ 33; Ex. E
28 (Notice of Termination).)

1   2007) turned out to be incomplete and inaccurate. Some of the prime deficiencies

2   in that submission were: (1) 15,000 of the registrations contained only the proxy

3   registration Data through RegisterFly's "ProtectFly" service, and did not reveal any

4   of the actual customer Data; and (2) in a comparison to a statistically-significant

5   sampling of information provided by the .net and .com registries, out of the sample

6   of 1000 RegisterFly-sponsored domain names within these registries, 94 of those

7   names were not even found in RegisterFly's submission. All of these names should

8   have appeared within RegisterFly's Data. Based on this sample, ICANN does not

9   have Data for 9.4% of RegisterFly-sponsored domain names within the two most

10 common Internet registries. (Pritz Decl., ¶ 19.) Stated differently, ICANN

11 apparently does not have data for tens of thousands of RegisterFly's customers.

12   On March 8, 2007, ICANN sent RegisterFly a letter detailing some of the

13 deficiencies with the March 5 data submission. (Pritz Decl., ¶ 20; Ex. F (March 8

14 Letter).) RegisterFly has not submitted any supplemental data to address the

15 deficiencies discussed above. (Pritz Decl., ¶ 21.) Instead, on March 23, 2007,

16 ICANN received from RegisterFly a copy of the "data" in response to ICANN's

17 request of March 20, 2007. However, this "data" was simply a duplicate of the

18 deficient data RegisterFly had earlier sent to ICANN on March 5; the "data" had

19 not been updated at all. ICANN technical staff verified that the data set received

20 earlier (on March 5) matched the data received on March 23. Since some names

21 had expired and had transferred from RegisterFly since the data set was received on

22 March 5, the March 23 data set obviously could not match the March 5 set AND be

23 accurate.[10] In addition to being nearly a month old, the "data" naturally suffered

24 _____

25 [10] RegisterFly's sponsored portfolio is constantly changing, and significant
    changes have occurred since February 27, 2007. For example, through the
26 customer service work that ICANN has been performing as a result of RegisterFly's
27 neglect of its duties, ICANN is aware of *thousands* of domain names that have been
    transferred out of RegisterFly's sponsorship since the March 5, 2007 submission.
28 (Pritz Decl., ¶ 38.)

1 from all of the same deficiencies as the "data" detailed in Paragraph 19. (Pritz

2 Decl., ¶ 35.)

3   It is hard to imagine that RegisterFly's provision of duplicate data on

4 March 23 was anything less than a delaying tactic. RegisterFly obviously

5 understands its contractual obligations but is trying to delay its performance of

6 those obligations, all to the detriment of ICANN and, more importantly,

7 RegisterFly's customers. In RegisterFly's March 22, 2007 transmittal email,

8 RegisterFly failed to inform ICANN that it was sending an exact duplicate of

9 RegisterFly's earlier "data" submission. Thus, ICANN staff spent many hours

10 attempting to analyze the data only to determine that it was a duplicate of what

11 ICANN had already received. (Pritz Decl., ¶ 35; Ex. M.)

12   On the morning of March 27, 2007, ICANN sent a final letter demanding that

13 current, correct and complete RegisterFly Data be immediately sent via electronic

14 means to ICANN. (Pritz Decl., ¶ 36; Ex. N ("Final Demand Letter").) Later that

15 same day, RegisterFly contacted ICANN and stated that it would send an electronic

16 version of updated RegisterFly Data that evening. RegisterFly claimed that it had

17 "inadvertently" sent the wrong version of the data received by ICANN on

18 March 23, 2007. ICANN arranged to set up the proper secured method for

19 receiving RegisterFly's updated Data, and worked with RegisterFly's representative

20 to ensure he had all the necessary information to electronically transmit

21 RegisterFly's Data to ICANN. RegisterFly's representative understood ICANN's

22 instructions and indicated RegisterFly's full intention to transmit the data as

23 discussed. (Pritz Decl., ¶ 37.) At that time, RegisterFly informed ICANN that due

24 to required processing prior to transmittal, the Data would be electronically

25 transmitted to ICANN no later than 9:00 a.m. EDT on March 28, 2007. (Pritz

26 Decl., ¶ 37.) ICANN did not receive the Data as promised. In fact, as of 12:00

27 a.m. PDT on March 29, 2007, ICANN had not received any additional Data from

28 RegisterFly. Further, if ICANN were to receive additional data, RegisterFly's

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1 history of dealing with ICANN supports the conclusion that RegisterFly will

2 continue providing insufficient and incomplete submissions as delaying tactics.

