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7  
8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**  
10

11 THE INTERNET CORPORATION FOR )  
ASSIGNED NAMES AND NUMBERS, )

12 Plaintiff,

13 v.

14 REGISTERFLY.COM, INC., and )  
15 UNIFIED NAMES, INC., )

16 Defendants.  
17

CASE NO. CV 07-2089 R (PLAx)

**EX PARTE APPLICATION TO  
MODIFY INJUNCTION OR, IN THE  
ALTERNATIVE, TO RECONSIDER  
ISSUANCE OF INJUNCTION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

18  
19 Defendants RegisterFly.com, Inc. ("RegisterFly") and UnifiedNames, Inc.  
20 (hereinafter "defendants") bring this *ex parte* application seeking modification of the  
21 preliminary and permanent injunctions entered by this Court or, in the alternative,  
22 for reconsideration of this Court's entry of the preliminary and permanent  
23 injunctions against RegisterFly. The portion of the injunctive relief which  
24 defendants seek to have modified is the requirement for defendants to post the  
25 notice on the website www.registerfly.com regarding the termination of its ICANN  
26 registrar accreditation. The grounds for seeking modification of the injunctions is  
27 that circumstances have changed since the time the injunctions were entered which  
28 render that portion of the injunction unnecessary for protection of the public, and

1 serving no legitimate purpose, while causing injury to defendants' business. The  
2 grounds for seeking reconsideration are that there has been a change in facts since  
3 the Court's rulings on the injunctions, and that there was a manifest failure to this  
4 Court to consider facts presented to the Court which divest this Court of jurisdiction  
5 to enter a permanent injunction.

6 This Application is based upon this notice, the memorandum of points and  
7 authorities attached hereto, the declaration of Heather L. McCloskey re: notice and  
8 declarations of Kevin Medina and Heather L. McCloskey In Support Of Ex Parte  
9 Application and exhibits thereto filed concurrently herewith; such other matter as  
10 may be filed with the Court prior to the hearing on the motion; and the pleadings,  
11 records and files in this action.

12 Notice of defendants' intent to file this Application was given by e-mail on  
13 May 31, 2007. Plaintiff's counsel has indicated that plaintiff plans to oppose this  
14 application. (See Declaration of Heather L. McCloskey re: Notice, ¶2.)

15

16 DATED: June 4, 2007

ERVIN, COHEN & JESSUP LLP  
Kelly O. Scott  
Heather L. McCloskey

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By: Heather L. McCloskey  
Heather L. McCloskey  
Attorneys for REGISTERFLY.COM, INC.  
AND UNIFIEDNAMES, INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants RegisterFly.com, Inc. and UnifiedNames, Inc. (hereinafter  
4 "defendants") bring this *ex parte* application seeking modification of the preliminary  
5 and permanent injunctions entered by this Court or, in the alternative, for  
6 reconsideration of this Court's entry of the permanent injunction entered on May 25,  
7 2007. Defendants do not wish to modify the entirety of the injunctive relief granted,  
8 but rather, only the portion of the injunctive relief which affirmatively requires  
9 defendants to post a notice on the [www.registerfly.com](http://www.registerfly.com) website that their  
10 accreditation as an ICANN registrar has been terminated.

11 The relevant case law is clear that this Court retains the inherent power to  
12 modify, alter or dissolve an injunction at any time on consideration of new facts or  
13 changed circumstances. As demonstrated herein, defendants have met their burden.  
14 More specifically, at the time the injunction was issued, ICANN argued, and the  
15 Court accepted, that defendants had the ability to continue to register domain names,  
16 and thus, the notice provision advising purchasers that [www.registerfly.com](http://www.registerfly.com) was no  
17 longer an accredited registrar was necessary to protect the public at large. At the  
18 present time, however, defendants have ceased any and all registrar functions and  
19 have removed all language on the [www.registerfly.com](http://www.registerfly.com) website that references  
20 defendants as domain name registrars (defendants are still resellers of domain names  
21 but this is not at issue in this action and is not the subject of ICANN's claim for  
22 injunctive relief). Thus, the notice that the Court ordered defendants to post on the  
23 [www.registerfly.com](http://www.registerfly.com) website is moot, serves no legitimate purpose, and merely  
24 works to damage defendants' business reputation and goodwill as all users who  
25 access the website for other of defendants' legitimate business services are called to  
26 question the notice contained thereon. Thus, of present, the injunction has an overly  
27 punitive effect which is expressly contrary to the public policy concerns espoused as  
28 the rationale for injunctive relief in the first instance.

