

# DAVIES WARD PHILLIPS & VINEBERG LLP

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File No. 201779

December 16, 2003

## **BY COURIER**

Courtney Schaberg  
Jones Day  
555 West Fifth Street  
Suite 4600  
Los Angeles, CA 90013-1025  
USA

Dan Halloran  
Internet Corporation For Assigned Names and  
Numbers  
4676 Admiralty Way  
Suite 330  
Marina del Ray, CA 90292-6601  
USA

Dear Courtney and Dan:

### **ICANN ats Pool.com Inc.**

I attach a brief containing the agreements provided by Pool.com. You will note that there are only 17 agreements (not the 23 claimed by Mr. Hall in his Affidavit). Also, you will note that it appears that there are only two agreements entered into with Ontario corporations (I do not know where Rebel.com is incorporated or where it carries on business). We should discuss, quite promptly, what steps we should take to confirm that these agreements have, in fact, been entered into and what connection the various "partners" have to Ontario, if any.

As you are aware, Pool.com has raised considerable concern about the use to which ICANN will put these agreements. Considering the deemed undertaking rule, as previously discussed, we should limit our use of these documents to the purpose of this litigation.

Please call me so that we can discuss our next steps.

Yours very truly,



Matthew P. Gottlieb

MPG/amh  
Enclosure

Tor #: 1301473 1

**Pool.com Registrar Partner Agreements (as referred to in the Affidavit of Robert Christopher Hall sworn September 17, 2003 and produced in accordance with Order of Maranger J. dated December 3, 2003)**

**Document Index**

1. Alice's Registry
  - (a) Registrar partner agreement – effective date August 27, 2003
2. A Technology dba NameSystem
  - (a) Registrar partner agreement – effective date June 15, 2003
  - (b) Amendment – effective November 1, 2003
3. AusRegistry Group
  - (a) Registrar partner agreement – effective date July 17, 2003
  - (b) Amendment – effective November 1, 2003
4. Direct Information Pvt. Ltd.
  - (a) Registrar partner agreement – effective date July 18, 2003 (unsigned version attached)
  - (b) Amendment No. 1 – effective date August 13, 2003
  - (c) Amendment – effective November 1, 2003 (2 copies)
5. Domain The Net Technologies Ltd
  - (a) Registrar partner agreement – effective date July 9, 2003
  - (b) Amendment – November 1, 2003
6. Domains ToBeSeen.com, Division of R. Lee Chambers Company LLC
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7. Encirca
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8. Galiano Investment Company, Ltd.

- (a) Partner agreement – effective date August 18, 2003
- 9. Medialogic Inc.
  - (a) Partner agreement – effective date September 10, 2003
- 10. Moniker Online Services LLC
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- 11. NameScout Corp.
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- 12. Neteka Inc.
  - (a) Registrar partner agreement – effective date July 24, 2003
  - (b) Amendment – effective November 1, 2003
- 13. Nitin Networks
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- 14. PSI-Japan Inc.
  - (a) Registrar partner agreement – effective date July 4, 2003
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- 15. R & K Global Business Services, Inc. dba 000Domains.com
  - (a) Registrar partner agreement – effective date August 28, 2003
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- 16. Rebel.com
  - (a) Registrar partner agreement – effective date July 19, 2003
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- 17. Spot Domain LLC dba Domainsite.com
  - (a) Registrar partner agreement – effective date September 14, 2003

## Pool.com Registrar Partner Agreement

This Registrar Partner Agreement (this "Agreement") is entered into on August 27<sup>th</sup>, 2003 (the "Effective Date") by and between Pool.com Inc., a Canadian corporation with offices at 43 Auriga Dr. Ottawa, ON, Canada, K2E 7Y8 ("Pool") and Alice's Registry, a California corporation with offices at 704 Almar Ave Santa Cruz CA 95060 ("Registrar"). Inc.

The parties hereto agree as follows:

1. **Pool Services.** Pool offers domain backorders, domain keyword alerts and other services (the "Services") to customers. Services are currently offered via (i) Pool's website, located at www.pool.com, and (ii) a network of resellers/affiliates that either link to Pool's website or offer the Services via a co-branded or "white-labeled" Pool website. Pool may also offer the Services through additional channels in the future. Pool registers backordered domains on behalf of its customers through its network of accredited registrars.

