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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 The Internet Corporation for Assigned
Names and Numbers,

13 Plaintiff,

14 v.

15 RegisterFly.Com, Inc., and
16 UnifiedNames, Inc.,

17 Defendants.
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Case No. CV 07-2089 R (PLAx)

**MEMORANDUM IN SUPPORT
OF APPLICATION FOR CIVIL
CONTEMPT SANCTIONS**

Date: TBD
Time: TBD
Judge: Hon. Manuel L. Real

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

1 **I. INTRODUCTION**

2 Defendants RegisterFly.Com, Inc. and UnifiedNames, Inc. (collectively,
3 “RegisterFly”) have willfully violated this Court’s Revised Temporary Restraining
4 Order (“TRO”) issued on April 16, 2007 and the Preliminary Injunction (“PI”)
5 entered on April 26, 2007. In fact, RegisterFly has acted in complete disregard of
6 this Court; even though the parties’ contract provides that disputes would be heard
7 in this Court, RegisterFly has failed to even appear in these proceedings.

8 RegisterFly’s violations of the TRO and subsequent PI place all of
9 RegisterFly’s customers at risk of losing the operability of their domain names.
10 Without the Data that this Court ordered RegisterFly to provide to ICANN (Data
11 that RegisterFly is contractually obligated to provide), ICANN has no ability to
12 protect RegisterFly’s customers. Everyday that RegisterFly is allowed to ignore
13 this Court’s Orders, the situation gets worse.

14 ICANN urges this Court to exercise its contempt power and to sanction
15 RegisterFly for its violations of this Court’s orders. ICANN does not seek fines, as
16 it is not seeking *compensation* for RegisterFly’s violations of the PI. Instead,
17 ICANN seeks sanctions in the form of a seizure order authorizing a U.S. Marshal to
18 seize the requested Data from RegisterFly, and to accompany ICANN
19 representatives to obtain access to audit RegisterFly’s books and records.

20 **II. FACTS AND PROCEDURAL POSTURE**

21 Many of the background facts have been fully set out for this Court in
22 ICANN’s March 29, 2007 Complaint, its March 29, 2007 Memorandum of Points
23 and Authorities in Support of Plaintiff’s Ex Parte Application for Temporary
24 Restraining Order, its April 11, 2007 Supplement to TRO Application, and the
25 April 24, 2007 Brief in Support of Entry of Preliminary Injunction. ICANN will
26 only summarize them here, with references to the declarations that ICANN has
27 previously submitted.

1 RegisterFly has operated as an ICANN-accredited registrar since 2004,
2 pursuant to a Registrar Accreditation Agreement (“RAA”). Over the past several
3 months, RegisterFly has been a consistent source of trouble for its customers and
4 ICANN because RegisterFly is in a downward spiral. Due to its many breaches of
5 the RAA, including its failure to maintain Data, to allow customers the ability to
6 transfer their domain names, and to allow ICANN access to audit records, ICANN
7 exercised its rights under the RAA to terminate RegisterFly’s accreditation.
8 RegisterFly was causing its customers to “lose” their registered domain names, as it
9 failed to fund its accounts with global top level domain (“gTLD”) Internet
10 registries, such as .com, .net and .org. (March 29, 2007 Declaration of Kurt Pritz
11 (“Pritz Decl.”), ¶¶ 17, 18.)