3 unless under court order. A court order also will ensure that RegisterFly provides

4 updates of the Data to ICANN every 48 hours, as ICANN has been requesting for

5 several weeks. (*See* Pritz Decl., ¶¶ 19, 35.)

6 **Why ICANN Needs the Data Urgently.** Any delay in furnishing complete

7 and accurate Data to ICANN places all RegisterFly's customers at further risk of

8 losing access to their domain names. RegisterFly has already caused an unknown

9 number of customers to lose domain name registrations due to its ongoing failures

10 to fund registry accounts. If those registries refuse to honor RegisterFly's requests

11 with respect to these domain names (because RegisterFly has not paid these

12 registries), the registries might wind up re-registering these names to different

13 consumers. Moreover, the security of RegisterFly's website is questionable, as

14 there have been repeated instances of outages of RegisterFly's website and its

15 "Whois" service (also a breach of the RAA). Obtaining the Data is the only way

16 that ICANN can attempt to provide any assurance of continued service to

17 RegisterFly customers. (Pritz Decl., ¶ 23.)

18 Importantly, if the Data is lost, it *can never be recreated*. Over a period of

19 time, the loss of Data would potentially cause hundreds of thousands of domain

20 names originally purchased via RegisterFly to become inoperable for the consumers

21 who registered those names. With the Data, in the event that anything happens to

22 RegisterFly, or if its servers or the Data are in any way compromised, ICANN will

23 be able to restore functionality. (Pritz Decl., ¶ 25.)

24 ICANN's rights to obtain a copy of the Data under sections 3.4 and 3.6 of the

25 RAA are unrestricted. Further, as explained above, given the potential business

26 failure and termination of RegisterFly, ICANN believes that it needs to receive

27 updates to the Data at least every 48 hours so that ICANN can monitor the status of

28 RegisterFly's actions and, if necessary, request further relief from the Court should

1   it appear that even more urgent relief – i.e., the appointment of a receiver for

2   RegisterFly – is required. (Pritz Decl., ¶ 25.) Obtaining updates to the data every

3   48 hours is the only way to address ICANN's concerns that RegisterFly will be

4   making changes to the Data, and to allow ICANN to continue to verify that the data

5   is complete, consistent and in proper format. This will also allow ICANN to

6   monitor the recent requests that RegisterFly's customers have made and whether

7   RegisterFly is honoring those requests. (Pritz Decl., ¶ 22.)

8   ICANN requires a *current, complete and correct* copy of all registrant Data it

9   is entitled to under Section 3.6 of the RAA. The fact that RegisterFly has delivered

10   to ICANN *some* stale "data" does not offer any protection to RegisterFly's

11   customers. Without current, complete and correct Data, in the event that ICANN

12   needs to facilitate a bulk transfer of RegisterFly's sponsored portfolio after the

13   termination of the RAA, any registrar that receives the Data would be unable to

14   authenticate or determine the identity of the true registrant for *any* of the domain

15   names therein. Without the ability to authenticate the true registrant, the new

16   registrar could not make changes or transfer the name out to another registrar, and

17   the use of the domain name could be suspended or frozen. The inability to

18   authenticate or determine the true identity of registrants also makes the opportunity

19   for fraud rampant. (Pritz Decl., ¶ 39.)

20   As a result, ICANN is seeking this temporary restraining order to require

21   RegisterFly to turn over to ICANN – every 48 hours – the Data to which ICANN is

22   entitled under the RAA. Only by having this data can ICANN attempt to protect

23   RegisterFly's customers.

24   **Effect on RegisterFly.** Turning over the Data *will not affect RegisterFly's*

25   *operations in any way*. It will not affect RegisterFly's ability to attempt to service

26   its customers. It will not affect RegisterFly's ability to attempt to sell its

27   registration portfolio (if that is what RegisterFly is hoping to do). It will simply

28   fulfill RegisterFly's contractual obligation to ICANN to provide the Data, and serve

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1 as a means for ICANN to act to protect RegisterFly's customers in the event

2 RegisterFly cannot sustain its business – a very real possibility. (Pritz Decl., ¶ 26.)

3 Further, requiring RegisterFly to give ICANN access to audit all registration Data

4 will fulfill RegisterFly's contractual requirement, will allow ICANN further means

5 to verify that RegisterFly is properly maintaining and changing Data, and will not

6 otherwise affect RegisterFly's ability to attempt to service its existing customers.

