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25 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
26 **COUNTY OF LOS ANGELES**

27 **DAVID SCOTT SMILEY, et al.,**
28 Plaintiffs,
vs.
**INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS, et al. ,**
Defendants.

CASE NO. BC 254659
**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
REPLY TO DEFENDANT INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS'
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

Date: September 26, 2001
Time: 1:30 p.m.
Dept: 309

Plaintiffs reply to Defendant Internet Corporation for Assigned Names and Numbers'
Opposition to Motion for Preliminary Injunction as follows:

INTRODUCTION

1
2 Defendant ICANN is a private corporation responsible for distribution of domain names.
3 While Defendants purport to be acting on behalf of a "global consensus" of the Internet community,
4 they make unilateral decisions which go un-checked on many levels. This case centers around one
5 such decision, namely, the implementation of an illegal lottery scheme to allocate the <.biz> top-level
6 domain names.

7 Defendant ICANN'S brief in Opposition to Plaintiff's Motion seeks to mislead the Court into
8 the mistaken belief that, as a government contractor, it has the authority to act above the law in
9 enacting the lottery scheme. It further confuses the issue at hand by accusing Plaintiffs of de-railing
10 the progress of Internet evolution. As Plaintiff's here reply, they are not seeking to dispute ICANN's
11 goals, or disrupt the growing progress of the Internet, Plaintiff's merely seek to address the unfair and
12 illegal lottery scheme in which Defendants are engaged.

13 Despite Defendant ICANN's contention that Plaintiffs will suffer only minimal harm, it is
14 imperative that the Court preserve the status quo in granting an injunction or Plaintiff's damages will
15 be immeasurable. While ICANN alleges harm to itself and the public if the <.biz> roll-out is not
16 allowed to move forward as planned, they provide no credible evidence of such harm. Therefore, it
17 remains true that all parties will be served by this Court's decision to preserve the status quo by
18 injunction. Only an injunction will prevent any further damages inevitable by the existence of an
19 illegal lottery scheme which has already garnered millions of dollars from innocent consumers, and
20 will result in greater harm if not enjoined.

FACTS RELEVANT TO ICANN'S OPPOSITION BRIEF

23 A. ICANN is a Private Government Contractor and Not a Global Consensus Based 24 Organization

25 Defendant ICANN is a non-profit California corporation which won a government contract
26 (that expires in less than one year, if not renewed) to oversee the technical functions underlying the
27 Internet domain name system. ICANN does not have government authority to act in any way in
28 contravention with state law, and has no elected (or even appointed) officials which would entitle to

1 any exception from state law. It has does not have any members or legal constituents. It is overseen
2 solely by its 19 member board of directors, which generally meets three times each year. Its day to
3 day functions are carried out by a three officers (one of which also sits on its board *ex officio*)
4 supported by a small staff of 14 people.

5 ICANN is not a government actor. No government participates in ICANN's decision making
6 process. ICANN does not function pursuant to global consensus or bottom-up policy development,
7 nor is it backed by the "Internet community". ICANN solicits, and perhaps even considers, public
8 feedback regarding its action. However, it is nothing more than a private corporation which makes
9 its own decisions without checks, balances, or public process.

10
11 **B. ICANN Never Asked, Nor Received, Public Comment Regarding Neulevel's Illegal**
12 **Lottery**

13 ICANN generated substantial profit in its selection of new gTLD registry operators.
14 Specifically, it charged \$50,000 to each party applying to operate a new top level domain name.
15 Within a few months, it generated \$2,350,000.00 in application fees. As a result of that process and
16 apparent lack of connection between services and registry application fees, ICANN sustained global
17 criticism.

18 Neulevel was one of 47¹ applicants who applied to operate a gTLD registry. Neulevel's
19 proposal did not call for an initial allocation of domain names pursuant to a lottery. It simply
20 proposed an initial sunrise registration process for trademark owners, and a subsequent first-come
21 first-served domain registration model.