12 ICANN filed suit against RegisterFly on March 29, 2007 and
13 contemporaneously filed an Application for Temporary Restraining Order. On
14 April 16, 2007, this Court issued a Revised Temporary Restraining Order (“TRO”)
15 requiring, among many other things, RegisterFly to provide a “complete copy of all
16 registrant data ..., including the registration data for the equitable registrants of
17 those domain names currently identified as registered by a proxy registration
18 service” with updates on a “recurring weekly (once every seven days) basis.”
19 (TRO at ¶ 1.) RegisterFly ignored the Court’s TRO, as it failed to: (1) provide a
20 *single* Data submission in compliance with the technical specifications mandated
21 therein; (2) provide data for equitable registrants for the domain names registered
22 by a proxy service;¹ (3) make timely submissions of Data; and (4) provide ICANN
23 access to inspect and audit RegisterFly’s books and records. (Memo ISO P.I. at

24 ¹ Approximately 20% of the nearly 800,000 domain names registered through
25 RegisterFly are actually registered by a proxy registration service such as
26 “ProtectFly.” Without the registration data identifying the equitable (true)
27 registrants of those names registered by a proxy registration service, ICANN cannot
28 protect those customers after RegisterFly’s accreditation is terminated, and can
never re-create that Data. (Supplemental Briefing In Support of TRO (“Supp.
Brief.”) at 3:10-23; Pritz Decl., ¶¶ 23, 24.)

1 3:10-24.) Additionally, RegisterFly's Data submissions have not cured ICANN's
2 concerns over the completeness of the Data when compared to samples provided by
3 the registries. (Supp. Brief at 3:24-4:9; Declaration of Jeffrey A. LeVee in Support
4 of Contempt Application ("LeVee Contempt Decl.") at ¶ 16.)

5 Upon entering the TRO, the Court issued an Order to Show Cause Regarding
6 Preliminary Injunction ("OSC"), setting out a briefing schedule for the parties.
7 RegisterFly did not file any response by the April 20, 2007 deadline that the Court
8 established. On April 24, 2007, in accordance with the OSC, ICANN filed a
9 Memorandum in Support of Preliminary Injunction ("Memo ISO P.I.") detailing
10 RegisterFly's total disregard for the TRO and explaining the additional and serious
11 harm RegisterFly's customers face.

12 On April 26, 2007, the Court entered the preliminary injunction. RegisterFly
13 did not appear for the hearing.² ICANN immediately served RegisterFly with
14 notice of the entry of the PI.³ (LeVee Contempt Decl., ¶¶ 13, 14.) The PI imposes
15 all of the same requirements as the TRO, and imposes additional obligations on
16 RegisterFly, including a requirement that RegisterFly "immediately post a notice on
17 its website" of the notice of termination, so that unsuspecting consumers can
18 perform additional research prior to paying for RegisterFly's services ("Notice to
19 Consumers"). (PI at ¶¶ 1, 11.) Again, RegisterFly, continues to ignore this Court's
20 order. As of 5:00 p.m. on May 1, 2007, RegisterFly's website does not yet have
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23 ² Neither of the RegisterFly defendants has responded to ICANN's
24 Complaint or made any other appearance in this case. ICANN is in the process of
25 seeking entry of default of both of the RegisterFly defendants. (LeVee Contempt
26 Decl. at ¶ 11.) Although RegisterFly has failed to acknowledge this suit, it
27 continues to pursue a related arbitration. (LeVee Contempt Decl., ¶ 12.)

28 ³ ICANN served notice of the Preliminary Injunction via Federal Express and
email, and also attached the Preliminary Injunction to the Notice of Hearing on
Permanent Injunction (scheduled for June 5, 2007), which this Court required
ICANN to personally serve. (LeVee Contempt Decl., ¶ 13.)

1 any notice to consumers.⁴ RegisterFly's website, however, indicates that it is still
2 actively soliciting domain name registrations, transfers and renewals. (LeVee
3 Contempt Decl., ¶ 17 ; Ex. H.)

4 As RegisterFly's financial condition worsens, (Memo ISO P.I. at 5:6-23,
5 6:1-4; April 24, 2007 Declaration of Jeffrey LeVee ("April 24 LeVee Decl."), ¶¶
6 11, 12), ICANN's need to enforce this Court's orders against RegisterFly grows.
7 Only by having access to RegisterFly's Data can ICANN attempt to provide any
8 assurance of continued operability to RegisterFly's customers.⁵ (Pritz Decl., ¶¶ 23,
9 26.)

10 This matter is appropriate for decision on an *ex parte* basis because
11 irreparable harm is occurring on a daily basis for every day RegisterFly is not
12 complying with the Preliminary Injunction. (LeVee Contempt Decl., ¶ 15.)

13 **III. LEGAL STANDARD**

14 A party's failure to obey the terms of a temporary restraining order or
15 preliminary injunction constitutes a contempt of court. *See Federal Trade*
16 *Commission v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999) (affirming
17 finding of the defendants in civil contempt for failure to comply with a temporary
18 restraining order). Courts have both inherent and statutory authority to punish
19 contempt and to coerce compliance with their orders. *Int'l Union, United Mine*
20 *Workers of America (UMWA) v. Bagwell*, 512 U.S. 821, 831 (1994); 18 U.S.C.

21 ⁴ Attached as Exhibit H to the LeVee Contempt Decl. is a printout from
22 www.registerfly.com on May 1, 2007. The website still advertises RegisterFly's
23 services for the transfer and registration of domain names and does not include any
24 language warning consumers that ICANN issued a Notice of Termination.

25 ⁵ After this Court granted ICANN the right to immediately terminate the
26 RAA and to use the collected Data for the public purpose of protecting
27 RegisterFly's registrants (PI at ¶¶ 14, 17), ICANN announced that it is accepting
28 statements of interest from accredited registrars to act as a transfer provider for all
of RegisterFly's customers. (*See* announcement at
<http://www.icann.org/announcements/announcement-27apr07.htm>, attached to the
LeVee Contempt Decl. as Exhibit I.)

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1 § 401(3) (authorizing a federal court to fine or imprison parties for contempt of its
2 authority such as “[d]isobedience or resistance to its lawful writ, process, order,
3 rule, decree, or command.”).

4 Civil contempt sanctions serve two primary purposes: (1) to coerce the
5 defendant to comply with the court’s order and (2) to compensate the complainant
6 for losses sustained. *United States v. United Mine Workers of America*, 330 U.S.
7 258, 303-304 (1947); *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th
8 Cir. 1992). Sanctions for civil contempt may be imposed in an ordinary civil
9 proceeding with notice and an opportunity to be heard; a jury trial is not required.
10 *Int’l Union, UMWA*, 512 U.S. at 827. A party moving for civil contempt must
11 show, by clear and convincing evidence, “that the contemnors violated a specific
12 and definite order of the court. The burden then shifts to the contemnors to
13 demonstrate why they were unable to comply.” *Affordable Media*, 179 F.3d at
14 1239.

15 Where the purpose of civil contempt sanctions is to make the contemnor
16 comply with a court order, the court has the discretion to fashion sanctions, taking
17 into account several factors, including: (1) the harm from continuing
18 noncompliance; (2) the probable effectiveness of the sanction; (3) the financial
19 burden the sanction may impose on the contemnor; and (4) the contemnor’s
20 willfulness in failing to comply with the court’s order. *United Mine Workers of*
21 *America*, 330 U.S. at 303-306. Sanctions for civil contempt are not limited to
22 monetary fines. *See Whittaker Corp.*, 953 F.2d at 517-19 (approving of civil
23 sanctions of a ban from engaging in a sector of business and the destruction of parts
24 at issue in the case).