7 (*See* Ex. E to Pritz Decl. (RegisterFly RAA) at § 3.4.3.).)

III. LEGAL STANDARD FOR OBTAINING A TRO

9 The traditional criteria for a temporary restraining order ("TRO") requires

10 that the moving party establish the following: (1) a likelihood of success on the

11 merits; (2) a substantial threat of irreparable injury to the movant; (3) the threatened

12 injury outweighs any damage to the defendant; and (4) the relief will serve the

13 public interest. *Tenakee Springs v. Block*, 778 F.2d 1402, 1407 (9th Cir. 1985).

14 The Ninth Circuit allows the movant to meet this burden by proving either of the

15 following: (1) that the movant has a "probable" success on the merits and the

16 "possibility" of irreparable injury; or (2) that even though there are serious

17 questions raised as to the success on the merits and irreparable injury, so long as the

18 balance of hardships "tips sharply in [plaintiff's] favor," the relief is proper.

19 *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839-40

20 (9th Cir. 2001).

21 Both tests focus on the merits of the asserted claims and the relative hardship

22 faced by the parties. They represent a "sliding scale in which the required degree of

23 irreparable harm increases as the probability of success decreases. If the movant

24 has 100% probability of success on the merits, this alone entitles it to reversal of a

25 district court's denial of a preliminary injunction, without regard to the balance of

26 the hardships." *Sammartano v. First Judicial Dist. Ct. in and for County of Carson

27 City*, 303 F.3d 959, 965 (9th Cir. 2002) (internal citation and quotations omitted).

28

1   Further, "if the balance of harm tips decidedly toward the plaintiff, then the

2   plaintiff need not show as robust a likelihood of success on the merits." *Alaska ex*

3   *rel Yukon Flats Sch. Dist. v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th

4   Cir. 1988). If plaintiff must address the balance of hardships, then plaintiff must

5   show that the "threat of irreparable harm" is "immediate" and "significant."

6   *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988).

7   Here, under any of the applicable tests, ICANN is entitled to a TRO because

8   ICANN has a strong likelihood of prevailing on the merits, and there would be

9   substantial harm to ICANN and the public if the TRO is not issued.

IV.   ARGUMENT

A.   ICANN IS EXTREMELY LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS AGAINST REGISTERFLY.

13   RegisterFly is in breach of the RAA (and has not claimed otherwise).

14 RegisterFly has refused to provide ICANN with a complete copy of its Data, as

15 required under Section 3.6 of the RAA. (Ex. B to Pritz Decl. (RegisterFly RAA)

16 ("During the Term of this Agreement . . . Registrar shall submit an electronic copy

17 of the database ").) Further, RegisterFly has refused to make available to ICANN

18 the Data that it is required to maintain under Section 3.4.3 of the RAA.

19 RegisterFly's incomplete Data submissions do not cure its breaches of either of

20 these sections of the RAA.

21   ICANN has requested both the Data copy and audit on no fewer than *six*

22 occasions (see Exs. E (Notice of Termination); H (February 21 Notice of Audit); I

23 (February 28 Notice of Audit); K (March 15 Demand Letter); L (March 20 Letter);

24 and N (Final Demand Letter) to Pritz Decl.). RegisterFly has failed to comply. No

25 matter what RegisterFly states that it "intends" to do in regards to providing the

26 Data to ICANN – nor its last-minute, incomplete attempts to provide *some* Data to

27 ICANN – RegisterFly has not complied with ICANN's demands and is in breach of

28 the RAA. Further, RegisterFly has failed to cure many of its other breaches of the

RAA, and each separate breach provides an independent ground for ICANN to terminate the RegisterFly RAA.

RegisterFly truly has no defense for its refusal to perform its contractual obligations. ICANN therefore has an extremely high probability of success on the merits. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2005).

B.   ICANN – AND REGISTERFLY'S CUSTOMERS - WILL BE IRREPARABLY HARMED IF THIS DATA IS NOT PRESERVED.

ICANN's fundamental mission is to maintain the stability and security of the Internet. This requires compliance with ICANN's policies and procedures. Registrars such as RegisterFly exist only because they have agreed to sign ICANN's Registrar Accreditation Policy, which gives ICANN a variety of rights, including the right to obtain a copy of the Data at ICANN's request and the right to inspect and audit the Data. The registrars are not given an option whether to comply with ICANN's requests because ICANN must have the Data in order to attempt to protect the public.