2. **Domain Registration.** Registrar agrees to provide domain registration services to Pool on behalf of Pool's customers. Pool and Registrar will cooperate to facilitate registrations of Pool's backordered domains; provided, however, the parties will at all times maintain full compliance with all applicable registry, ICANN and any other governing body's policies, rules and procedures. Pool will not modify or delete domains other than domains registered on behalf of Pool's customers.

3. **Fees.** Pool will pay to Registrar Fifty Percent of the "Net Revenue" generated from Services completed by Registrar on behalf of Pool's customers ("Fees"). "Net Revenue" means gross fees actually collected from a customer for a Service, including without limitation backorder fees and fees collected from completed auctions of backordered domains, less refunds, reimbursed registry fees, discounts, third party selling/affiliate commissions, credit card and bank fees (Pool will deduct 6% for credit card and bank fees) and any taxes. Current Service fees are available at www.pool.com, and may be amended from time to time in Pool's sole discretion. Registry fees incurred in connection with the registration of domains on behalf of Pool's customers are the responsibility of Registrar.

Provided that the go-live date of the Pool Services on Registrar is no later than September 1, 2003, Pool will pay to Registrar an advance on future Fees of \$10,000 (such payment to be made within 5 business days of the actual go-live date).

Pool may, upon prior written notice to Registrar, change its method for paying fees to registrars, including Registrar, in order to provide equal payments to all registrars in the Pool system. Instead of the method set forth in the immediately preceding paragraph, Pool would calculate Fees as follows (the "Shared Fee System"): Pool will calculate Net Revenue for a given calendar month generated from all registrars in the Pool system. Pool will distribute 50% of total Pool Net Revenue equally to each registrar (subject to appropriate pro-rata adjustment downward for registrars who were live in the Pool system for less than the entire month). In the event Pool moves to a Shared Fee System for Registrar, Pool will reimburse registry fees incurred by Registrar and such fees will be deducted in determining Net Revenue.

Registrar will give Pool exclusive and continual access to 100% of the connections allocated to Registrar by each registry for registering deleted domains and will not, during the term of this Agreement, use such registry connections in any way to compete (alone or with any third party) with Pool in the business of registering deleted domains.

4. **Payment of Fees to Registrar.** Pool will pay to Registrar all Fees due to Registrar for a particular calendar month as soon as commercially reasonable, and not later than thirty days after the end of such month. Payments will be made via check or wire transfer. At the time of payment, Pool will also send to Registrar a detailed summary of all Fees owed to Registrar for Services. In the event Pool experiences a charge-back or otherwise discounts or refunds a customer for all or any portion of a Service fee, and Pool has already paid Registrar a Fee for such Service, Pool will deduct the payment made to Registrar in connection with such Service from a current or future payment to Registrar. In the event Pool moves to a Shared Fee System, any charge-backs, discounts, etc. will be deducted from total Pool revenue (in determining Net Revenue) in the month such charge is experienced by Pool and such cost will therefore be spread evenly among all Pool registrars.

5. **Term and Termination.** This Agreement will have an initial term of one year and, unless 30 days' prior written notice is provided by either party, will be automatically extended for successive one-year periods on the same terms and conditions expressed herein, or as may be amended by the parties. Either party may terminate this Agreement without penalty on thirty days prior written notice to the other party. This Agreement may be terminated by either party, upon written notice: (i) upon the insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of its debts, which are not dismissed or otherwise resolved in its favor within 60 days thereafter; (ii) upon the other party's making a general assignment for the benefit of creditors; or (iii) upon the other party's dissolution or ceasing to conduct business in the ordinary course.

6. **Confidentiality.** The parties will have access to certain confidential and proprietary information of the other party ("Confidential Information"). Confidential Information includes information either marked as confidential or information known by the receiving party as being treated by the disclosing party as confidential. Each party agrees to keep Confidential Information confidential and not to use such information except as authorized by this Agreement or otherwise authorized by the disclosing party, and use at least the same degree of care (and not less than a reasonable degree of care) that it uses to protect its own confidential information. Each party may disclose Confidential Information to its employees, contractors, or agents who reasonably require access in order to carry out the terms of this Agreement and who have been informed of and are obligated to maintain

confidentiality. Confidential information does not include information that: (i) was in the public domain at the time it was disclosed or has become in the public domain through no fault of the receiving party; (ii) was known to the receiving party, without restriction, at the time of disclosure, as demonstrated by files in existence at the time of disclosure; (iii) is disclosed with the prior written approval of the disclosing party; (iv) was independently developed by the receiving party without any use of the Confidential Information; (v) becomes known to the receiving party, without restriction, from a source other than the disclosing party, without breach of this Agreement, by the receiving party; or (vi) is disclosed generally to third parties by the disclosing party without restrictions similar to those contained in this Agreement. The receiving party may disclose the other party's Confidential Information to the extent such disclosure is required by order or requirement of a court, administrative agency, or other governmental body, but only if the receiving party provides prompt notice thereof to the disclosing party to enable the disclosing party to seek a protective order or otherwise prevent or restrict such disclosure. The financial and other terms of this Agreement are "Confidential Information" under this Section 8.