1 **IV. ARGUMENT**

2 **A. REGISTERFLY HAS FAILED TO COMPLY WITH THE**
3 **COURT'S PRELIMINARY INJUNCTION.**

4 This Court issued a Preliminary Injunction on April 24, 2007 requiring
5 RegisterFly to provide, among other things, a complete copy of "all registrant data
6 for all Internet domain names that RegisterFly services as an ICANN-accredited
7 Registrar, including the registration data for the equitable registrants of those
8 domain names currently identified as registered by a proxy registration service,
9 such as "ProtectFly"." (PI at ¶ 1; TRO at ¶ 1.) Additionally, the PI and the TRO
10 previously issued by the Court set out the specific contents and technical
11 specifications that RegisterFly was required to include when providing the Data.
12 (See PI at ¶¶ 2, 5-7 and TRO at ¶¶ 2, 5-7.) The Court also required that RegisterFly
13 provide ICANN with updates of this Data on a weekly basis. (PI at ¶ 1; TRO at
14 ¶ 1). RegisterFly has not provided complete and accurate Data to ICANN, and the
15 Data submissions suffer from the same faults as ICANN detailed in its papers in
16 support of the TRO and PI. ICANN *still* does not have *any* Data relating to the
17 equitable registrants of the domain names registered by a proxy service. (LeVee
18 Contempt Decl., ¶ 15.) And RegisterFly continues to refuse to comply with nearly
19 all of the other technical specifications for submissions imposed by this Court.
20 (LeVee Contempt Decl., ¶ 15.)

21 After the Court entered the TRO, ICANN immediately demanded an audit of
22 RegisterFly's books and records as allowed for in that Order. (TRO at ¶ 8; April 24
23 LeVee Decl., ¶ 8, Ex. C.) RegisterFly has not responded to that audit demand, an
24 obligation that was again imposed on RegisterFly in this Court's PI. (PI at ¶ 8;
25 LeVee Contempt Decl., ¶ 19.) ICANN has not yet had the ability to conduct such
26 an audit, which will provide it with the ability to confirm the accuracy of
27 RegisterFly's registration Data.
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1 Finally, RegisterFly is in violation of the PI in its failure to post any sort of
2 notice to consumers on its website. To assist ICANN in protecting unaware domain
3 name registrants, this Court ordered RegisterFly to “immediately post a notice on
4 its website ... and any other website through which it offers to register Internet
5 domain name registrations” a notice to consumers of the fact that ICANN issued a
6 notice of termination of RegisterFly’s RAA. (“Notice to Consumer”). (PI at ¶ 11.)
7 As of May 1, 2007, RegisterFly’s main website, www.registerfly.com, does not
8 have *any* such Notice to Consumers in compliance with the PI, or any other
9 indication that the termination of its accreditation is imminent. (See Ex. H to
10 LeVee Contempt Decl.)

11 **B. REGISTERFLY SHOULD BE FOUND IN CIVIL CONTEMPT**
12 **AND SHOULD BE FORCED TO COMPLY WITH THE**
13 **COURT’S ORDERS.**

14 Civil contempt sanctions are appropriately imposed to force compliance with
15 court orders upon evaluation of: (1) the harm from continuing noncompliance;
16 (2) the probable effectiveness of the sanction; (3) the financial burden the sanction
17 may impose on the contemnor; and (4) the contemnor’s willfulness in failing to
18 comply with the court’s order. *United Mine Workers of America*, 330 U.S. at 303-
19 306. Here, all of these factors are met. ICANN, however, requests this Court to
20 exercise its discretion and impose civil contempt sanctions in the form of:
21 (1) ordering a U.S. Marshal to accompany ICANN to physically obtain an
22 electronic copy of all Data required under the PI;⁶ and (2) ordering a U.S. Marshal
23 to accompany ICANN in gaining access to RegisterFly’s books and records to
24 perform the Court-ordered audit.⁷

25 ⁶ ICANN will need to obtain RegisterFly’s compliance with paragraph 10 of
26 the PI, which requires RegisterFly to immediately provide ICANN with all physical
27 locations of the Data. As RegisterFly has not yet complied voluntarily, ICANN
28 will likely need this Court’s approval to force an examination of RegisterFly to
obtain these locations.

