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The Internet Corporation for Assigned Names
and Numbers

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CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES

FILED

**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 07-2089 R (PLAx)

**ICANN'S MEMORANDUM IN
SUPPORT OF ENTRY OF
PRELIMINARY INJUNCTION**

[Declaration of Jeffrey A. LeVee in
Support of Preliminary Injunction
filed concurrently herewith;
[Proposed] Preliminary Injunction
lodged concurrently herewith]

Date: April 26, 2007
Time: 10:00 a.m.
Judge: Hon. Manuel L. Real

1 **I. INTRODUCTION**

2 On April 16, 2007, this Court entered a Temporary Restraining Order
3 ("TRO") that required Defendants RegisterFly.Com, Inc. and UnifiedNames, Inc.
4 (collectively, "RegisterFly") to provide Plaintiff Internet Corporation for Assigned
5 Names and Numbers ("ICANN") with various critical information and with
6 immediate access to RegisterFly's books and records. Also on April 16, the Court
7 issued an Order to Show Cause with respect to a preliminary injunction that
8 established a briefing schedule with respect to the preliminary injunction.

9 A full week after the Court's orders were issued, RegisterFly has: (i) refused
10 to respond to (much less to comply with) ICANN's request that RegisterFly comply
11 with the TRO; (ii) failed to file a memorandum in response to the Court's Order to
12 Show Cause; and (iii) failed to file any response to ICANN's complaint (which was
13 due on April 23, 2007).¹ As RegisterFly refuses to comply with the Court's orders,
14 the situation for RegisterFly's customers and for ICANN's efforts to assist those
15 customers gets worse every day.

16 ICANN urges the Court to issue a preliminary injunction to maintain
17 RegisterFly's obligations as set forth in the contract between the parties (the
18 "RAA") and this Court's TRO. ICANN also provides the Court with additional
19 information – as set forth in the accompanying declaration of Jeffrey A. LeVee – to
20 support the form of preliminary injunction that ICANN is submitting concurrent
21 with this memorandum in order to further assist ICANN's efforts to protect
22 RegisterFly's customers and to preserve ICANN's rights under the RAA.

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¹ Concurrent with the filing of this memorandum, ICANN is submitting an
26 Request for Clerk's Entry of Default as to Defendant RegisterFly.Com, Inc. based
27 upon its failure to defend. Defendant UnifiedNames, Inc. has until April 25, 2007
28 to file a responsive pleading to ICANN's complaint, and if no response is filed,
 ICANN will apply for entry of default on April 26, 2007.

1 **II. A PRELIMINARY INJUNCTION IS APPROPRIATE AND**
2 **NECESSARY.**

3 **A. ICANN Has Served RegisterFly with The Court's Orders, But**
4 **RegisterFly Has Refused To Respond.**

5 ICANN has been extremely careful to serve all of the pleadings in this action,
6 including the Court's orders, on RegisterFly. In addition to serving RegisterFly's
7 chief executive officer via both email and Federal Express, ICANN has been
8 serving RegisterFly's general counsel (Mr. Novick) in New Jersey via email and
9 Federal Express.² (Declaration of Jeffrey A. LeVee ("LeVee Decl."), ¶ 1.) ICANN
10 knows that Mr. Novick has been receiving email and Federal Express packages
11 related to this lawsuit because Mr. Novick has been using that same email address
12 to send email to the American Arbitration Association with respect to an arbitration
13 that RegisterFly has initiated in an attempt to keep its status as an ICANN-
14 accredited registrar.³ (LeVee Decl., ¶ 4; Exs. A, B.)⁴

15 In addition to service via email and Federal Express, ICANN also has
16 provided updates on this litigation on ICANN's website, located at www.icann.org,
17 including the fact that this Court issued the TRO on April 16, 2007

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19 ² ICANN has filed its Proofs of Service. (LeVee Decl., ¶ 3.) ICANN served
20 the Complaint, the Application for TRO and all supporting papers on RegisterFly
21 on March 29, 2007 through email and Federal Express. ICANN served its
22 Supplement to the TRO Application on April 11, 2007, also through email and
23 Federal Express. On April 16, 2007, the day the Court entered the TRO and Order
24 to Show Cause, ICANN served notice of the entry of each order to RegisterFly via
25 email and Federal Express. (LeVee Decl., ¶ 3.)

26 ³ Under the RAA, RegisterFly has the right to initiate an arbitration to
27 challenge ICANN's termination of the RAA. However, as explained below,
28 ICANN also has the right to seek injunctive relief in this Court even while the
arbitration is pending.

⁴ In addition, after ICANN filed and served its April 11, 2007 Supplement to
its TRO application, RegisterFly's staff contacted ICANN's staff to discuss certain
of the technical specifications referenced in the TRO papers. (LeVee Decl., ¶ 5.)