1 In the alternative, defendants move this Court for reconsideration of its prior  
2 order. As relevant hereto, a motion for reconsideration may be based on the  
3 emergence of new material facts occurring after the time of the decision and/or a  
4 manifest showing of the Court's failure to consider material facts presented to the  
5 Court before its decision. As argued with respect to defendants' motion to modify  
6 specific portions of the preliminary and permanent injunctive relief, the fact that  
7 defendants no longer acts as a domain name registrar and the efforts they have taken  
8 in this regard are new and material facts that warrant the Court's reconsideration of  
9 its prior order. Moreover, at the time of hearing on the permanent injunction, the  
10 Court failed to consider material facts presented which divest this Court of  
11 jurisdiction to enter a permanent injunction. More specifically, the parties entered  
12 into an agreement to arbitrate any and all disputes, which agreement to arbitrate  
13 permitted the respective parties to file an action outside of the arbitral forum solely  
14 and exclusively for the purpose of obtaining a temporary restraining order and/or  
15 preliminary injunction. Thus, defendants request that this Court reconsider the  
16 granting of the permanent injunction on the basis that such order exceeds the  
17 jurisdiction boundaries dictated by the parties' agreement to arbitrate.

18 **II. PERTINENT FACTS**

19 **A. Procedural History**

20 In order to obtain its ICANN accreditation as a domain name registrar,  
21 RegisterFly entered into the Registrar Accreditation Agreement ("RAA") which  
22 fully sets forth the terms of the accreditation.<sup>1</sup> The RAA also provides, in Section  
23 5.6, specific procedures for the resolution of disputes arising under the RAA,  
24 including the right for either party to elect to initiate arbitration proceedings with the  
25 American Arbitration Association. (Medina Decl., Exh. "A".)

26 \_\_\_\_\_  
27 <sup>1</sup> The RAA, which is in RegisterFly's former name, Top Class Names, Inc., is  
28 attached to the Complaint filed by ICANN, and is attached to the Declaration of  
Kevin Medina, filed herewith, as Exhibit "A".

1 On March 17, 2007, ICANN gave notice to RegisterFly that the RAA would  
2 be terminated as of March 31, 2007. (Medina Decl., ¶3.) Pursuant to Section 5.6 of  
3 the RAA, RegisterFly initiated arbitration proceedings on March 28, 2007 with the  
4 American Arbitration Association seeking resolution of the dispute. (Medina Decl.,  
5 Exh. "B".) RegisterFly filed a demand for arbitration, seeking a determination that  
6 (a) the termination was inappropriate, null, and void, and (b) the RAA remains in  
7 full force and effect. RegisterFly also requested a stay of the termination until a  
8 determination has been made – which is provided for in the RAA.<sup>2</sup>

9 On March 29, 2007 – *after RegisterFly had initiated arbitration proceedings*  
10 – ICANN filed this lawsuit. Pursuant to Section 5.6 of the RAA, the remedies  
11 available to ICANN from the Court once RegisterFly invoked the arbitration  
12 provision were *limited to the provisional remedies of a temporary restraining*  
13 *order and a preliminary injunction* to be in place until resolution of the dispute  
14 through arbitration.

15 The RAA provides, in Section 5.6, in pertinent part:

16 For the purpose of aiding the arbitration and/or preserving  
17 the rights of the parties during the pendency of an  
18 arbitration, the parties shall have the right to seek  
19 temporary or preliminary injunctive relief from the  
20 arbitration panel or in a court located in Los Angeles,  
21 California, USA, which shall not be a waiver of this  
22 arbitration agreement.

23 (Medina Decl., Exh. "A") Consistent with this provision, the Complaint filed by  
24 ICANN on March 29, 2007 seeks imposition of *preliminary injunctive relief*.

25 \_\_\_\_\_  
26 <sup>2</sup> The Demand for Arbitration form filed by RegisterFly on March 28, 2007 is  
27 attached as Exhibit B to the Declaration of Kevin Medina, served and filed herewith,  
28 and was previously submitted to this Court with RegisterFly's response to the OSC  
re: permanent injunction attached as Exhibit B to the Declaration of Robert O'Neil  
of RegisterFly.

1 This Court entered a temporary restraining order on April 16, 2007 and a  
2 preliminary injunction on April 26, 2007. These remedies are authorized by the  
3 RAA, despite the fact that an arbitration had been initiated on March 28, 2007.  
4 (Medina Decl., Exh. "A".) Further, however, this Court entered a permanent  
5 injunction on May 25, 2007, which clearly exceeds the permissible relief which may  
6 be obtained by ICANN under the RAA. (*Id.*) In opposing the entry of the  
7 permanent injunction, RegisterFly submitted in its papers evidence of (1) the status  
8 of the pending arbitration proceedings, and (2) the limitations on the relief which  
9 may be granted ICANN by this Court under the RAA.<sup>3</sup> Despite submitting this  
10 evidence, the Court noted during oral argument on May 25, 2007 that it had not  
11 been presented with evidence of the pending arbitration. (McCloskey Decl., ¶3.)

12 **B. RegisterFly Is No Longer A Registrar**

13 Prior to the filing of this lawsuit, and even prior to RegisterFly initiating  
14 arbitration proceedings to have a determination made whether ICANN's  
15 cancellation of RegisterFly's accreditation as a domain name registrar, ICANN  
16 voiced to RegisterFly that it strongly desired for RegisterFly to cease acting as a  
17 registrar, and to transfer all of its registered domain names to some other ICANN-  
18 accredited domain name registrar. (Medina Decl., ¶3.) Upon receiving this request  
19 in mid-March of 2007, RegisterFly began negotiations to sell all of its registered  
20 domain names to another ICANN-accredited domain name registrar. (*Id.*) Of  
21 course, such a significant sale and transfer of data to a purchaser took a great deal of  
22 effort and time to accomplish. (*Id.*) RegisterFly informed ICANN of the status of  
23 these efforts at every step of the process and informed ICANN on Friday, May 25,  
24 2007 that the transfer was all but finalized. (*Id.*) ICANN announced the completion  
25 of the transfer on May 29, 2007. (*Id.*, Exh. "C".) Upon completion of the transfer

26  
27 <sup>3</sup> The evidence submitted included RegisterFly's demand for arbitration, filed  
28 March 28, 2007 and the RAA, which were attached to the Declaration of Robert  
O'Neil as Exhibits "B" and "A", respectively.



1 of RegisterFly's domain names to Godaddy, RegisterFly ceased being a domain  
2 name registrar and, given the status of its ICANN accreditation, is unable to  
3 recommence providing the services of a registrar until that dispute is resolved.  
4 (Medina Decl., ¶¶7-10.) RegisterFly no longer has access to domain name  
5 registries, has no access to its registrar account, and is incapable of acting as a  
6 domain name registrar. (*Id.*) Thus, even if RegisterFly wanted to act as a registrar,  
7 it could not do so. (*Id.*)

8         Given RegisterFly's inability to act as a domain name registrar, requiring  
9 RegisterFly to continue to post the notice on its website regarding the termination of  
10 its ICANN registrar accreditation serves no purpose whatsoever, and threatens to  
11 injure RegisterFly's remaining business. RegisterFly continues to offer services  
12 other than those of a domain name registrar, such as reselling domain names  
13 (registered by ICANN-accredited registrars), web site hosting, ssl certificates, site  
14 builder tools to name just a few items. (*Id.*) RegisterFly has been a reseller of  
15 domain names for the past six (6) years and only last year become operational as a  
16 registrar. (*Id.*) Over 65% of the value of RegisterFly is not in the reselling or sale  
17 of domain names. (*Id.*) If the notice requirement of the injunction is continued, it  
18 will have a detrimental impact on RegisterFly's domain name reselling business, as  
19 the notice does not make mention that RegisterFly has transferred those names for  
20 which it was the registrar to another entity and, therefore, the names that can be  
21 purchased on the www.registerfly.com website are names for *resale*. (*Id.*)

22         **C. The Difference Between A Domain Name Registrar And A Reseller**

23         ICANN has never raised any objection to defendants' acting as a reseller of  
24 domain names, and has no reason to do so. ICANN's counsel's continued insistence  
25 that there is something inappropriate about offering the ability to search for and  
26 purchase domain names on www.registerfly.com is simply misleading this Court in  
27 reliance on the Court's lack of understanding as to how domain name sales and  
28 registrations work. The failure of ICANN to accurately inform the Court as to the

1 nature of the activities undertaken by RegisterFly has rendered the Court's orders  
2 overreaching and inappropriate. Therefore, an explanation of the difference  
3 between a registrar and a reseller of domain names is warranted.

4 The difference between a reseller and a registrar is not obvious from simply  
5 viewing a website and seeking to purchase a domain name. As a registrar, entities  
6 have direct connections/access to each respective domain name registry. (Medina  
7 Decl., ¶11.) For example, when a domain name is purchased, a registrar uses its  
8 registry connection to check availability of the requested domain. (*Id.*) If available,  
9 the registrar then uses the required purchase commands with the required attributes  
10 (all established by ICANN) and this would secure the name via the registrar's  
11 account. (*Id.*) The purchase would debit the registrar's registry account. (*Id.*) The  
12 same goes for domain name management. (*Id.*) When a client wishes to change the  
13 name servers of a domain name, the registrar would use its credentials to  
14 authenticate at the registry and make the required changes. (*Id.*)

15 The role of a reseller is different. Resellers do not have direct registry access.  
16 (*Id.*, ¶12.) Rather, a reseller uses a registrar's application programming interface to  
17 check domain names, purchase or manage. (*Id.*) Any purchases of domain names  
18 from a reseller are deducted from the reseller's account. (*Id.*) When names are  
19 registered, the actual registrar whose name it is will show as the registrar of record,  
20 not the reseller. (*Id.*)

21 RegisterFly's new role is strictly as a reseller of domain names, and it uses an  
22 ICANN-accredited registrar to actually serve as the registrar of record. In addition,  
23 RegisterFly provides a suite of additional services outside of domain name  
24 registrations (e.g. hosting, ssl certs, site tools, etc).

### 25 **III. ARGUMENT**

#### 26 **A. *Basis For Ex Parte Relief***

27 Good cause exists for the requested *ex parte* relief. The need for this motion  
28 did not arise until very recently – when (1) RegisterFly's transfer of all of its domain

1 name registrations to Godaddy.com, an ICANN-accredited domain name registrar,  
2 was finalized so that RegisterFly no longer has any registrations or any ability to act  
3 as a domain name registrar, and (2) on May 25, 2007, when this Court entered a  
4 permanent injunction against RegisterFly. The need for the requested relief is  
5 urgent because the notice requirement of the injunction entered against RegisterFly  
6 no longer serves any purpose whatsoever, and is effectively punishing RegisterFly –  
7 which is not a permissible basis for injunctive relief under the RAA. There is  
8 insufficient time to have this motion heard on regular notice, as the punitive aspect  
9 of the injunction is causing and will continue to cause RegisterFly irreparable injury  
10 to its reputation, good will, and customer relations until it is lifted.

11 **B. Standards For Determining Whether An Injunction Should Be**  
12 **Modified**

13 Because an injunction by its very nature is a judgment of prospective  
14 application subject to continuing supervision, and because injunctive matters are  
15 generally open-ended in nature, a trial court retains the inherent power to modify,  
16 alter or dissolve the injunction at any time on consideration of new facts or changed  
17 circumstances. *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (2002). In  
18 this regard, the relevant portions of Federal Rule of Civil Procedure Section 60(b)  
19 provide that, on motion and upon such terms as are just, the Court may relieve a  
20 party from a final judgment, order or proceeding where "it is no longer equitable  
21 that the judgment should have prospective application" or for any other reason  
22 justifying relief from the operation of the judgment. FRCP R. 60(b) sub. 5 and 6.  
23 This provision clearly provides a Court the power to modify an injunction upon such  
24 a showing.

25 The Supreme Court's decision in *System Federation No. 91, Railway*  
26 *Employees Dep't v. Wright*, 364 U.S. 642 (1961) and the Ninth Circuit's decision in  
27 *Clark v. Coye*, 60 F. 3d 600, 604 (9th Cir. 1995) are instructive. In *System*  
28 *Federation*, the Court acknowledged that an injunction is subject always to

1 adaptation as future events may shape the need:

2           There is also no dispute that a sound judicial discretion  
3           may call for the modification of the terms of an injunctive  
4           decree if the circumstances, whether of law or fact,  
5           obtaining at the time of its issuance have changed, or new  
6           ones have since arisen. . . . [T]he court cannot be required  
7           to disregard significant changes in law or fact if it is  
8           'satisfied that what it was been doing has been turned  
9           through changing circumstances into an instrument of  
10          wrong.

11 *Id.* (citing *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)).

12          Further, in *Clark*, the Ninth Court made clear that this premise is especially  
13 true as it relates to permanent injunctions: "Because permanent injunctive relief  
14 controls future conduct, federal courts must be sensitive to the need for modification  
15 when circumstances change. [Internal citation omitted]. A sensitivity to the need for  
16 modification is particularly important when an injunction involved changing  
17 conduct and facts not predicted at the time the injunction was issued." *Clark*, 60 F.  
18 3d at 604. As demonstrated herein, there are newly discovered additional facts that  
19 were not, nor could have been raised, at the time of the hearing on the OSC re  
20 Permanent Injunction that warrant a slight modification to the Court's prior order.

21           **C.    The Preliminary And Permanent Injunctions Entered Should Be**  
22 **Modified Based On A Change In Circumstances**

23          At the time this Court entered the Temporary Restraining Order and  
24 Preliminary Injunction, RegisterFly still possessed and maintained domain name  
25 registrations, so its conduct in connection with those registrations was the subject  
26 matter of the dispute pending in arbitration. However, since that time – and as  
27 acknowledged by ICANN on May 29, 2007, RegisterFly has since sold and  
28 completed the transfer of all of its registrations to Godaddy.com, an ICANN-

1 accredited registrar. (Medina Decl., ¶¶7-9) RegisterFly no longer has any direct  
2 access to any domain name registries. (*Id.*) RegisterFly no longer has any access to  
3 its registrar account. (*Id.*) Thus, even though the status of its ICANN-accreditation  
4 is still at issue in the arbitration proceedings, RegisterFly is incapable of functioning  
5 as a registrar. Since the notice provision of the injunctions entered against  
6 RegisterFly were for the purpose of protecting the public seeking to utilize  
7 RegisterFly's registrar services, the notice provision no longer serves any purpose.

8 In addition, with this change in status, this notice provision is in violation of  
9 the terms of the RAA, which provides, in Section 5.6, that the injunctive relief  
10 available to ICANN is limited to the purpose of "aiding the arbitration and/or  
11 preserving the rights of the parties during the pendency of an arbitration[.]"  
12 (Medina Decl., Exh. "A".) No such purpose is being served by this provision since  
13 RegisterFly is no longer able to offer the services of a registrar.

14 **D. In The Alternative, This Court Should Reconsider Its Ruling**  
15 **Granting The Preliminary And Permanent Injunction As A Result Of A**  
16 **Change In Circumstances**

17 Pursuant to Central District California Local Rule 7-18 ("Local Rule 7-18), a  
18 motion for reconsideration may be made on any the following grounds: (1) a  
19 material difference in fact or law from that presented to the Court at the time of  
20 hearing that could not have been reasonably known to the party seeking  
21 reconsideration, (2) the emergence of new material facts or a change of law  
22 occurring after the time of such decision, and/or (3) a manifest showing of a failure  
23 to consider material facts presented to the Court before its decision. As  
24 demonstrated herein, each of these three standards for reconsideration is met for  
25 separate, yet equally persuasive, reasons.

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1           **1. New Material Facts Have Emerged After the Time Of The Hearing**  
2 **On The Motion re Preliminary/Permanent Injunction.**

3           Since the entry of the temporary restraining order, preliminary injunction, and  
4 permanent injunction, RegisterFly is no longer able to function as a registrar and has  
5 transferred all of its registrations to Godaddy.com, an ICANN-accredited registrar.  
6 (Medina Decl., Exh. "A".) As a result, there is no longer any purpose served by the  
7 notice requirement in the injunctions entered, and the injunctions serve only to  
8 punish RegisterFly. Under *Clark*, this Court "must be sensitive to the need for  
9 modification when circumstances change." *Clark, supra*, 60 F. 3d at 604. This  
10 change in circumstances especially warrants a change in the injunction because, as  
11 discussed in *Clark*, "A sensitivity to the need for modification is particularly  
12 important when an injunction involved changing conduct and facts not predicted at  
13 the time the injunction was issued." *Id.* The injunctions entered include the  
14 mandatory injunction requiring the posting of the notices described herein. Since  
15 the conduct which the notices are intended to prohibit is now impossible, the notice  
16 requirement serves only to punish RegisterFly, which is not a valid reason to enjoin  
17 conduct.

18           **2. At The Time Of Hearing On The Order To Show Cause Why**  
19 **Permanent Injunction Should Not Issue, The Court Failed To Properly**  
20 **Consider That It Did Not Maintain Jurisdiction To Enter A Permanent**  
21 **Injunction.**

22           In its papers opposing the entry of the permanent injunction, RegisterFly  
23 informed the Court both of the fact that RegisterFly had instituted arbitration  
24 proceedings prior to the initiation of this lawsuit and that the RAA provided that the  
25 parties could seek only provisional remedies from a Court if either party invoked the  
26 arbitration provision in the contract. (McCloskey Decl., ¶3.) Thus, ICANN is  
27 limited to obtaining a temporary restraining order and a preliminary injunction  
28 which may remain in effect until the resolution of the arbitration proceedings

1 initiated to determine whether the termination of RegisterFly's ICANN accreditation  
2 is appropriate. However, in granting the permanent injunction on May 25, 2007,  
3 this Court ignored the limitations imposed by the RAA's arbitration clause, and  
4 rendered that clause completely meaningless in entering the order for a permanent  
5 injunction. This ruling shows a manifest failure by this Court to consider the facts  
6 presented to it at the May 25, 2007 hearing, namely that RegisterFly had invoked the  
7 arbitration clause prior to ICANN filing this lawsuit and that the arbitration clause  
8 contained in the RAA limited the relief which this Court could grant to the  
9 provisional remedies of a temporary restraining order and a preliminary injunction.

10 Defendant does not contend that this Court does not have the authority to  
11 enter a preliminary injunction in this action, nor, with the exception of the changed  
12 circumstances outlined above, does Defendant contend that the preliminary  
13 injunction was granted in error. Rather, Defendant maintains that the Court failed to  
14 consider its jurisdictional boundaries in its issuance of the permanent injunction.

15 Applicable authorities make it clear that the parties' agreement within the  
16 RAA to arbitrate this dispute will be enforced, and will be enforced specific to the  
17 terms provided for therein.

18 The Federal Arbitration Act was designed to overrule the judiciary's  
19 longstanding refusal to enforce agreements to arbitrate. It is intended to put  
20 arbitration agreements on the same footing as other contracts. The Supreme Court  
21 has specifically held that the FAA has "the primary purpose of ensuring that private  
22 agreements to arbitrate are enforced according to their terms and its application  
23 merely permitted the courts to give effect to the contractual rights and expectations  
24 of the parties." (internal quotations omitted) *Bradley v. Harris Research, Inc.*, 275  
25 F.3d 884, 889 (9<sup>th</sup> Cir. 2001), quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of the*  
26 *Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989). Specifically, the FAA was  
27 intended to "allow arbitration to proceed *in the manner provided for in the parties'*  
28 *agreement.*" (emphasis in original, internal quotations omitted) *Id.*

1 As set forth in Defendant's Response to Order to Show Cause, the parties to  
2 this action entered into a Registrar Accreditation Agreement ("RAA") which  
3 governs the parties' relationship, and, in fact, serves as the predicate for ICANN's  
4 breach of contract action. (Complaint, Attachment 1). The RAA provides specific  
5 procedures for the resolution of disputes arising under the RAA, including the right  
6 for either party to elect to initiate arbitration proceedings with the American  
7 Arbitration Association. (Id., Section 5.6.) Upon receiving ICANN's termination  
8 letter, on March 28, 2007, RegisterFly.com, Inc. initiated arbitration proceedings  
9 pursuant to Section 5.6 of the RAA. (O'Neil Decl., ¶5.) On the following day,  
10 March 29, 2007, ICANN commenced litigation before this Court. (Id., ¶6.)

11 In pertinent part, the RAA Section 5.6 provides as follows:

12 For the purpose of aiding the arbitration and/or preserving  
13 the rights of the parties during the pendency of an  
14 arbitration, *the parties shall have the right to seek*  
15 *temporary or preliminary injunctive relief* from the  
16 arbitration panel or in a court located in Los Angeles,  
17 California, USA, which shall not be a waiver of this  
18 arbitration agreement.

19 (Medina Decl., Exh. "A" (emphasis added)) Consistent with this provision, the  
20 Complaint filed by ICANN on March 29, 2007 seeks imposition of preliminary  
21 injunctive relief. (Id.) With the commencement of arbitration proceedings prior to  
22 the filing of this lawsuit and knowledge of the limitations on the relief ICANN is  
23 permitted to obtain from this Court under the RAA, RegisterFly chose not to oppose  
24 ICANN's request for a temporary restraining order or preliminary injunctive relief.  
25 However, the imposition of a permanent injunction was both opposed by  
26 RegisterFly and patently inappropriate.

27 When one considers the practical implications of the Permanent Injunction  
28 entered by this Court on May 25, 2007, the reason for the Supreme Court's ruling



1 becomes abundantly clear. If the permanent injunction stands, then RegisterFly  
2 must forever continue to maintain on its website the notice concerning its ICANN  
3 accreditation, regardless of the outcome of the arbitration proceedings instituted to  
4 challenge the appropriateness of the termination of RegisterFly's accreditation. In  
5 effect, the entry of this preliminary injunction renders the arbitration agreement  
6 contained in the RAA completely meaningless.

7 **IV. CONCLUSION**

8 The requested *ex parte* relief should be granted. The injunctions entered  
9 against RegisterFly should be modified to eliminate the requirement that RegisterFly  
10 post the aforementioned notice on its website, since the circumstances which  
11 justified entry of that injunction have changed and such a requirement no longer  
12 serves the purpose of "preserving the rights of the parties during the pendency of an  
13 arbitration" which is the only basis permissible under the RAA. In addition, the  
14 permanent injunction should be vacated, since ICANN is not entitled to such relief  
15 under the RAA and, since the filing of the arbitration demand on March 28, 2007 –  
16 prior to the filing of this lawsuit on March 29, 2007 – this Court lacks jurisdiction to  
17 enter such an injunction.

18  
19 DATED: June 4, 2007

ERVIN, COHEN & JESSUP LLP  
Kelly O. Scott  
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22 By: Heather L. McCloskey  
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Attorneys for REGISTERFLY.COM, INC.  
AND UNIFIEDNAMES, INC.

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PROOF OF SERVICE BY HAND-DELIVERY

STATE OF CALIFORNIA        )  
  ) ss:  
COUNTY OF LOS ANGELES    )

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 350 S. Figueroa Street, Suite 299, Los Angeles, California 90071.

On June 4, 2007, I served the document described as **EX PARTE APPLICATION TO MODIFY INJUNCTION OR, IN THE ALTERNATIVE, TO RECONSIDER ISSUANCE OF INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the parties in this action by delivering a true copy thereof enclosed in a sealed envelope addressed as follows:

Jeffrey A. LeVee  
Samantha Eisner  
Jones Day  
555 S. Flower Street, 50<sup>th</sup> Floor  
Los Angeles, CA 90071-2300  
Tel: (213) 489-3939  
Fax: (213) 243-2539  
**Attorneys for Plaintiff**

I delivered such envelope(s) by hand to the office of the addressee(s).

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

EXECUTED on June 4, 2007 at Beverly Hills, California.

By: Sheldon Solin

Print: Sheldon Solin