7. Press Release. The parties will cooperate in issuing a jointly approved press release concerning this Agreement, including (without limitation), at Pool's discretion, an initial such release within thirty (30) days after the Effective Date of this Agreement announcing this Agreement and the appointment of Company as a Pool Registrar partner.

#### 8. Trade Marks.

8.1 License. During the term of this Agreement, each party is hereby granted a non-exclusive non-transferable royalty free license to use the trade marks, trade names, service marks, domain names and logos of the other party (collectively, the "Trade Marks") in connection with this Agreement provided, however, that nothing herein will grant a party any right, title or interest in Trade Marks of the other party except as expressly specified in this Agreement.

8.2 Restrictions. Any and all goodwill arising from use of the Trade Marks of a particular party will inure solely to the benefit of such party. Neither party will assert any claim to the Trade Marks of the other party or goodwill associated therewith. Neither party will challenge the validity of or attempt to register any Trade Mark of the other party, nor will it adopt any derivative or confusingly similar trade marks, domain names, brands or marks or create any combination marks with any Trade Mark of the other party.

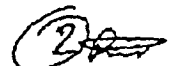
8.3 Usage. Each party will use the Trade Marks of the other party only in accordance with such party's trade mark usage policies as such may be in effect from time to time and only in accordance with this Agreement. If at any time a party reasonably believes that the use of its Trade Marks by the other party fails to otherwise comply with such party's trade mark usage guidelines, such party will so notify the other party in writing. Upon receipt of such notification, the notified party will immediately initiate steps to conform with the trade mark usage guidelines and will effect such conformance or cure within 15 days.

9. Ownership. Each party will retain ownership of its intellectual property. Except as expressly provided in this agreement, neither party is authorized or licensed to use the other party's intellectual property.

10. Indemnity. Each party, at its own expense, will defend, indemnify and hold the other party, its officers, directors, employees, agents and successors harmless against any liability, or any litigation cost or expense (including attorneys' fees), arising out of acts or omissions of the indemnifying party's agents or employees, breach of any provisions of this agreement, or operation of such indemnifying party's business; provided that the indemnified party provides the indemnifying party with: (i) prompt written notice of such claim, and (ii) proper and full information and assistance to settle or defend any such claim. The indemnifying party will not enter into any settlement or compromise of any indemnifiable claim without the indemnified party's prior written permission, which permission shall not be unreasonably withheld or delayed.

11. Disclaimer. REGISTRAR ACKNOWLEDGES AND AGREES THAT THE SERVICES ARE PROVIDED "AS IS," AND THAT POOL MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, AND SPECIFICALLY DISCLAIMS, ON ITS OWN BEHALF ON AND BEHALF OF ITS SUPPLIERS AND LICENSORS, ANY WARRANTIES AS TO THE USEFULNESS, ACCURACY, RELIABILITY, NON-INFRINGEMENT OR EFFECTIVENESS OF SUCH SERVICES OR THAT ANY OF SUCH SERVICES WILL BE UNINTERRUPTED, ERROR FREE, OR THAT DEFECTS HAVE OR WILL BE CORRECTED, OR THAT SUCH SERVICES WILL MEET THE NEEDS OF ANY PARTY. WITHOUT LIMITING THE FOREGOING, POOL DISCLAIMS ALL WARRANTIES OF REASONABLE SKILL OR CARE. IN NO EVENT WILL POOL BE LIABLE TO REGISTRAR FOR ANY FAILURE, DISRUPTION, DOWNTIME, INCORRECT LINKAGE OR OTHER NON-PERFORMANCE OF THE SERVICES, POOL'S SOLE LIABILITY, AND REGISTRAR'S SOLE REMEDY, WITH RESPECT TO SUCH WARRANTY WILL BE POOL'S OBLIGATION TO CORRECT ERRORS WITH A LEVEL OF EFFORT COMMENSURATE WITH THE SEVERITY OF THE ERROR.

12. Limitation of Liability. IN NO EVENT WILL EITHER PARTYS LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT FROM ANY CAUSE EXCEED FEES PAID BY POOL TO REGISTRAR UNDER THIS AGREEMENT FOR THE SIX-MONTH PERIOD IMMEDIATELY PRECEDING THE DATE ON WHICH THE CAUSE OF ACTION AROSE. IN ADDITION, IN NO EVENT WILL EITHER PARTY, ITS AFFILIATES, OR EACH OF THEIR DIRECTORS, OFFICERS, EMPLOYEES OR AGENTS BE RESPONSIBLE OR LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY, PUNITIVE OR OTHER DAMAGES (INCLUDING BUT NOT LIMITED TO LOSS OF REVENUES OR LOSS OF PROFITS), EVEN IF SUCH PARTY, ITS AFFILIATES, OR ANY OF THEIR DIRECTORS, OFFICERS, EMPLOYEES OR AGENTS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY ARISING OUT OF OR RELATING IN ANY WAY TO SERVICES, OR ANY OTHER SUBJECT MATTER OF THIS AGREEMENT. NEITHER PARTY WILL BE LIABLE FOR ANY LOSS OR DAMAGE CAUSED BY DELAY IN FURNISHING SERVICES TO THE




OTHER PARTY OR ANY OTHER PERFORMANCE UNDER THIS AGREEMENT. Neither party will be liable for delays in data transmission.

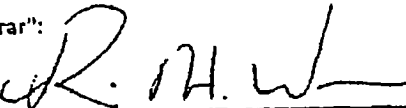
13. Pool Affiliate Relationship. In the event Registrar acts as a reseller or affiliate of the Services at any time during the term of this Agreement, the terms and conditions contained in the Pool Affiliate Agreement located at [www.pool.com/affiliate\\_agreement.aspx](http://www.pool.com/affiliate_agreement.aspx) (as may be amended from time to time in accordance with the terms therein) is incorporated into this Agreement by reference.

14. Miscellaneous. Non-performance of either party will be excused to the extent that performance is rendered impossible by any force majeure event and not caused by the gross negligence or willful misconduct of the non-performing party. The relationship of the parties established by this Agreement is that of independent contractors. This Agreement will be governed by and construed under the laws of the Province of Ontario, Canada without reference to conflict of law principles. Each party submits to the exclusive subject matter jurisdiction, personal jurisdiction and venue of the courts of that Province. Each party agrees that any action, suit of application will be brought and heard in Ottawa, Canada. The parties will endeavor to settle amicably by mutual discussions any disputes, differences or claims whatsoever related to this Agreement. This Agreement, together with all exhibits and attachments hereto, sets forth the entire agreement and understanding of the parties relating to the subject matter herein (other than agreements relating to confidentiality) and merges all prior discussions between them. Except as set forth in Section 13, No modification of or amendment to this Agreement, nor any waiver of any rights under this Agreement, will be effective unless in writing signed by both parties, and the waiver of any breach or default will not constitute a waiver of any other right hereunder or any subsequent breach or default. Neither party may assign this Agreement, or assign or delegate any right or obligation hereunder, without the prior written consent of the other party, except in the case of a sale or other transfer of substantially all of such party's assets or equity, whether by sale of assets or stock or by merger or other reorganization, provided that the assignee has agreed in writing to be bound by all the terms and conditions of this Agreement. Subject to the foregoing sentence, this Agreement will be binding on each party's respective successors and assigns. If any provision in this Agreement is found invalid then such provision will be construed, if feasible, so as to render the provision enforceable, and if no feasible interpretation would save such provision, it will be severed from the remainder of this Agreement, and the parties will negotiate, in good faith, a substitute, valid and enforceable provision that most nearly effects the parties' intent in entering into this Agreement. This Agreement may be executed in any number of counterparts, each of which will be deemed an original, and all of which when taken together will constitute a single instrument.

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed on its behalf on the Effective Date by their respective duly authorized representatives.

Pool.com Inc.:

By:   
Name: Ken Bayles  
Title: Vice President

"Registrar":  
By:   
Name: Rick H. Wesson  
Title: CEO



## Pool.com Registrar Partner Agreement

This Registrar Partner Agreement (this "Agreement") is entered into on June 15, 2003 (the "Effective Date") by and between Pool.com Inc., a Canadian corporation with offices at 43 Auriga Dr. Ottawa, ON, Canada, K2E 7Y8 ("Pool") and A Technology, a Ontario corporation with offices at 3 Hawthorn Gardens, Toronto, ("Registrar"). O.B.A NameSystem Ontario M4W 1P4

Canada

The parties hereto agree as follows:

1. **Pool Services.** Pool offers domain backorders, domain keyword alerts and other services (the "Services") to customers. Services are currently offered via (i) Pool's website, located at www.pool.com, and (ii) a network of resellers/affiliates that either link to Pool's website or offer the Services via a co-branded or "white-labeled" Pool website. Pool may also offer the Services through additional channels in the future. Pool registers backordered domains on behalf of its customers through its network of accredited registrars.

2. **Domain Registration.** Registrar, an accredited registrar, agrees to provide domain registration services to Pool on behalf of Pool's customers. Pool and Registrar will cooperate to facilitate registrations of Pool's backordered domains; provided, however, the parties will at all times maintain full compliance with all applicable registry, ICANN and any other governing body's policies, rules and procedures.

3. **Fees.** Pool will pay to Registrar Fifty Percent of the "Net Revenue" generated from Services completed by Registrar on behalf of Pool's customers ("Fees"). "Net Revenue" means gross fees actually collected from a customer for a Service, including without limitation backorder registration fees and fees collected from completed auctions of backordered domains, less refunds, discounts, third party selling/affiliate commissions, credit card and bank fees (Pool will deduct 5% for credit card and bank fees) and any taxes. Current Service fees are available at www.pool.com, and may be amended from time to time in Pool's sole discretion. Registry fees incurred in connection with the registration of domains on behalf of Pool's customers are the responsibility of Registrar.

4. **Payment of Fees to Registrar.** Pool will pay to Registrar all Fees due to Registrar for a particular calendar month within thirty days after the end of such month. Payments will be made via check or wire transfer. At the time of payment, Pool will also send to registrar a detailed summary of all Fees owed to Registrar for Services. In the event Pool experiences a charge-back or otherwise discounts or refunds a customer for all or any portion of a Service fee, and Pool has already paid Registrar a Fee for such Service, Pool will deduct the payment made to Registrar in connection with such Service from a current or future payment to Registrar.

5. **Term and Termination.** This Agreement will have an initial term of one year and, unless 30 days' prior written notice is provided by either party, will be automatically extended for successive one-year periods on the same terms and conditions expressed herein, or as may be amended by the parties. Either party may terminate this Agreement without penalty on thirty days prior written notice to the other party. This Agreement may be terminated by either party, upon written notice: (i) upon the institution by the other party of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of its debts, which are not dismissed or otherwise resolved in its favor within 60 days thereafter; (ii) upon the other party's making a general assignment for the benefit of creditors; or (iii) upon the other party's dissolution or ceasing to conduct business in the ordinary course.

6. **Confidentiality.** The parties will have access to certain confidential and proprietary information of the other party ("Confidential Information"). Confidential Information includes information either marked as confidential or information known by the receiving party as being treated by the disclosing party as confidential. Each party agrees to keep Confidential Information confidential and not to use such information except as authorized by this Agreement or otherwise authorized by the disclosing party, and use at least the same degree of care (and not less than a reasonable degree of care) that it uses to protect its own confidential information. Each party may disclose Confidential Information to its employees, contractors, or agents who reasonably require access in order to carry out the terms of this Agreement and who have been informed of and are obligated to maintain confidentiality. Confidential Information does not include information that: (i) was in the public domain at the time it was disclosed or has become in the public domain through no fault of the receiving party; (ii) was known to the receiving party, without restriction, at the time of disclosure, as demonstrated by files in existence at the time of disclosure; (iii) is disclosed with the prior written approval of the disclosing party; (iv) was independently developed by the receiving party without any use of the Confidential Information; (v) becomes known to the receiving party, without restriction, from a source other than the disclosing party, without breach of this Agreement, by the receiving party; or (vi) is disclosed generally to third parties by the disclosing party without restrictions similar to those contained in this Agreement. The receiving party may disclose the other party's Confidential Information to the extent such disclosure is required by order or requirement of a court, administrative agency, or other governmental body, but only if the receiving party provides prompt notice thereof to the disclosing party to enable the disclosing party to seek a protective order or otherwise prevent or restrict such disclosure.

7. **Press Release.** The parties will cooperate in issuing a jointly approved press release concerning this Agreement, including (without limitation), at Pool's discretion, an initial such release within thirty (30) days after the Effective Date of this Agreement announcing this Agreement and the appointment of Company as a Pool Registrar partner.

8. **Trade Marks.**