1 (http://www.icann.org/announcements/announcement-17apr07.htm). There also
2 have been media reports regarding the litigation and various allegations of
3 impropriety against RegisterFly's officers. (LeVee Decl., ¶ 12; Ex. J.)

4 In short, there is no question that RegisterFly is receiving all of the papers in
5 this case yet is affirmatively choosing to disregard those papers and, most
6 importantly, this Court's orders. The result is that RegisterFly has failed: 1) to file
7 any response to the complaint; 2) to comply with the TRO; or 3) to respond to this
8 Court's Order to Show Cause.

9 **B. RegisterFly Has Failed To Comply With the TRO.**

10 Since the entry of the TRO, ICANN has not received a single Data
11 submission complying with the specifications set forth in the TRO. RegisterFly's
12 last Data submission, although made through the SFTP server (as ordered at ¶ 5 of
13 the TRO), did not meet any of the other technical specifications.⁵ More
14 importantly, the submission did not include the critical registration information for
15 the equitable registrants of those domain names currently identified as registered by
16 a "proxy" registration service, such as "ProtectFly." (TRO, ¶¶ 2-4; LeVee Decl.,
17 ¶ 6.) The use of a "proxy" registration service masks the actual registrants of the
18 domain names; because ICANN has no way of knowing who the actual registrants
19 are for *twenty percent* of RegisterFly's registered domain names. (See Supplement
20 at 3:10-22.) Further, because RegisterFly has not complied with the technical
21 specifications set forth in the TRO, ICANN cannot be sure that *any* of the Data
22 submissions are complete. (See Supplement at 5:3-6:20.) And RegisterFly has
23 now further violated the TRO because it has not submitted any additional Data to
24 ICANN in more than a week. (LeVee Decl. ¶ 6.)

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26 ⁵ In particular, the last Data submission did not include an MD5 algorithm
27 (TRO, ¶ 6), and it did not conform to meet RFC 4180 (.csv) specifications. (TRO,
28 ¶ 7.) In addition, no one from RegisterFly contacted anyone at ICANN to discuss
alternates to the .csv specifications. (TRO, ¶ 7; LeVee Decl., ¶ 7.)

1 ICANN has also been denied access to audit RegisterFly's books and
2 records, as this Court ordered in the TRO. (TRO, ¶¶ 8, 9.) On April 16, 2007,
3 along with the Notice of Entry of Temporary Restraining Order, ICANN sent to
4 RegisterFly a demand for inspection and audit. (LeVee Decl., ¶ 8; Ex. C.) ICANN
5 never received any response to this demand and has not been able to conduct the
6 inspection/audit. (LeVee Decl., ¶ 8.)

7 **C. The Preliminary Injunction Should Strip RegisterFly of Its**
8 **Accreditation So That No Additional Consumers Are Injured.**

9 Because of RegisterFly's refusal to comply with this Court's TRO, ICANN
10 urges the Court to grant further relief in order to protect the interests of
11 RegisterFly's customers and other consumers who might consider using
12 RegisterFly to subscribe to new domain names. Unfortunately, despite
13 RegisterFly's problems, consumers are still paying RegisterFly to register domain
14 names on RegisterFly's website. This must stop. ICANN has terminated
15 RegisterFly's status as an accredited registrar, but because RegisterFly has initiated
16 an arbitration to challenge the termination, RegisterFly continues to offer domain
17 names on its website. The arbitration provided an automatic stay of the
18 termination, but ICANN requests that stay be lifted, pursuant to the terms of the
19 RAA, in light of RegisterFly's failure to respond to Court orders. Further, the
20 arbitration demand is meritless – indeed, all that RegisterFly stated in its demand to
21 initiate the arbitration is that it “contest[s] the termination”; RegisterFly has not
22 referenced a *single* factual basis to support its position. (Ex. D to LeVee Decl.)

23 The last sentence of Section 5.6 of the RAA provides:

24 For the purpose of aiding the arbitration and/or preserving the rights
25 of the parties during the pendency of an arbitration, the parties shall
26 have the right to seek temporary or preliminary injunctive relief from
27 the arbitration panel or in a court located in Los Angeles, California,
28 USA, which shall not be a waiver of this arbitration agreement.

1 (Ex. E to LeVee Decl.)

2 There is no doubt that, in order to protect ICANN's rights, and in order to
3 spare potentially thousands of consumers from registering domain names on
4 RegisterFly's website and putting those names (and a lot of money) at risk, the
5 Court's preliminary injunction order should permit ICANN immediately to suspend
6 RegisterFly's accreditation.⁶ Indeed, by refusing to abide by the TRO and by
7 conducting its business on terms that raise serious questions as to insolvency,
8 RegisterFly has given ICANN the right to terminate the RAA immediately based on
9 Sections 5.1 and 5.3.5 of the RAA, which permits ICANN to seek specific
10 performance of the RAA (as ICANN has sought and obtained in this lawsuit), and
11 which permits ICANN to terminate the RAA if RegisterFly fails to comply with
12 that order of specific performance.