⁷ The Court has the ability to fashion contempt sanctions in any form
necessary, including ordering the seizure of property. *Whittaker Corp.*, 953 F.2d at
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1 Every day that RegisterFly continues its business without compliance with
2 Court orders, RegisterFly is causing additional harm to its customers, and rendering
3 ICANN's ability to fix this situation even more difficult. As detailed in ICANN's
4 Complaint and earlier filings, ICANN has rightfully issued notices of termination of
5 RegisterFly's accreditation, and such termination is imminent. RegisterFly,
6 however, continues to solicit and accept customer requests for domain name
7 registrations, renewals and transfers – without providing any information to
8 consumers that it is operating under the specter of termination. (LeVee Contempt
9 Decl., ¶ 17; Ex. H.) While it continues to accept registrations, RegisterFly fails to
10 fund its registry accounts to allow for those registrations, renewals or transfers to be
11 accepted by the registries. (LeVee Contempt Decl., ¶ 18.)

12 ICANN needs to have a complete and accurate copy of the Data RegisterFly
13 is obligated to provide to ICANN under the TRO so that it may use that Data in
14 effectuating a transfer of the domains registered through RegisterFly to a stable,
15 reputable registrar. This transfer will allow RegisterFly's customers the ability to
16 once again use their domain names as expected. Most importantly, ICANN needs
17 to obtain the Data for the twenty percent of RegisterFly's domain names that are
18 registered by a proxy service such as "ProtectFly." ICANN must obtain the
19 equitable (true) registrants of the domain names registered by a proxy service so
20 that ICANN can protect those customers once ICANN terminates RegisterFly's
21 accreditation. (See Pritz Decl., ¶ 39; Supp. Brief. at 3:10-23.)

22 RegisterFly has demonstrated that it has no regard for this Court's orders.
23 Further, RegisterFly's business dealings show that it has no concern for accruing

24 _____
(continued...)

25 517-19 (ordering the seizure and destruction of property as civil contempt
26 sanctions). Fines are appropriate where compensation is the goal; however, where
27 the primary function is to coerce compliance with orders, the court has wider
28 discretion in fashioning contempt sanctions. *United Mine Workers of America*, 330
U.S. at 304.

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1 financial obligations and not paying them. ICANN's request to authorize a U.S.
2 Marshal to accompany ICANN to seize a copy of the Registration Data and to
3 accompany ICANN in an inspection of RegisterFly's books and records will assist
4 in guaranteeing that ICANN obtains the necessary information.

5 ICANN's requested sanctions bear a rational relationship to the damage from
6 RegisterFly's continued violations of this Court's orders. *See United Mine Workers*
7 *of America*, 330 U.S. at 304; *Whittaker Corp.*, 953 F.2d at 517-19 (sanctions to
8 terminate contemnor's business operations and destroy infringing property are
9 proper and related to business violations). Further, the seriousness of RegisterFly's
10 violations supports the imposition of ICANN's suggested sanctions. *United Mine*
11 *Workers of America*, 330 U.S. at 304-05 (even high and burdensome fines are
12 supported when they are imposed conditionally and can be avoided with proof of
13 compliance with Court order); *Whittaker Corp.*, 953 F.2d at 517-18 (civil contempt
14 sanctions such as the termination of rights to run a business are appropriate when
15 the court makes subject to revocation upon proof of voluntary compliance with
16 court orders).

17 **V. CONCLUSION**

18 RegisterFly has violated this Court's TRO and PI. For every day that
19 RegisterFly is allowed to continue to violate the PI, it is harming its customers and
20 injuring ICANN's ability to protect those customers. ICANN seeks the right to
21 obtain the information that RegisterFly is withholding. ICANN's requested civil
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1 contempt sanctions are the only way this Court can enforce its orders and stop
2 RegisterFly's continual abuses.

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4 Dated: May 1, 2007

RESPECTFULLY SUBMITTED,
JONES DAY

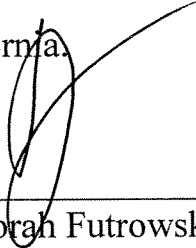
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Executed on May 2, 2007, at Los Angeles, California.



Deborah Futrowsky