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SENT VIA U.S. MAIL, E-MAIL, AND FAX TO (213) 243-2539

April 23, 2004

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Los Angeles, CA 90013-1025

Re: Registersite.com v. ICANN, et al.; Your April 15, 2004 Letter and Threats

Dear Jeff:

This responds to your April 15, 2004 letter on behalf of ICANN threatening a malicious prosecution action against the plaintiffs in the above referenced action.

We are disappointed ICANN has resorted so quickly to a minatory strategy based on intimidation and unfounded accusations. Such heavy-handed tactics needlessly increase attorney billings while doing nothing to advance the resolution of the case on its merits. In any event, and notwithstanding your assertion to the contrary, plaintiffs bring this lawsuit in good faith, and the claims stated therein are consistent with applicable authority and are (or will be) supported by competent evidence. Accordingly, even if ICANN were to prevail in this case, any malicious prosecution action ICANN subsequently commenced would be entirely devoid of merit.

We address your specific points in kind.

ALL PLAINTIFFS WERE ACCREDITED WHEN WLS WAS APPROVED

ICANN alleges that ICANN "could not possibly have breached the RAA" with respect to plaintiffs that were not yet accredited at the time of the Dotster suit. However, ICANN did not approve Verisign's WLS proposal

until March 6, 2004, as of which date all plaintiffs were accredited[1]. Prior to that date, ICANN's approval of the WLS was nothing but a contingency that had not yet arisen, and that may or may not have arisen thereafter, as ICANN itself noted in its opposition to Dotster's motion for preliminary injunction. Having argued that its approval of negotiations with Verisign did not amount to approval of the WLS, it is disingenuous for ICANN now to claim that any plaintiff aware of those negotiations at the time it became accredited is thereby barred from objecting to ICANN's subsequent conduct in approving the WLS.

DOTSTER OPINION IS ERRONEOUS AND NOT BINDING UPON PLAINTIFFS HERE

ICANN contends that our clients should be bound by Judge Walter's opinion in the *Dotster* lawsuit over the same contract at issue in this case. As you know, our clients did not have the opportunity to be heard in the *Dotster* litigation. We believe Dotster's arguments were flawed in several material respects, were presented without context, and were lacking in evidentiary support. Under the circumstances, it is not entirely surprising that Judge Walter reached the conclusions he did. Once evidence is presented in this case, however, we are confident the Court will find those conclusions erroneous.

Judge Walter's holding was based on three key findings, to wit: (i) subsection 4.1 of the RAA does not impose any obligation on ICANN to adopt policies by consensus; (ii) subsection 4.2 of the RAA does not impose any independent obligation to develop consensus policies with respect to domain names; and (iii) the WLS is "outside" the RAA, and Subsection 2.3 of the RAA therefore does not apply. Although we believe the *Dotster* court was incorrect on all three points, the error is most glaring with respect to the last: the WLS plainly impacts the "rights, obligations, or role(s)" of registrars, and ICANN is therefore required to conduct itself in accordance with the requirements set forth in subsections 2.3.1-2.3.4 of the RAA. In particular, implementation of the WLS would constitute a breach of Verisign's obligation to delete domain names from the registry in response to registrar "delete" commands.

The *Dotster* court's finding that ICANN is not contractually obligated to use consensus procedures in connection with domain name allocation is similarly incorrect. Although a comprehensive review of the central importance of consensus development to ICANN's existence and mission is beyond the scope of this letter, it is worth noting that

[1]You cite ! $! BID IT WIN IT, INC. ("Bid It") as an example of a plaintiff not accredited at the time of the Dotster decision. However, Bid It applied for accreditation long before Dotster filed its lawsuit. Though ICANN claims to process registrar accreditation within 30 days, ICANN did not review Bid It's application until six months later after Bid It requested ICANN to return its application fee.

certain of the contractual language at issue was expressly intended to give registrars a contractual right to compel ICANN to act in accordance with its by-laws requiring consensus. As the Department of Commerce explained:

> [T]he scope of ICANN's authority is bounded by its bylaws, which set out the purpose of the corporation, the processes it must follow when pursuing these goals, and the need for consensus on the specific approach adopted to pursue these goals. We also believe that antitrust law also constrains ICANN policy development to that which is reasonably necessary to achieve the legitimate goals of the corporation, in a manner that is no broader than necessary to achieve those goals.
>
> Nonetheless, we believe it would be constructive to have a clearer articulation of the limits of ICANN's authority. For these reasons we have urged the Board to assure registrars and registries, including NSI, through contract, that ICANN will restrict its policy development to matters that are reasonably necessary to achieve the goals specified in the White Paper, in accordance with the principles of fairness, transparency and bottom-up decision making articulated in the White Paper. This commitment would, in effect, give all who enter into agreements with ICANN a contractual right to enforce safeguards that are now contained in the ICANN bylaws and in the antitrust laws of the United States.[2]

This interpretation is supported by consistent statements by ICANN's own officers and directors attesting to ICANN's obligation to develop policies by consensus rather than by fiat. Former ICANN president and director Michael Roberts, for example, stated that ICANN was "created to accomplish . . . consensus decision-making"[3] and that its ultimate goal is "to become a truly effective consensus development body for the entire Internet community in the areas for which ICANN is responsible"[4]. Dr. Vinton G. Cerf, chairman of ICANN, eloquently described the role of consensus in ICANN governance as follows:

> There is nothing quite like ICANN anywhere in the world, and of course it will be some time before we are certain that this unique approach to consensus development can effectively carry out the limited but quite important tasks assigned to it.

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[2] Letter from Andrew J. Pincus, U.S. Department of Commerce, to Hon. Tom Bliley, Chairman, Committee on Commerce, United States House of Representatives, July 8, 1999.
[3] Testimony of Michael Roberts, president and CEO of ICANN, before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications, February 14, 2001.
[4] Id.

> The White Paper set forth four principles that it described as critical to the success of an entity such as ICANN: stability; competition; private, bottom-up coordination; and representation. …
>
> [The] third principle was private sector, bottom-up consensus development, and the entirety of ICANN's processes are controlled by this principle. ICANN is a private-sector body, and its participants draw from the full range of private-sector organizations, from business entities to non-profit organizations to foundations to private individuals. Its policies are the result of the complex, sometimes cumbersome interaction of all these actors, in an open, transparent and sometimes slow progression from individuals and particular entities through the ICANN working groups and Supporting Organizations to ICANN's Board, which by its own bylaws has the role of recognizing consensus already developed below, not imposing it from above. Like democracy, it is far from a perfect system, but it is an attempt, and the best way we have yet been able to devise, to generate global consensus without the coercive power of governments.
>
> Finally, the fourth core principle on which ICANN rests is representation. A body such as ICANN can only plausibly claim to operate as a consensus development organization for the Internet community if it is truly representative of that community. The White Paper called for ICANN to "reflect the functional and geographic diversity of the Internet and its users," and to "ensure international participation in decision making." To satisfy these objectives, all of ICANN's structures are required to be geographically diverse, and the structures have been designed to, in the aggregate, to provide opportunities for input from all manner of Internet stakeholders. This is an extremely complicated task, and we are not yet finished with the construction phase; indeed, we have just initiated a Study Committee chaired by the former Prime Minister of Sweden, Carl Bildt, to oversee a new effort to find a consensus solution for obtaining input from and providing accountability to the general user community, which might not otherwise be involved in or even knowledgeable about ICANN and its activities. [5]

Finally, ICANN itself acknowledges that it is obligated to develop policies through consensus, as evidenced by the following excerpt from its “FAQ” page:

> Q: I want a domain that has recently expired, but the registrar won't release it. How can I get the name?

[5] Testimony before the U.S. House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, February 8, 2001. [Emphasis added]

> A: Section 3.7.5 of the Registrar Accreditation Agreement requires registrars to delete domain registrations after a second notice and a grace period, unless there are "extenuating circumstances." Some examples of such "extenuating circumstances" might include ownership disputes, payment disputes, or lame server delegations. Only the registrar would know exactly why it hasn't yet deleted a particular name. No specific dates or deadlines are prescribed in the current provisions. ICANN has not yet adopted a uniform policy concerning the handling of expired domain names. If you're interested in helping to craft such a policy, you can learn more about ICANN's bottom-up, consensus-based process for making new policies at ICANN's website.