RegisterFly has continually avoided its obligations to ICANN. If ICANN is not immediately given a complete copy of the Data, ICANN's ability to fulfill its role of protecting domain name registrants is severely compromised. Further, because of the rapid changes of sponsored registrations expected in this period leading to the termination of RegisterFly's RAA, ICANN requires a 48-hour rolling update of all Data, in order to ensure that RegisterFly maintains the most up-to-date sponsorship information, and in order to evaluate whether further steps may be appropriate in the event RegisterFly's situation continues to deteriorate. Similarly, ICANN requires an immediate ability to audit all of RegisterFly's Data to ensure that it is being properly recorded and maintained.

1   Indeed, the protection of the Data is the *only* way that ICANN can provide

2   the Internet community with any assurance of continuity of service for the affected

3   registered names. Otherwise, tens (if not hundreds) of thousands of registered

4   name holders will face an unprecedented situation of inoperability. The imminent

5   harm comes from multiple sources, including the fear that RegisterFly may go out

6   of business, the ongoing deletion of registrations, the fact that many customers have

7   been unable to transfer their domain names from RegisterFly to a different registrar,

8   and the uncertainty caused by the fact that many customers simply have been

9   unable to get RegisterFly to honor their requests. Because of the dire and escalating

10   situation at RegisterFly, action must be taken *now*.

11   ICANN's requested relief – affirmatively requiring RegisterFly to provide a

12   copy of the Data and regular updates to the Data – is well within the Court's

13   discretionary powers. *See Stuhlbarg Int'l Sales Co.*, 240 F.3d at 841 n.8 (district

14   court has discretionary power to fashion relief as required to prevent irreparable

15   harm). The provision of this Data is the only means for ICANN to fulfill its

16   obligations to the Internet community. *Id.*, at 841. Further, requiring RegisterFly

17   to turn over the Data does not represent any meaningful change to the status quo

18   because RegisterFly should have been providing the Data all along. *See Walczak v.*

19   *EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999) (order stopping company

20   from taking further action that could harm movant properly preserved status quo).

21   Indeed, ICANN's request is the only means to *preserve* the status quo, *i.e.*, to

22   preserve the Data as it currently exists and before it is compromised any further.

23   RegisterFly obviously cannot be trusted to preserve the Data on its own (and

24   ICANN's contractual rights to obtain the Data mean that any "trust" that might be

25   placed in RegisterFly is irrelevant in any event).

26   RegisterFly has not provided ICANN with any reason to "trust" it over this

27   past month. Its dealings have been a series of delaying tactics and unfulfilled

28   promises, such the last minute provision of incomplete data (on *two* occasions).

1   RegisterFly has also waited until the very last minute to take corrective action, such

2   as the payment of its outstanding balance to ICANN on the *very last day* possible,

3   or waiting twelve days after ICANN's termination of a license agreement to stop

4   using ICANN's logos. Indeed, even if RegisterFly were to attempt to thwart this

5   application through the last minute submission of Data, ICANN would still seek

6   emergency relief from the Court, as RegisterFly has shown that it cannot be trusted

7   to do what it says it will. ICANN would still need the power of the Court to require

8   RegisterFly's compliance in providing updated data every 48 hours.

9   Ordering the Data to be provided to ICANN is the only way to prevent the

10   irreparable harm that is imminent. This is particularly true inasmuch as ICANN

11   seeks only injunctive relief, not money damages. *See, e.g, Gilder v. PGA Tour,*

12   *Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) ("where the threat of injury is imminent and

13   the measure of that injury defies calculation, damages will not provide a remedy at

14   law. Thus, immeasurable injuries likely to be suffered by the individual plaintiffs

15   supports the district court's conclusion that they will be irreparably harmed.");

16   *Justin v. City of Los Angeles,* No. CV-00-12352 LGB (AIJx), 2000 U.S. Dist.

17   LEXIS 17881, at *30 (C.D. Cal. Dec. 5, 2000) (TRO is proper where money

18   damages or future legal remedies will not adequately address irreparable harm).

19   This lawsuit is not about ICANN's money – it is about preservation of Data to

20   prevent the loss of hundreds of thousands of domain names (and the money those

21   consumers paid for those names).

