

SCHEDULE "A"**COURT FILE NO.: 03-CV-24621****SUPERIOR COURT OF JUSTICE - ONTARIO****RE:** POOL.com INC. (Plaintiff) v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (Defendant)**BEFORE:** The Honourable Mr. Justice Robert Maranger**COUNSEL:** K. Scott McLean, and
Y. Monica Song, for the PlaintiffMatthew P. Gottlieb, and
Andrea L. Burke, for the Defendant**HEARD:** October 31, 2003**RULING ON MOTION**

[1] This motion is brought by the plaintiff, Pool.com Inc., for a confidentiality or protective order to limit the scope of its disclosure of 23 agreements that were referred to in the affidavit of Robert Hall, sworn on September 17, 2003.

[2] The affidavit in question was as a result of a motion brought by the defendant, Internet Corporation for Assigned Names and Numbers ("ICANN"), to stay or dismiss the action brought by Pool.com Inc. on jurisdictional grounds.

[3] The 23 agreements were referenced in the affidavit of Robert Hall, said affidavit sworn on September 17, 2003 and the said evidence was to be relied upon in resisting the jurisdictional stay sought by the defending party in their motion.

[4] The issues raised by this motion are as follows:

1. Is Pool.com Inc. entitled to a confidentiality protective order with respect to these 23 agreements, which would entitle them to produce only expurgated forms of the 23 agreements?
2. Is Pool.com Inc. entitled to an order disallowing ICANN from learning information concerning the identity of the contracting parties in the 23 agreements, and limiting this information to ICANN's counsel?
3. Is Pool.com Inc. entitled to an order prohibiting ICANN's counsel from disclosing the identity of the contracting parties to any third parties for purposes relating to ICANN's jurisdictional motion under the defence of this action?

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[5] Rule 30.04(2) requires a party who refers to documents within the context of an affidavit to have to produce the document for inspection in its entirety without deletions if a party requests production of the said document.

[6] Advising the party opposite that the document in question is confidential does not preclude the obligation of production.

[7] The jurisprudence has established that confidentiality orders are exceptional orders and only to be done when the moving party has provided the adequate factual background for the granting of such orders. The Courts in Ontario appear to have utilized two tests in deciding whether it was appropriate to grant protective or confidentiality orders in a given case.

[8] With respect to the first such test the Court was referred to the case of *BASF Canada Inc. v. Max Auto Supply (1986) Inc.* (1999), 30 C.P.C. (4th) 23 (Ont. S.C.J.), which found that a party who seeks to protect a particular article from disclosure to the other side has to satisfy the court of three specific matters: (1) that the document is confidential, (2) that the information is commercially sensitive and (3) that a competitor could obtain an unfair advantage if the document or information were released.


[9] In relationship to the second test the Court was referred to the case of *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, which dealt with sealing orders, and in that case the court found that the party seeking such an order had to demonstrate "that such an order was necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and, the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context means the public interest in open and accessible courts."

[10] In this case Pool.com Inc. has not tendered any convincing evidence respecting commercial sensitivity or specific harm that they could suffer because of any disclosures made by full production of the said agreements. They have argued that the agreements themselves on their face contain specification of confidentiality as between the signing parties, and have also alluded to a proprietary interest in the identity of the signing parties. This in my view falls short of the evidence required to meet the onus for the granting of such an order, regardless of which of the two tests is used in the analysis.

[11] The motion is therefore dismissed.

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[12] Counsel may make written submissions as to costs within 15 days of the release of this decision. Counsel for the defendant, ICANN, shall forward their submissions on costs to Pool.com Inc. within ten days within the release of this judgment to allow them to reply to their claim.


Mr. Justice Robert Maranger

DATE: December 3, 2003

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