22 ICANN represents that it considered the proposal of each applicant. It did in fact post for
23 public comment the paperwork each applicant submitted in support of their proposals. However, no
24 proposal, including that of Neulevel, contemplated a lottery system for the allocation of domain
25 names. Accordingly, ICANN never solicited, nor did it ever receive, public comments or other advice
26 regarding a lottery system. Rather, Neulevel developed the system *after* ICANN selected it to

27
28 ¹Three of the applicants were not considered for various reasons, but ICANN did not refund their
respective \$50,000 application fees

1 operate the <.biz> registry, and then ICANN approved of the lottery system without any public
2 feedback or "consensus".

3 4 ARGUMENT

5 In order to succeed on a motion for preliminary injunction, the moving party must show a
6 likelihood of success on the merits. *King v. Meese*, 43 Cal.3d 1217, 1226. The moving party should
7 also show that it will suffer irreparable harm if the injunction does not issue, which would outweigh
8 harm to the non-moving party in the event the injunction does issue. *IT Corp. v. County of Imperial*
9 35 Cal.3d 63 (1983). The presence or absence of each factor (*i.e.*, likelihood of success on the one
10 hand, and irreparable harm, on the other hand) is usually a matter of degree, and if the party seeking
11 the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial
12 court has discretion to issue the injunction notwithstanding that party's inability to show that the
13 balance of harms tips in his favor. *King v. Meese*, 43 Cal.3d at pp. 1227-1228.

14 15 **C. ICANN's Own Lawyers, in Representing Another Client, Properly Conclude that** 16 **Neulevel's <.biz> Allocation Scheme Constitutes an Illegal Lottery, and Therefore a** 17 **Likelihood of Success on the Merits Exists**

18
19 After the filing of this lawsuit, ICANN's counsel, the Los Angeles office of Jones, Day, Reavis
20 & Pogue, on behalf of a different client, took the position that the Neulevel <.biz> allocation scheme
21 was an illegal lottery. Specifically, Jones Day wrote a demand letter to Defendant Neulevel on behalf
22 of its client, Amazon, stating that its <.biz> domain name allocation system "constitutes an illegal
23 lottery" because the scheme is comprised of "the elements of: 1) a prize (*i.e.*, the opportunity to
24 register . . . a .biz name); (2) chance (*i.e.*, determination of the person chosen as registrant . . . is not
25 based on skill; and (3) consideration (*i.e.*, the \$2.00 application fee . . . charge [sic] by Neulevel)."
26 ICANN's lawyers further cite California Business & Professions Code § 17200 and Penal Code § 319
27 in support of their conclusion. ICANN's attorneys themselves conclude that Defendants are engaged
28 in an illegal lottery, illustrating that a likelihood of success on the merits exists.

1 **D. Plaintiffs Will Suffer Irreparable Harm in the Event an Injunction Does Not Issue**

2
3 ICANN argues that the Court need not issue an injunction because Plaintiffs can prevent the
4 harm to them by not utilizing any <.biz> domain name pending a final judgment in this case. ICANN
5 suggests that Defendants should be permitted to sell chances to win domain names, and even award
6 the domain name prizes, but the winners of the domain names should not use them. In other words,
7 ICANN urges this Court to allow Defendants to continue their illegal operation, and retain their
8 profits, but the winners of Defendants' lottery must not take advantage of their prize. This argument
9 is without merit because if the Defendants are going to be permitted to issue <.biz> domain names
10 to consumers, the consumers should have every right to use those domain names without any fear of
11 them being revoked or otherwise lost. Defendants cannot have it both ways – if Plaintiffs should not
12 use <.biz> domain names pending a final judgment in this matter as ICANN suggests, then likewise
13 Defendants should be restrained from selling <.biz> domain names pending the outcome of this
14 action.

15 ICANN alleges that the harm to innocent consumers of being “duped” into paying
16 consideration to Defendants in connection with the lottery “is now largely moot because . . .
17 [Neulevel will stop accepting entries in the lottery] after September 17, 2001.” However, as of the
18 date of filing this memorandum, Defendant Neulevel is still selling lottery tickets to unknowing
19 consumers who must pay fees to Neulevel in order to be eligible for domain names Neulevel will
20 award in the “landrush” it created. Unless this Court enjoins Defendants from engaging in an illegal
21 lottery, Defendants have every right to continue their illegal activities as they are currently doing.