22   RegisterFly will not be harmed by turning over a copy of the Data to

23   ICANN. Indeed, RegisterFly has already purported to turn over this Data twice,

24   although the submissions did not comply with RegisterFly's contractual

25   obligations. RegisterFly will continue to be able to run its business (at least to the

26   extent it is capable of doing do), and RegisterFly will incur no costs beyond those

27

28

1   that the RAA already imposes on it.[11] *See, e.g. Wham-O, Inc. v. Paramount*

2   *Pictures Corp.*, 286 F. Supp. 2d 1254, 1264 (N.D. Cal. 2003) (balance of hardships

3   in defendant's favor where it will require affirmative alterations in business plans or

4   impose additional development costs).

5   In reality, there truly is no balancing to take into account: ICANN and the

6   RegisterFly's customers *will suffer* if no injunction is issued; RegisterFly will not

7   suffer any harm if an injunction is issued. Even with RegisterFly's incomplete

8   submissions, ICANN and RegisterFly's customers are still facing immediate

9   irreparable harm. Combined with ICANN's likelihood of success on the merits,

10   there is little doubt that a TRO should issue.

11   **C.   THE PUBLIC INTEREST IS SERVED BY ORDERING**
                REGISTERFLY TO TURN OVER THE DATA.
12

13   A TRO surely will serve the public interest here. *FTC v. World Wide*

14   *Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (affirming early injunctive relief in

15   the public interest where over 100,000 consumers were potentially affected). The

16   entire purpose of the Data provision in the RAA is to assist ICANN in its mission to

17   preserve and protect the stability of the Internet for all users. *See, e.g., Heil v. Wells*

18   *Fargo Bank,* No. C06-02002-MJJ, 2006 U.S. Dist. LEXIS 26654, at *14 (N.D. Cal.

19   April 27, 2006) (protecting single property owner from erroneous loss of property

20   is in the public interest and supports granting of TRO).

21   By contrast, protecting RegisterFly's private interests – and allowing it to

22   continue to breach the RAA – is not a valid reason for denying ICANN's interests

23   or the public's interests. *See Welcome Co. Ltd. v. Harriet Carter Gifts, Inc.*, CV

24   _____

25   [11] The provision of complete Data to ICANN actually could *benefit*
RegisterFly, given the current instability of its operations. Granting ICANN's

26   Application guarantees that RegisterFly's customers will have the hope of
continued service, no matter what becomes of RegisterFly. RegisterFly agreed long

27   ago to provide this Data; that RegisterFly is on the brink of imploding does not now

28   relieve it of this obligation.

98-598DT(JGx), 1998 U.S. Dist. LEXIS 21883, at *17 (C.D. Cal. Apr. 21, 1998) (potential for defendant losing the ability to "reap . . . enormous profits" does not outweigh movant's ability to obtain TRO and protect and maintain status quo.).

V.   CONCLUSION

ICANN requests that the Court issue a temporary restraining order that requires defendant RegisterFly to permit ICANN to obtain a complete copy of all of RegisterFly's registration Data. Further, ICANN requests that the TRO obligate RegisterFly to provide a 48 hour rolling update of all Data through the time that the RegisterFly RAA is terminated. Finally, ICANN requests that RegisterFly be required to immediately provide ICANN access to inspect and copy all Data in accordance with its audit rights under Section 3.4 of the RAA. Only by issuing the TRO will ICANN be able to ensure that RegisterFly's customers can be protected. Only by issuing the TRO will ICANN be able to fulfill its mission to protect the security and stability of the Internet.

Respectfully submitted,

Dated: March 29, 2007   JONES DAY

By:_____
        Jeffrey A. LeVee

Attorneys for Plaintiff
THE INTERNET CORPORATION
FOR ASSIGNED NAMES AND
NUMBERS

PROOF OF SERVICE BY OVERNIGHT DELIVERY AND ELECTRONIC

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On March 29, 2007, I deposited with Federal Express, a true and correct copy of the within documents:

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S EX PARTE
APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

in a sealed envelope, addressed as follows and by transmitting electronically the document(s) listed above:

Kevin Medina
RegisterFly.com, Inc.
960 Arthur Godfrey Road
Suite 402
Miami Beach, FL 33140
Email: kevin@unifiednames-inc.com

Mitchell Novick, Esq.
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Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

LAI-2857778v1

Executed on March 29, 2007, at Los Angeles, California.

_____
Martha L. Espelage-Alvarez

NOTICE OF EX PARTE APPLICATION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER