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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

16 **COUNTY OF LOS ANGELES**

17
18 DAVID SCOTT SMILEY, *et. al.*,

19 Plaintiffs,

20 vs.

21 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS, *et.*
22 *al.*,

23 Defendants.
24
25

CASE NO. BC 254659

CLASS ACTION

**NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF;
DECLARATIONS OF DAVID
SMILEY; BRETT DROGMUND;
AND PAUL A. TRAINA**

Date: September 13, 2001

Time: 9:00 a.m.

Dept: 309

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on September 13, 2001, at 9:00 a.m., in Department
3 “309” of the above-entitled Court, located at 600 S. Commonwealth, Los Angeles,
4 California, Plaintiffs David Scott Smiley, individually and doing business as Smiley
5 Productions (“Smiley”), and Skyscraper Productions, LLC (“Skyscraper”), individually and
6 on behalf of all similarly situated persons (hereinafter “Plaintiffs”) will, and hereby do, move
7 this Court for an order for a Preliminary Injunction, restraining and enjoining Defendant
8 Internet Corporation For Assigned Names and Numbers (“ICANN”) and Defendant
9 NeuLevel¹, their agents, servants, assigns and all those acting in concert with the Defendants
10 from:

- 11 1. Offering the chance to register a domain name in exchange for consideration;
- 12 2. Distributing, assigning, causing registration of, and/or transferring a
13 domain name pursuant to a lottery system (*i.e.*, a system comprised of
prize, consideration, and chance);
- 14 3. Spending, distributing, encumbering, assigning, and/or transferring money
15 that Defendants have received from consumers/businesses as consideration
for the chance to register a domain name; and
- 16 4. Not prohibiting domain name registrars and other third parties, which
17 Defendants have accredited or empowered to offer domain names, from
offering the chance to register a domain name in exchange for consideration.

18 This Motion is for a Preliminary Injunction pursuant to Code of Civil Procedure,
19 sections 526 and 527, Business and Professions Code, section 17203, and the common law
20 on the grounds that Defendants and each of them are engaged in an “illegal lottery” which
21 violates both the Penal Code and Business and Professions Code, section 17200, *et seq.* As
22 stated below, Plaintiffs have demonstrated both a strong likelihood of prevailing on the
23 merits at trial and that they will suffer immediate and irreparable harm if the Preliminary
24 Injunction is not granted.

25 This Motion is based on this Notice, the attached Memorandum of Points and

26
27 ¹Although Plaintiffs named as Defendants all entities which they are informed and believe to be
28 participating in the illegal lottery scheme, Defendants ICANN and NeuLevel control the process, accredit
(*i.e.*, certify) agents as “Registrars”, and will be responsible for distributing the new <.biz> domain names.
Enjoining Defendants ICANN and NeuLevel from further implementing the lottery scheme will stop all other
Defendants.

1 Authorities, the Declarations of David Smiley, Brett Drogmund and Paul A. Traina, the reply
2 papers, on all pleadings and records on file in this action, on such other matters of which this
3 Court may take judicial notice, and upon such oral or documentary evidence as may be
4 presented at the time of hearing.

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Dated: August 20, 2001

Respectfully submitted,

NEWMAN & NEWMAN
ATTORNEYS AT LAW, LLP

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. INTRODUCTION**

4 The Defendants are engaged in an “illegal lottery” for distribution of Internet domain
5 names in California and across the United States. Specifically, Defendants are offering the
6 chance to register a domain name in exchange for consideration. Participants in the lottery
7 are required to pay for said chance, but receive nothing in return unless they happen to win
8 the lottery prize of domain name registration. The random drawing for the lottery, which
9 these Defendants created, approved and implemented, is scheduled to take place between
10 September 18, 2001 and October 2, 2001. As described below, the lottery violates both the
11 Penal Code and Business and Professions Code, section 17200, *et. seq.* (“Unfair Competition
12 Law”). As a result of Defendants’ unfair and illegal conduct, Plaintiffs and similarly situated
13 persons across the country are suffering irreparable harm for which money damages will not
14 be able to compensate them. Plaintiffs have a substantial likelihood of prevailing in this
15 action. Accordingly, Plaintiffs request a Preliminary Injunction enjoining Defendants from
16 engaging in such conduct.

17 **A. The Domain Name System and Illegal Lottery**

18 **1. Domain Names**

19 The Internet is a very important mechanism for advertising, marketing and transacting
20 business, which has become indispensable to consumers and businesses alike. Consumers
21 and businesses use the Internet to sell and buy products, research and obtain information
22 which at one time was either impossible to find or costly to retrieve, and advertise and market
23 goods and services. The Internet now provides consumers and businesses the ability to
24 access web pages and learn intimate details about companies and their products without
25 having to leave the comfort of their homes or offices.

26 Almost every computer on the Internet which offers information, research, news,
27 entertainment, etc., is identified by a domain name. Domain names have become
28 synonymous with the web sites and e-mail addresses they identify. For example, the domain

1 name <LASuperiorCourt.org>² identifies the computer which hosts the web site for the Los
2 Angeles Superior Court.

