

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

POOL.com INC.

Plaintiff

- and -

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Defendant

**MOTION RECORD OF THE MOVING PARTY,
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS**

DAVIES WARD PHILLIPS & VINEBERG LLP
Barristers & Solicitors
1 First Canadian Place
Suite 4400
Toronto, ON M5X 1B1

Matthew P. Gottlieb (LSUC #32268B)
Andrea L. Burke (LSUC #37761L)
Tel: 416.863.0900
Fax: 416.863.0871

Solicitors for the Moving Party,
Internet Corporation for Assigned Names and
Numbers

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

POOL.com INC.

Plaintiff

- and -

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Defendant

NOTICE OF MOTION
(Returnable March 16, 2004)

The Defendant, Internet Corporation for Assigned Names and Numbers ("ICANN"), will make a motion to a Judge on March 16, 2004, at 10:00 a.m. or as soon after that time as the motion can be heard, at 161 Elgin Street, Ottawa, Ontario.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

THE MOTION IS FOR:

1. an Order staying or dismissing this Action;
2. the Defendant's costs on the motion on a substantial indemnity scale; and
3. such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

- (a) this Court lacks jurisdiction over ICANN because, among other things, ICANN is a United States corporation, is not resident in Ontario, does not conduct business in Ontario and has no assets in Ontario;
- (b) this Court lacks jurisdiction over the subject matter of this Action, which has no real and substantial connection to Ontario because, among other things, all of the events relevant to the Action as set out in the Statement of Claim arise in California, not Ontario;
- (c) in the alternative, California, and not Ontario, is the convenient forum for the trial of this Action because, among other things, virtually all, if not all, of the evidence and witnesses relevant to the Action are in California and the issue of whether ICANN acted improperly must be determined by a consideration of several agreements, all of which must, by their terms, be considered by the Courts of California;
- (d) Rules 17.06 and 21.01(3)(a) of the *Rules of Civil Procedure*; and
- (e) such other and further relief as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (i) the Affidavit of Daniel E. Halloran, sworn September 8, 2003; and
- (ii) the Supplementary Affidavit of Daniel E. Halloran, sworn September 23, 2003;

- (iii) the Second Supplementary Affidavit of Daniel E. Halloran, sworn January 21, 2004; and
- (iv) such further and other material as counsel may advise and this Honourable Court may permit.

Date: January 23, 2004

DAVIES WARD PHILLIPS & VINEBERG LLP
1 FIRST CANADIAN PLACE
SUITE 4400
TORONTO, ON M5X 1B1

Matthew P. Gottlieb (LSUC #32268B)
Andrea L. Burke (LSUC #37761L)
Tel: 416.863.0900
Fax: 416.863.0871

Solicitors for the Defendant

TO: OSLER HOSKIN & HARCOURT LLP
50 O'Connor Street
Suite 1500
Ottawa, ON K1P 6L2

K. Scott McLean
Monica Song
Tel: 613.787.1029
Fax: 613.235.2867

Solicitors for the Plaintiff

POOL.com INC.

and

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS
Defendant

Court File No: 03-CV-24621

Plaintiff

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Ottawa

NOTICE OF MOTION

DAVIES WARD PHILLIPS & VNEBERG LLP
1 FIRST CANADIAN PLACE
SUITE 4400
TORONTO, ON M5X 1B1

Matthew P. Gottlieb (LSUC #32268B)
Andrea L. Burke (LSUC #37761L)
Tel: 416.863.0900
Fax: 416.863.0871

Solicitors for the Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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POOL.com INC.

Plaintiff

- and -

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Defendant

**AFFIDAVIT OF DANIEL E. HALLORAN
(sworn September 5, 2003)**

I, DANIEL E. HALLORAN, of the City of Los Angeles, in the State of California, in the United States of America, MAKE OATH AND SAY:

1. I am an attorney admitted to the State Bar of California, and am the Chief Registrar Liaison and Acting Secretary of the Defendant, Internet Corporation for Assigned Names and Numbers ("ICANN"). I have been an employee of ICANN since 2000. As such, I have knowledge of the matters to which I hereinafter depose, except where I have stated such matters to be based on information and belief, in which case, I verily believe such information to be true.

2. I am swearing this Affidavit in support of ICANN's motion for an Order staying or dismissing this action on jurisdictional grounds. As is set out in detail below:

(a) this Court lacks jurisdiction over ICANN because, among other things, ICANN is a corporation incorporated under the laws of the State of

California within the United States, has no presence in Ontario, does not conduct business in Ontario and has no assets in Ontario;

- (b) this Court lacks jurisdiction over the subject-matter of this Action, which has no real and substantial connection to Ontario because, among other things, all of the events relevant to the Action as set out in the Statement of Claim arise in California, in the United States, not Ontario; and
- (c) California, and not Ontario, is the convenient forum for the trial of this Action because, among other things, virtually all, if not all, of the evidence and witnesses relevant to the Action are in California and the issue of whether ICANN acted improperly must be determined by a consideration of several agreements, all of which are, by their terms, governed by the laws of the State of California, and require that actions brought under such agreements be brought in the courts of the State of California.

ICANN Does Not Reside or Carry On Business in Ontario

3. ICANN is a not-for-profit corporation that was organized under the laws of the State of California in 1998. As is explained below, pursuant to delegation from the United States Department of Commerce, ICANN is responsible for administering certain aspects of the Internet's domain name system (the "DNS").

4. ICANN's principal place of business is in Marina Del Rey, which is in Los Angeles County, California in the United States. ICANN has no offices or facilities other than those in Marina Del Rey.

5. ICANN does not engage in any acts or activities in Ontario, provided that ICANN has accredited five registrars resident in the Province of Ontario.

6. ICANN has no assets or real estate in the Province of Ontario or at all in Canada. It is not registered to do business in Ontario (or any other Canadian province). It does not solicit any business in Ontario (or any Canadian province), it does not sell any goods or services in Ontario (or Canada). (In fact, ICANN actually does not sell anything at all.) ICANN does not have a bank account in Ontario (or Canada), and it does not have any employees in Ontario (or Canada).

7. ICANN maintains several websites that provide information regarding its Internet-coordination activities, including the websites at <http://www.icann.org>, <http://www.iana.org> and <http://www.internic.net>. All of these websites are operated from web servers physically located in Los Angeles County, California. The websites contain a wealth of information about ICANN, about ICANN constituent groups and about the projects that ICANN has undertaken in connection with the Internet. The websites also contain links to other information that is related to ICANN's activities. As explained above, ICANN does not offer anything for sale on any of its websites.

The Subject-matter of the Action has No Substantial Connection to Ontario

8. In order to understand the subject-matter in this Action, one must have an understanding of (i) how the Internet and, specifically, the Internet's DNS operates, and (ii) ICANN and its authority and responsibilities with respect to the Internet's DNS.

(a) The Internet and DNS

9. The Internet is a network of computers and computer networks that allows computers around the world to communicate with each other quickly and efficiently over a variety of physical links. For the Internet to function effectively, each computer connected to the Internet must have a unique identifier, or address, so as to allow the computers to communicate with each other.

10. These addresses are, in fact, lengthy numerical codes known as Internet Protocol ("IP") numbers or addresses. For example, an IP number might be 192.234.223.142, which is the address for the City of Ottawa's website.

11. Because IP numbers are long and difficult to remember, the IP address system has been overlaid by a more "user-friendly" system of "domain names". The system associates a "domain name" (a string of characters) with the IP number. For example, the domain name for the City of Ottawa's website host computer is "city.ottawa.on.ca".

12. In accordance with the Internet's DNS, Internet domain names consist of a string of "domains" separated by periods. The "top-level" domains, or "TLDs" are found to the right of the last period and include, among others, ".com", ".gov" and ".net", which are also known as generic TLDs, or "gTLDs".

13. There are approximately 250 different TLDs which are administered and operated by different entities around the world. Some TLDs are country code specific, such as ".uk" for the United Kingdom and ".ca" for Canada. The country specific domains are known as "ccTLDs".

14. The domain names for each TLD are maintained, monitored and controlled by a company, each called a "registry" or "registry operator". There is one registry for each TLD. A registry operates like a phone book, keeping a comprehensive listing of each registered domain name within the relevant TLD and its corresponding IP address.

15. Individuals seeking to register domain names do not deal with ICANN or registry operators but, instead, deal with third-party "registrars". It is the "registrars" that, in turn, deal with the appropriate registry on these individuals' behalf to register the domain names. Registrars are companies that register domain names on behalf of the public and co-ordinate the registration of the domain names in the DNS with the appropriate registry. Currently, approximately 170 registrars worldwide are engaged in dealing with customers and, in turn, requesting that various registry operators make registrations of domain names in the TLDs they operate.

(b) ICANN's Role in the DNS

16. Historically, much of the Internet's DNS was overseen by United States government agencies or by third-parties pursuant to agreements with U.S. government agencies. In 1997, the President of the United States directed the United States Secretary of Commerce to privatize the DNS.

17. In response to the government's direction, a broad coalition of the Internet's business, technical, academic and user communities formed ICANN in November 1998. At that time, ICANN signed a memorandum of understanding ("MOU") with the U.S. Department of Commerce to transition the administration of the Internet

from government to the private sphere. Pursuant to the MOU, the U.S. Department of Commerce retains responsibility for general oversight of ICANN's activities. A copy of the MOU, as amended to date, is attached hereto as Exhibit "A".

18. Thus, ICANN has been recognized by the U.S. and other governments, as well as by technical standards development bodies and other private sector entities involved in the Internet's operation, as the global consensus development entity to coordinate technical management of the DNS.

19. In accordance with its authority under the MOU, ICANN has entered into agreements (generally, a "Registry Agreement") with operators for most of the 14 gTLDs (a few gTLDs such as .gov and .mil operate under legacy arrangements under the direct auspices of the U.S. government.) Pursuant to a Registry Agreement, the basic obligations of a registry operator of a gTLD are to maintain a database of domain names within the particular TLD (such as .com or .net) it operates and respond to millions of queries from computers seeking to translate those domain names to IP numbers.

20. Whereas ICANN has a significant role in developing and implementing registration policies with respect to the gTLDs, ICANN's role in the coordination of the country specific TLDs, the ccTLDs, is limited to the delegation of responsibility for operation of ccTLDs to responsible trustees for the respective local Internet community, and ensuring global interoperability. Each ccTLD is operated on behalf of the local Internet community with the manager and/or supporting organization having a direct

responsibility to the local Internet community, and to the global Internet community through ICANN.

21. The internationally recognized delegee of the Canadian ccTLD, the .ca registry, is the Canadian Internet Registration Authority ("CIRA") located in Ottawa, Ontario. CIRA is a not-for-profit Canadian corporation.

22. In order to become a gTLD registrar, a company must be accredited by ICANN. ICANN accredits registrars by entering into a form agreement with each of them (each, a "Registrar Accreditation Agreement"). The current form of Registrar Accreditation Agreement is posted on the ICANN website at <http://www.icann.org/registrars/ra-agreement-17may01.htm>. An example of a Registrar Accreditation Agreement is attached hereto as Exhibit "B". Under a Registrar Accreditation Agreement, a corporation is granted permission to register domain names for the public in specifically named TLDs.

23. Each Registrar Accreditation Agreement contains a provision which states that the Registrar Accreditation Agreement is deemed to have been entered into in California and also contains a provision that any litigation which arises between the registrar and ICANN must be conducted in California. Specifically, clause 5.6 of the Registrar Accreditation Agreement states:

"In all litigation involving ICANN concerning this Agreement (whether in a case where arbitration has not been elected or to enforce an arbitration award), jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California, USA; however the parties shall also have the right to enforce a judgment of such a court in any court of competent jurisdiction."

24. Each Registrar Accreditation Agreement also contains an express exclusion of obligations to non-parties to the agreement. Specifically, clause 5.10 of the Registrar Accreditation Agreement states:

"No Third-Party Beneficiaries. This Agreement shall not be construed to create any obligation by either ICANN or Registrar to any non-party to this Agreement, including any Registered Name Holder."

25. ICANN has entered into Registrar Accreditation Agreements with five Ontario-based companies on terms identical to those ICANN has entered into with all other registrars.

26. In summary, when an individual or company wishes to register or attempt to register a specific domain name in a gTLD, it may contact an ICANN-accredited registrar. It advises the registrar of the domain name that it wishes to register. Upon receiving the information, the registrar contacts the appropriate registry to inquire as to whether the domain name is available or is currently registered by someone else. If the domain name is not currently registered by someone else, the registrar will be able to register the domain name on behalf of its customer. If the domain name is currently registered by someone else, the registrar will not be able to register that domain name on behalf of its customer.

(c) Pool.com

27. In the Statement of Claim, the plaintiff, Pool.com Inc. ("Pool.com"), alleges that it is an Ontario corporation engaged in the business of operating a "backorder" service for registered and soon-to-be-deleted domain names in the ".com" and ".net" gTLDs of the Internet's DNS.

28. Pool.com is not an ICANN-accredited registrar but, on information and belief, operates through a network of ICANN-accredited registrars in competing to acquire, for its customers, domain names that have not yet been renewed by their owners within the time required for renewal and have therefore been dropped or deleted out of the relevant TLD. Pool.com has no relationship or business dealings whatsoever with ICANN.

29. Based on my review of Pool.com's website, I understand that if the right to register a domain name is successfully acquired for a single customer, Pool.com charges the customer a (US) \$60.00 fee. However, if two or more of its customers have back-ordered a particular domain name, Pool.com requires the customers to hold a three-day auction to compete for the domain name. After three days, the domain name registration is awarded to the highest bidder who must pay the amount of its winning bid to Pool.com.

30. Although Pool.com was incorporated in Ontario, it appears that Pool.com conducts its business entirely in U.S. dollars. On its website, Pool.com explicitly states: "[A]ll prices, fees, and bids are in U.S. dollars". Copies of web-pages from Pool.com's website are attached hereto as Exhibit "C".

(d) The Wait List System ("WLS")

31. Notwithstanding the fact that Pool.com has not entered into any agreement with ICANN, and has no relationship or dealings whatsoever with ICANN, it appears to base its entire claim on the allegation (that is factually incorrect) that ICANN breached its contractual obligations to registrars under the Registrar Accreditation

Agreements (none entered into with Pool.com, but with ICANN-accredited registrars) by authorizing the registry operator of the ".com" and ".net" gTLDs to implement a "wait list" system for the registration of newly-deleted domain names. The "wait list" system which is at the heart of Pool.com's claim is explained below.

32. Domain names are registered for a limited period of time. If that period expires without renewal of the domain name, the registration may be deleted and following certain automatic renewal and grace periods, the domain name again becomes available for registration by the first person who requests registration. Currently, several registrars offer services to the public that attempt to register expired domain names almost immediately after they become available for re-registration.

33. I understand that in the .com and .net gTLDs alone, more than 800,000 domain names are deleted each month and become available for registration by registrants through the approximately 170 ICANN-accredited registrars. Those registrars seeking to register a recently deleted domain name on a customers' behalf do so by programming their systems to transmit continuous automated "add" domain name commands to the registry for a particular deleted domain name in an effort to be the first registrar to request registration of the domain name following its deletion. This tactic is utilized simultaneously by multiple registrars seeking multiple domain names, and often the same domain names, in excess of 100 million "add" commands being submitted to the .com registry per day.

34. Consumers who want to register a deleted or soon-to-be-deleted domain name under the current system need to sign up and, in many cases, pay for multiple

registrars in advance to try and register the newly deleted domain name on their behalf. Under this system, a consumer can never be certain that it will obtain the rights to a particular domain name if the domain name is deleted from the registry, even if the consumer signs up with multiple registrars currently offering this type of service.

35. Beginning in 2001, VeriSign, Inc. ("VeriSign") (the registry operator of the .com and .net gTLDs) proposed to offer a wait-list service (the "WLS") at the registry level with respect to domain names within the .com and .net gTLDs. The WLS would operate by permitting ICANN-accredited registrars, acting on behalf of customers, to place reservations for currently registered domain names in the .com and the .net gTLDs. The WLS would only permit one wait-list reservation to be accepted for each registered domain name. Each reservation would be for a one-year period and reservations would be accepted on a first come, first served basis, with the opportunity for renewal. VeriSign would charge the registrar a fee, which would be no higher than \$24.00 for a one-year reservation. The registrar's fee to the customer would be established by the registrar, not VeriSign. In the event that a registered domain name is not renewed and is deleted from the registry, VeriSign would check to determine whether a reservation for the domain is in effect and register the deleted domain name to the customer with the reservation or, if there is no reservation, VeriSign would delete the name from the registry so that the name is returned to the pool of names equally available for re-registration through all registrars on a first come, first served basis.

36. VeriSign has proposed to implement the WLS for a twelve-month trial beginning no sooner than October, 2003. At the end of the trial, ICANN and VeriSign would evaluate whether the service should be continued.