22 Finally, ICANN argues that Plaintiffs do not suffer harm by an illegal lottery because Plaintiffs
23 have no legal right to the domain names Defendants offer as the lottery prize. However, by opening
24 up a process for the public distribution of <.biz> domain names, Defendants created a public right to
25 the <.biz> domain names. Now that Defendants are offering these <.biz> domain names, Defendants
26 must offer their product in accordance with law. California law clearly provides that goods and
27 services sold shall be subject to lawful and fair processes. Business & Profession Code § 17200, *et*
28 *seq.* Accordingly, inapposite to ICANN's averment, Plaintiffs absolutely have a legal right to a fair

1 and legal process with respect to the allocation of <.biz> domain names. In the event an injunction
2 does not issue, those names will be awarded pursuant to an unfair and illegal process, in direct
3 violation of the rights of plaintiff consumers. After the domain names are distributed by that unlawful
4 process, they can not be recalled and re-allocated legally. Therefore, Plaintiffs will suffer substantial
5 and irreparable harm in that they will have lost the opportunity to legally procure these very valuable
6 domain name properties.

7
8 **E. Neither the Public Nor the Internet Would Be Harmed as a Result of the Injunction**
9 **Plaintiffs Seek**

10
11 ICANN's opposition to Plaintiffs' instant motion alleges that the Internet public would suffer
12 harm in the wake of an injunction. ICANN argues that an injunction "at this juncture would cause
13 Internet users to be unable to communicate with each other, obtain and disseminate information, and
14 participate in the electronic marketplace." It alleges that the injunction would result in "hundreds or
15 thousands of ".biz" transactions [being] lost each second." ICANN's argument concludes that "[t]he
16 result would harm the continued development of the Internet as the truly remarkable medium it offers
17 for global commerce, communication, cultural interchange, and free expression."

18 Though its brief tells a good tale, ICANN fails to advance any authority in support of its
19 conclusions, nor does it explain how such harm could ever occur. To the contrary, the injunction
20 seeks only preservation of the *status quo*. Namely, at this juncture Internet users are completely able
21 to communicate with each other, obtain and disseminate information, and participate in the electronic
22 marketplace. The <.biz> lottery would not add to, nor take away from, that experience. Likewise,
23 persons around the globe are currently disseminating information, and participating in the electronic
24 marketplace. The injunction Plaintiffs seek would not interfere with any of that communication. In
25 addition, there are no ".biz" transactions pending which the injunction would thwart. Indeed, any
26 Internet transaction that could be accomplished by means of a <.biz> domain name, can be
27 accomplished now by means of in excess of two hundred fifty (250) existing top level domain names
28 which ICANN already oversees, and infinite Internet protocol addresses. The injunction would

1 prevent the illegal and unfair distribution of domain names that are unavailable now. The injunction
2 would not, and could not, interfere with the "continued development of the Internet as the truly
3 remarkable medium it offers for global commerce, communication, cultural interchange, and free
4 expression."

5 **F. ICANN's Only Harm If an Injunction Issues Will Be to its Reputation**

6 ICANN has faced negative scrutiny from diverse authorities, including Senators²,
7 Congressmen³, academics⁴, its own "constituents"⁵, and even members of its own board of directors⁶.
8 These authorities and the public are watching ICANN and testing its competence. ICANN is under
9 tremendous pressure to prove that it is the proper party to carry out the government contract granting
10 it the right to oversee the DNS.

11
12 ²Recently, Senator Conrad Burns, the Chair of the Senate Subcommittee on Communications of the
13 Senate Committee on Commerce, Science, and Transportation, drafted a letter to the Department of
14 Commerce querying both the adequacy of ICANN's performance and the legality of ICANN's relations
15 with the U.S. Department of Commerce. In a letter to the General Accounting Office, the senator asked for
16 a review of ICANN and, among other things, (1) whether the delegation of authority over the domain name
17 system (DNS) from the Department of Commerce (DOC) to ICANN is legal; and (2) whether ICANN is
18 the appropriate body to manage the DNS.

