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8

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

11

12 THE INTERNET CORPORATION FOR ) ASSIGNED NAMES AND NUMBERS, )	CASE NO. CV 07-2089 R (PLAx)
13 Plaintiff, )	<b>RESPONSE OF</b>
14 v. )	
15 REGISTERFLY.COM, INC., and )	<b>ORDER TO SHOW CAUSE RE:</b>
16 UNIFIED NAMES, INC. , )	<b>CONTEMPT</b>
17 Defendants. )	<b>DATE: June 12, 2007</b>
18	<b>TIME: 10:00 a.m.</b>
19	<b>CTRM.: 8 (Hon. Manuel L. Real)</b>

20 Defendants RegisterFly.com, Inc. and UnifiedNames, Inc. (hereinafter  
21 “defendants”) submit the following brief in response to this Court's Order To Show  
22 Cause Re Contempt.

23 **I. INTRODUCTION**

24 RegisterFly has done everything in its power to comply with the terms of this  
25 Court’s Order of May 25, 2007 (entered May 31, 2007) Imposing Further Civil  
26 Contempt Sanctions against RegisterFly. Despite this fact, there remain two aspects  
27 of the Order with which RegisterFly has been unable to comply to the letter of the  
28 Order: (1) the notice to consumers could not be placed at the top of the

1 www.registerfly.com home page because it caused severe website navigation issues  
2 and caused the entire website to be nonfunctional – so it has been temporarily placed  
3 at the bottom of the home page and on the consumer services page, and (2) some of  
4 the audit data to which ICANN is entitled access under the Registrant Accreditation  
5 Agreement Section 3.4.3 is not presently available to RegisterFly, and will not be  
6 available to RegisterFly for at least three weeks. However, neither of these aspects  
7 of compliance are within RegisterFly’s control – but at least one of those aspects is  
8 entirely within ICANN’s power to obtain itself. Given these facts, it would be  
9 inappropriate to further sanction RegisterFly for its inability to comply with the  
10 letter of the Order.

11 **II. REGISTERFLY IS IN COMPLIANCE WITH MOST OF THE TERMS**  
12 **OF THE MAY 25, 2007 ORDER**

13 **A. RegisterFly Provided The MD5 Algorithm And Corrected The .csv**  
14 **Formatting Issues On June 1, 2007**

15 RegisterFly provided to ICANN the “appropriate MD5 algorithm to  
16 accompany the transfer of all Data” on June 1, 2007. (Supplemental Declaration of  
17 Kevin Medina, ¶15.) By the evening of June 1, 2007, RegisterFly had corrected the  
18 .csv formatting issues which had been raised by ICANN and discussed during the  
19 June 1, 2007 conference call. (*Id.*) These issues included four additional lines of  
20 text and the beginning and end of each file and a missing delimiter at the end of the  
21 file. (*Id.*)

22 **B. RegisterFly Provided The MD5 Hash On June 2, 2007**

23 By mid-day on June 2, 2007, RegisterFly had provided the appropriate MD5  
24 hash with the files uploaded to ICANN. (*Id.*, ¶9.)

25 **C. RegisterFly Has Provided to ICANN Every Bit Of Registrant Data**  
26 **To Which RegisterFly Has Access**

27 Despite ICANN’s continued protestations to the contrary, RegisterFly has  
28 provided to ICANN every bit of registrant data to which it has access. RegisterFly  
cannot produce information it does not have. (*Id.*, ¶¶2, 3, 4, and 11.)

1 **III. REGISTERFLY HAS DONE EVERYTHING IN ITS POWER TO**  
2 **COMPLY WITH THE REMAINING TERMS OF THE COURT'S MAY 25,**  
3 **2007 ORDER**

4 **A. From June 2 through June 11, The Notice Was Posted At The**  
5 **Bottom Of The Home Page And On The Customer Services Page, As It Was**  
6 **Not Possible To Post It On The Top Of The Home Page Prior To June 11, 2007**