[Emphasis added]. Given these circumstances, and notwithstanding your assertion to the contrary, we consider our clients' breach of contract claims against ICANN significantly stronger than those advanced by the *Dotster* plaintiffs. Moreover, the *Dotster* court did not reach a final decision on the merits, so there is no controlling precedential or even persuasive authority arising out of that action.

THE CONTRACT CLAIM IS NOT LIMITED TO DAMAGES

Subsection 5.1 of the RAA expressly permits either party to seek specific performance of any provision of the RAA. A decree of specific performance is the only relief requested in connection with plaintiffs' claim against ICANN for breach of contract. Accordingly, your opinion that "the notion that any of these entities suffered cognizable damages is absurd" is simply not germane[6].

THE WLS IS CLEARLY A LOTTERY

Your position on plaintiffs' lottery claim is based on a flawed premise, namely, that "WLS will not involve any randomness." From the point of view of the consumer (which is the only point of view that matters in this context), the success or failure of a WLS subscription is a matter of fortuity, rather than skill. It is well established that "to constitute 'lot or chance,' in a legal sense, the condition upon which the prize is to be received must depend for its performance entirely upon others over whom and whose actions the beneficiary has no control." 23 Op. Atty Gen. 260 (1900); *see also* Public Clearing House v. Coyne, 194 U.S. 497 (1904); Wolf v. F.T.C., 135 F.2d 564 (7th Cir. 1943). The application of this principal to the WLS is straightforward: the WLS

[6]Assuming, *arguendo*, that ICANN is correct our clients suffered only a small amount of financial damages, there would nonetheless be compensable injury. The actual dollar figure representing those damages is irrelevant to whether there is a good faith claim.

subscriber does not control whether the current registrant renews or not. Accordingly, domain name registrations awarded in connection with WLS subscriptions are distributed by chance, and the WLS is an illegal lottery.

THE TIMING OF THE FILING OF LAWSUIT WAS NOT IMPROPER

Our clients obviously hope to prevent the WLS from launching. ICANN's contention that the timing of the filing of the suit somehow reflects an improper motive is ludicrous.

ICANN WOULD BE LIABLE TO OUR CLIENTS IN THE LAWSUIT THREATENED

ICANN could not prevail on a claim for malicious prosecution. In order to establish a cause of action for malicious prosecution a plaintiff must demonstrate "that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 871-872 (1989) (citations omitted). Malicious prosecution has traditionally been regarded as a disfavored cause of action, see, e.g., Babb v. Superior Court, 3 Cal.3d 841, 847 (1971); cf. Jaffe v. Stone, 18 Cal.2d 146, 159-160 (1941), and the elements of the tort have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim. Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 872 (1989). Consistent with this standard, in order to establish that an action was brought without probable cause, the Court must find that "*any reasonable attorney would agree that the [action] is totally and completely without merit*." Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 885 (1989).

ICANN cannot seriously contend that the instant action meets that standard, much less that it was initiated with malice. Moreover, as you are aware, California law provides an expedited process for disposing of lawsuits that arise from a defendant's exercise of their First Amendment rights, and any malicious prosecution action ICANN might initiate would be subject to that process, commonly known as the "anti-SLAPP" law. As you are also aware, a defendant who prevails on an anti-SLAPP motion is entitled to an award of attorney's fees. As such, the course of conduct you threaten, if pursued, would likely result in ICANN being ordered to pay our clients' attorney's fees, rather than vice-versa. If nothing else, such a result would demonstrate the wisdom of our current suggestion that in the future, you refrain from making such baseless and improperly motivated threats.

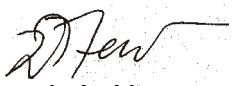
Our clients filed the lawsuit in, and will always exercise, good faith. They will not, however, be intimidated by ICANN's empty threats and bad faith efforts to scare the

plaintiffs into withdrawal.

Should you have any questions or wish to discuss this matter further, please contact me.

Very Truly Yours,

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP



Derek A. Newman