13 RegisterFly has also engaged in other actions that support the immediate
14 termination of the RAA. In particular, RegisterFly appears to be insolvent, which is
15 another ground for immediate termination of the RAA under Section 5.3.7.
16 (Because ICANN has been denied access to RegisterFly's books and records – in
17 violation of the Court's TRO – ICANN has not been able to determine whether
18 RegisterFly is, in fact, insolvent.) In the past two weeks alone, ICANN has been
19 made aware of three lawsuits filed against RegisterFly for failure to pay amounts
20 due. (LeVee Decl., ¶ 11; Exs. F-H.) First, RegisterFly is a defendant to an eviction
21 proceeding for past due rent. (Ex. F to LeVee Decl.) Second, RegisterFly was sued
22 in small claims action for failing to pay a contractor. (Ex. G to LeVee Decl.)
23 Third, RegisterFly is a defendant in a representative action brought by its

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25 ⁶ In addition, ICANN requests that the Court's order require RegisterFly to
26 post notification on its website that ICANN has issued a notice of termination of
27 accreditation. Providing such a notice will alert customers to the need to perform
28 research on the selection of RegisterFly as a registrar. In the event ICANN
terminates the RAA, the Court's order should further require RegisterFly to post a
notification of the fact of termination.

1 employees for failure to pay wages. (Ex. G to LeVee Decl.) These suits highlight
2 RegisterFly's financial troubles in addition to those already addressed by the United
3 States District Court for the District of New Jersey in the litigation between
4 RegisterFly's present and former shareholders. (Ex. I to LeVee Decl.)

5 ICANN therefore requests that the Court permit ICANN to terminate the
6 RAA immediately. This relief is supported by the RAA, and is warranted by
7 RegisterFly's refusal to comply with this Court's orders, RegisterFly's precarious
8 financial situation, and the harm that would occur in the event consumers continue
9 to register domain names using RegisterFly's website.⁷ In the (highly unlikely)
10 event that RegisterFly prevails in the arbitration that it has initiated, the arbitration
11 panel can fashion remedies to address the interim termination.

12 **III. CONCLUSION**

13 RegisterFly's refusal to comply with this Court's TRO and its failure to file
14 any response to this Court's Order to Show Cause warrants the issuance of the
15 preliminary injunction. Further, in order to protect ICANN's rights and
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23 ⁷ Once ICANN terminates the RAA, ICANN intends to use RegisterFly's
24 Data to protect RegisterFly's customers. ICANN likely will facilitate a bulk
25 transfer of the domain names registered through RegisterFly so that registrants of
26 those domain names have the ability to transfer, renew, update and otherwise
27 maintain the expected access to and functionality of their domain names. Thus, in
28 ICANN's proposed preliminary injunction, ICANN seeks the right to take all steps
necessary to preserve the domain names of all registrants for which RegisterFly
serves as the registrar of record and to be permitted to use all Data collected for any
purpose in the public interest.

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RegisterFly's present (and potential future) customers, ICANN requests that the Court permit the immediate termination of RegisterFly's accreditation.

ICANN urges this Court to enter the [Proposed] Preliminary Injunction.

Respectfully submitted,

Dated: April 24, 2007

JONES DAY

By: Jeffrey A. LeVee/sse
Jeffrey A. LeVee

Attorneys for Plaintiff
THE INTERNET CORPORATION
FOR ASSIGNED NAMES AND
NUMBERS

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PROOF OF SERVICE BY OVERNIGHT DELIVERY

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 April 24, 2007, I deposited with Federal Express, a true and correct copy of the within documents:

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**ICANN'S MEMORANDUM IN SUPPORT OF
ENTRY OF PRELIMINARY INJUNCTION**

in a sealed envelope, addressed as follows:

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Kevin Medina
RegisterFly.Com, Inc.
960 Arthur Godfrey Road, St402
Miami Beach, FL 33140
Email:
kevin@unifiednames-inc.com
President of RegisterFly.Com,
Inc. and Unified Names, Inc.

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Registerfly, and Unified Names

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Harold Rabner, Esq.
Rabner, Allcorn, Baumgart &
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Counsel for Kevin Medina,
RegisterFly, and Unified Names

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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.

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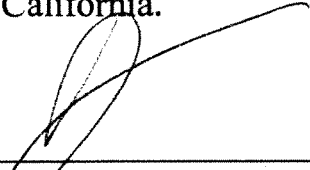
I have submitted a courtesy copy of the above described document via email to all parties listed above.

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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.

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Executed on April 24, 2007, at Los Angeles, California.



Deborah Futrowsky