7 The notice which was required to be posted within 48 hours of the hearing to  
8 the www.registerfly.com website was not posted until May 29, 2007 (the third day  
9 after the hearing). It was not able to be posted until May 29, 2007 because  
10 RegisterFly's webmaster was out of town. (Declaration of Charles Edmunds, ¶2.)  
11 RegisterFly first posted the notice only to the customer services page of the website.  
12 (*Id.*) When RegisterFly attempted to post the notice to the home page, the change  
13 caused navigation errors and caused the website to be inoperable. (*Id.*, ¶3.) It was  
14 eventually determined that each of approximately 4000 pages of the website would  
15 need to be rescripted in order to accommodate the notice as ordered at the top of the  
16 page, but that the notice could be posted to the bottom of the page without causing  
17 the same navigation issues. (*Id.*) *The notice was additionally posted to the bottom*  
18 *of the home page on June 2, 2007 at 9:13 a.m.* (*Id.*, ¶4.) RegisterFly's webmaster  
19 informed RegisterFly that the scripting changes necessary to fix the navigation  
20 issues – which need to be made to the 4000 pages of the website – would take a  
21 great deal of time to complete. (*Id.*, ¶3.) Those changes were completed and the  
22 revised notice posted to the top of the home page of www.registerfly.com on June  
23 11, 2007. (*Id.*, ¶5.)

24 **B. Registerfly Is Unable To Access Any Additional Audit Information**  
25 **For A Minimum Of Three Weeks – But ICANN Can Access This Information**  
26 **Immediately**

27 On May 31, 2007, RegisterFly offered to permit ICANN to access its audit  
28 information at its attorneys' offices. (Declaration of Heather L. McCloskey, ¶2.)  
ICANN's counsel requested that a copy of the data be provided to ICANN instead.  
(*Id.*, ¶3.) In an effort to comply with this request, on May 31, 2007 RegisterFly  
provided ICANN with a dvd containing all of the audit information to which it had

1 access. (*Id.*) Unfortunately, the dvd on which the data was provided was not  
2 readable by ICANN.<sup>1</sup> As soon as possible after learning that the dvd was not  
3 readable, RegisterFly provided a link to ICANN which contained the data on  
4 Monday, June 4, 2007. (*Id.*, ¶5.) RegisterFly does not maintain its own data, and is  
5 dependent on Tucows, Inc. to provide access to that data. (Medina Decl., ¶12.)  
6 RegisterFly was informed that Tucows would not be able to provide any additional  
7 data for a minimum of three weeks. (*Id.*) However, given the sanctions order  
8 previously granted ICANN, it has – and has had the ability to obtain this  
9 information on its own since May 9, 2007. ICANN has never explained its failure  
10 to execute on that sanctions order, and it seeks to continue to have RegisterFly  
11 sanctioned because RegisterFly cannot access and provide information to ICANN  
12 that ICANN has the right to itself immediately access.

13 ICANN claims that RegisterFly has never provided to ICANN the location of  
14 its data. (Medina Decl., ¶13.) However, ICANN has known since at least March of  
15 2007 that RegisterFly does not maintain its own data – that service is provided to  
16 RegisterFly by Tucows – and Tucows knows where the data is maintained – not  
17 RegisterFly. (*Id.*) ICANN was in touch with Tucows in March of 2007 regarding  
18 access to data, and has known since that time that Tucows is the entity to go to in  
19 order to access such data. (*Id.*) At this time, Tucows has indicated it does not have  
20 the resources to provide RegisterFly with a copy of the audit data to be passed on to  
21 ICANN. However, the sanctions order of May 9, 2007 granted ICANN gives it  
22 immediate access to that data whenever it wants. Thus, the failure for ICANN to  
23 obtain this information is ICANN's choice.

24 \_\_\_\_\_  
25 <sup>1</sup> Since the data was in a linux format, RegisterFly's counsel was not able to  
26 open the file containing the data, but would have had to rent a system in order for  
27 ICANN to audit the data as offered. (McCloskey Decl., ¶4.) Therefore, when  
28 ICANN requested a copy of the data – rather than to come review it – RegisterFly's  
counsel was able to download the file, but had no manner in which to confirm that  
the dvd was readable. (*Id.*) Despite these efforts, ICANN was not able to read the  
dvd.

1 **IV. FURTHER CONTEMPT SANCTIONS ARE NOT APPROPRIATE**

2 **A. Substantial Compliance, Inability To Comply, And Good Faith Are**  
3 **All Defenses To Sanctions For Contempt**

4 RegisterFly has made every effort to comply with this Court's order of May  
5 25, 2007, and has largely done so. The efforts have resulted in substantial  
6 compliance, and the remaining items are impossible for RegisterFly to comply with  
7 in the time permitted by the Court's Order. RegisterFly's efforts have been made in  
8 good faith and, therefore, RegisterFly should not be subject to further contempt  
9 sanctions for its failure to comply with the remaining terms of the injunction.

10 Substantial compliance with a court order is a defense to civil contempt and is  
11 not vitiated by technical violations where every reasonable effort has been made to  
12 comply. *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695  
13 (9th Cir. 1993). In addition, a defendant's inability to comply with the court's order  
14 is also a defense to civil contempt. To establish impossibility, a defendant must  
15 show that (1) it was unable to comply, (2) the inability to comply was not self-  
16 induced, and (3) in good faith, it made all reasonable efforts to comply. *Chicago*  
17 *Truck Drivers v. Brotherhood Labor Leasing*, 207 F3d 500, 506 (8th Cir. 2000);  
18 *Federal Trade Comm'n v. Affordable Media, LLC*, 179 F3d 1228, 1239 (9th Cir.  
19 1999). Finally, defendant's good faith attempt to comply with the Court's order  
20 should also be considered in determining whether sanctions are warranted. A  
21 person should not be held in contempt if his or her actions "appear to be based on a  
22 good faith and reasonable interpretation of the court's order." *In re Dual-Deck*  
23 *Video Cassette Recorder Antitrust Litig.*, *supra*, 10 F3d at 695.

24 **B. RegisterFly Has Substantially Complied With The Court's May 25,**  
25 **2007 Order, But Despite RegisterFly's Good Faith Efforts To Comply, Certain**  
26 **Aspects Of The May 25, 2007 Order Are Not Possible For RegisterFly To**  
27 **Comply With**

28 As discussed above, RegisterFly has provided to ICANN all of the registrant  
data to which it has access – and in the appropriate format. (Medina Decl., ¶¶2, 3, 4,  
and 11.) The last of this information was provided to ICANN on June 2, 2007. (*Id.*)

1 While ICANN continues to insist that RegisterFly still has not produced all of its  
2 registrant data, RegisterFly has confirmed that it has done so. In addition, if  
3 ICANN does not believe this is true, ICANN has the ability to execute on its  
4 sanctions order of May 9, 2007 and obtain its own copy of the registrant data.

5 In addition, while the initial copy of the audit data provided by RegisterFly on  
6 May 31, 2007 was not readable by ICANN, providing this dvd was an attempt to  
7 accommodate ICANN. Had ICANN taken RegisterFly up on its offer to review the  
8 data at RegisterFly's offices instead of requesting a copy of the data, then the  
9 information would have been made available on May 31, 2007. The injunction  
10 requires only that the information be made available – not that a copy be provided to  
11 ICANN. Thus, RegisterFly's offer for ICANN to review the information on May  
12 31, 2007 signifies RegisterFly's compliance, despite the fact that a usable copy was  
13 not able to be provided until June 4, 2007.

14 With respect to the additional audit information still to be provided,  
15 RegisterFly made every effort to obtain the additional audit data which is  
16 maintained by Tucows, but was informed by Tucows that it will take up to three  
17 weeks to produce the data that is due ICANN. (Medina Decl., ¶12.) RegisterFly  
18 had nothing to do with creating the situation in which Tucows lacks sufficient  
19 resources to prepare the data. (*Id.*) Thus, despite its best efforts, RegisterFly is not  
20 able to comply with this aspect of the May 25, 2007 Order. Notably, while  
21 RegisterFly has no manner in which to access this information, ICANN can  
22 immediately access the information by enforcing its May 9, 2007 sanctions order  
23 which gives it the immediate right to access such information.

24 As discussed above, RegisterFly made every attempt to post the notice on its  
25 website in compliance with the May 25, 2007 Order. Unfortunately, RegisterFly's  
26 webmaster was out of town the weekend the notice was supposed to be posted and,  
27 therefore, it could not be posted until Monday, May 29, 2007. (Edmunds Decl., ¶2.)  
28 Even then, posting the notice at the top of the home page caused severe scripting

1 errors which rendered the website inoperable, so the notice could not be posted as  
2 ordered. (*Id.*, ¶3.) The notice was initially posted on the Customer Service page of  
3 the website. (*Id.*, ¶3.) After working with the scripting issues, the notice was also  
4 posted on the bottom of the Home Page of the website on June 2, 2007. (*Id.*, ¶4.)  
5 As of this time, RegisterFly is at the mercy of its webmaster to rescript 4000 pages  
6 of the website in order to be able to post the notice at the top of the page as noticed.  
7 Thus, it was not possible for RegisterFly to post the notice precisely as ordered,  
8 despite its best efforts to do so.

9 **C. A Genuine Dispute Has Arisen With Respect To The Meaning Of**  
10 **“Books And Records”**

11 RegisterFly and ICANN have a dispute with respect to what records are  
12 required to be produced pursuant to Paragraph 8 of the Injunction. RegisterFly has  
13 not made its financial records available to ICANN, despite ICANN’s continued  
14 insistence that such records are required to be produced pursuant to Paragraph 8 of  
15 the Injunction entered against RegisterFly. That paragraph refers to Section 3.4.3 of  
16 the Registrar Accreditation Agreement, which requires that a registrar maintain  
17 certain data and make that data available for audit upon request by ICANN. Section  
18 3.4.3 requires that a registrant maintain all of the following: the submission date and  
19 time and the contend of all registration data submitted in electronic form to the  
20 registry operators, all written communications, constituting registration applications,  
21 confirmations, modifications, or terminations and related correspondence with  
22 registered name holders, including registration contracts, and records of the accounts  
23 of all registered name holders with registrar, including dates and amounts of all  
24 payments and refunds. To the extent that RegisterFly maintained these records, it  
25 has either made them available to ICANN, or it is unable to make them available  
26 due to Tucows’ back-up (discussed above) – but will provide them as soon as they  
27 are available (or ICANN can simply go get them itself). Section 3.4.3 says nothing  
28 about the financial records of the company, nor does Paragraph 8 of the Injunction.

1 Despite this, ICANN insists that Paragraph 8's reference to "books and records"  
2 includes financial records as well.

3 RegisterFly submits that the production of its financial records will in no way  
4 help to maintain the status quo in this case pending resolution of the remaining  
5 issues in this dispute. The justification for production of the financial records differs  
6 from the justification for producing the registrant data, since ICANN has argued that  
7 the registrant data is necessary to protect registrants. ICANN can make no similar  
8 argument with respect to RegisterFly's financial records. Since preserving the status  
9 quo during litigation is the only legitimate purpose of an injunctive order, there is no  
10 justification for requiring the production of RegisterFly's books and records. If  
11 ICANN is entitled to same, it may obtain those records in the due course of  
12 discovery.

13 **V. CONCLUSION**

14 For the reasons that RegisterFly has made good faith efforts to comply with  
15 this Court's Order of May 25, 2007, yet certain aspects of the Order are impossible  
16 for RegisterFly to comply with, this Court should not further sanction RegisterFly  
17 beyond the previously-ordered \$5,000/day sanction – which should be imposed only  
18 for the failure to substantially comply until June 2, 2007.

19  
20 DATED: June 11, 2007

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

21  
22  
23 By: Heather L. McCloskey  
24 Heather L. McCloskey  
25 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.

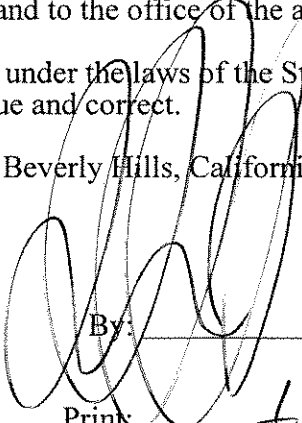
On June 11, 2007, I served the document described as **RESPONSE OF REGISTERFLY.COM, INC. TO ORDER TO SHOW CAUSE RE: CONTEMPT** on the parties in this action by delivering a true copy thereof enclosed in a sealed envelope addressed as follows:

Jeffrey A. LeVee  
Samantha Eisner  
Jones Day  
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**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 11, 2007 at Beverly Hills, California.

By:   
Print: Tim Lawson