19 ³Rep. Billy Tauzin, the Chairman of the Committee on Energy and Commerce, John Dingell,
20 ranking Democrat, Fred Upton, Chairman of the Subcommittee on Telecommunications and Edward
21 Markey, the ranking subcommittee Democrat, released a letter to the Department of Commerce Secretary
22 Donald Evans requesting a thorough review of some of ICANN's activities.

23 ⁴Prominent law professors have written lengthy detailed articles questioning ICANN's performance
24 and legitimacy. See Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN to Route Around the
25 APA and the Constitution, 50 Duke L.J. 17 (2000); See Jonathan Weinberg, ICANN and the Problem of
26 Legitimacy, 50 Duke L.J. 187 (2000); Milton Mueller, ICANN and Internet Governance: Sorting Through
27 the Debris of "Self-Regulation.", 1 INFO 497 (1999); Joseph P. Liu, Legitimacy and Authority in Internet
28 Coordination: A Domain Name Case Study, 74 Ind. L.J. 587 (1999);

⁵The group of persons representing country-code top level domain name names ("ccTLDs") before
ICANN recently contemplated not participating in any ICANN meetings, and did in fact vote to remove
themselves from ICANN's "domain name supporting organization".

⁶ICANN's director Karl Auerbach recently wrote "ICANN was in need of reform before it was
even created - its initial structure was the creation of a secretive process that both actively and passively
excluded any but those who were insiders to the process. The Boston Working Group, which I co-founded,
attempted to deal with a very limited set of these pre-creation problems. Most of our proposals were
ignored by ICANN and those that were adopted have been silently removed, ignored, or emasculated. For
example, ICANN is as secretive as ever." See <http://www.cavebear.com/icann-board/platform.htm>

1 Consequently, ICANN has a vested interest in assisting Defendant Neulevel to avoid an
2 injunction in this case. ICANN's involvement in an illegal lottery will show that, contrary to its brief
3 and statements to the public, it did not undertake a "careful process", it has not "acheive[d] the
4 responsible introduction of new gTLDs", and that its "painstaking efforts" have resulted in nothing
5 more than criminal activity harming the Internet community it purports to represent. Any harm to
6 ICANN arising out of the injunction of the illegal lottery is the product of ICANN's own poor
7 decisions and remiss legal analysis.

8
9 **G. ICANN Has the Right to Prohibit Registrars from Engaging in the Illegal Lottery**

10
11 ICANN argues that the proposed injunction is bizarrely worded because it prohibits ICANN
12 from allowing the other defendants in this case from engaging in an illegal lottery. However, ICANN
13 has the authority, pursuant to a standard agreement it entered into with all other defendants in this
14 case, to require those defendants to refrain from engaging in the illegal lottery. ICANN's registrar
15 accreditation agreement provides that the other defendants are subject to policies ICANN creates.
16 More importantly, the agreement provides that the defendants will distribute the domain names legally
17 and fairly. Plaintiffs are not asking for ICANN to require the other defendants to take certain actions
18 to which ICANN does not have a right to regulate. The injunction Plaintiffs seek only asks this court
19 to require ICANN to enforce its own agreement with the other defendants. In any event, this Court
20 has the authority to draft an order for preliminary injunction in different language than Plaintiffs
21 respectfully suggest.

22
23 **CONCLUSION**

24 As ICANN's lawyers articulated in a letter to Defendant Neulevel, Neulevel (and its co-
25 defendants) are engaged in an illegal lottery. Accordingly, Plaintiffs have a likelihood of success on
26 the merits of this case. Additionally, Plaintiffs will suffer irreparable harm in the event an injunction
27 is not issued to restrain Defendants from continuing their illegal lottery enterprise. Defendants, on
28 the other hand, will not suffer any harm, except damage to their reputation arising out of their own

1 illegal conduct. Therefore, this Court should issue an injunction enjoining Defendants' illegal lottery
2 scheme.

3
4 Respectfully Submitted,

5 DATED: September 21, 2001

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