3 Domain names can become exceptionally valuable, especially if they are generic in
4 the sense that they describe a product, service, trade, or industry. For example, the domain
5 name <business.com> was sold for seven million five hundred thousand dollars
6 (\$7,500,000.00) in 1999. Recent domain name sale transactions include <beauty.com>,
7 which sold for one million dollars (\$1,000,000.00), and <loans.com>, which sold for three
8 million dollars (\$3,000,000.00). As of the date of this motion, the domain name
9 <america.com> is on sale for thirty million dollars (\$30,000,000.00), and the domain name
10 <stocks.com> is on sale for two million five hundred thousand dollars (\$2,500,000.00).
11 Accordingly, when a domain is created, there is likely to be a “land rush” of businesses
12 making all efforts to register the very valuable generic domain names.

13 Domain names end in a suffix referred to as a “top-level domain name” or “TLD”.
14 To date, the most familiar top-level domain names are <.com>, <.net>, and <.org>. The Los
15 Angeles Superior Court’s domain name <LASuperiorCourt.org> operates under the <.org>
16 top-level domain name.

17 Defendants have introduced a new top-level domain name, namely, domain names
18 ending in <.biz>. However, unlike the prior registration procedures for other TLDs, which
19 were either conducted “free of charge” or for a “registration fee only,” Defendants are
20 conducting an illegal lottery as a system for determining who wins the chance to register each
21 new <.biz> domain name. Defendants’ lottery enterprise is illegal in the state of California
22 and every other state in this country³.

23 **2. The Illegal Lottery**

24 Defendant Internet Corporation for Assigned Names and Numbers (hereinafter
25 _____

26
27 ² Internet domain names are surrounded by the caret symbols (“<>”) herein to distinguish them. The
28 caret symbols, themselves, are not part of any domain name.

³ See First Amended Complaint, n. 10, p. 21.

1 referred to as “ICANN”) is a non profit California corporation which oversees the Internet
2 domain name system. On November 16, 2000, ICANN announced that it had chosen
3 Defendant NeuLevel to be the Registry for the <.biz> domain name. A “Registry” is the
4 organization which maintains the master database of domain names ending in a single TLD.
5 There can be only one Registry for each top-level domain name. As the <.biz> Registry,
6 Neulevel has the sole power (with the consent of ICANN) to cause the technical functions
7 which make possible the registration of domain names ending in <.biz>.

8 On June 27, 2001, Defendant NeuLevel, with the approval of Defendant ICANN,
9 implemented and began the Domain Name Application process for the administration of
10 <.biz> domain names. ICANN and NeuLevel, with the help of other parties called
11 “Registrars” (most of which are also named as Defendants in this lawsuit), began selling
12 applications for the <.biz> domain names. In particular, for a monetary fee, Defendants sold
13 to persons desiring domain names, an application, or in some cases, more than one
14 application, for the chance to win the right to register certain <.biz> domain names. (Decl.
15 of Smiley ¶¶ 7, 10-11, 14, 17; Decl. of Drogmund ¶¶ 7, 9, 12.) The purchase of a chance to
16 register a domain name from Defendants does not provide consumers with the opportunity
17 to actually register a domain name. Rather, Defendants merely provide their customers with
18 the chance to win the right to register a <.biz> domain name. (Decl. of Smiley ¶¶ 4-7, 14, 20
19 and 25; Decl. of Drogmund ¶¶ 5,7 and 12.)

20 Defendants’ web sites explain the “application” process. The Defendants are
21 accepting “applications” until September 17, 2001 from consumers who wish to register a
22 <.biz> domain name for commercial purposes. Each so called “application” is eventually
23 forwarded to Defendant NeuLevel, which maintains a list of all parties requesting each
24 <.biz> domain name. Persons wishing to register these domain names may increase their
25 chances of winning the right to register by purchasing several “applications,” none of which
26 guarantee that any purchaser will actually be able to register a domain name. (Decl. of
27 Smiley ¶¶ 5, 7 and 14 ; Decl. of Drogmund ¶¶ 5 and 7). After September 17, 2001, and
28 before October 2, 2001, Defendant NeuLevel will randomly select a winner (and there can

1 only be one winner for each <.biz> domain name) who will be given the right to register the
2 domain name. The losers will get nothing. (Smiley Decl. ¶¶ 5 and 14; Decl. of Drogmund
3 ¶ 15).

4 The Defendants’ lottery scheme is explained in detail in the declarations of the
5 representative Plaintiffs, which include copies of web pages created by Defendants
6 confirming Plaintiffs’ payment for the chance to win a <.biz> domain name. (Decl. of
7 Smiley ¶¶ 10-12, 17-18; Decl. of Drogmund ¶¶ 9-10, 12-13.) However, the lottery scheme
8 is probably best described by the Defendants themselves. For example, Defendant Tucows
9 explains the “application” process as follows:

10 Can we make more than one domain application for .biz domain names? Sure,
11 .biz operates like a lottery so the more applications (tickets) you buy the better
12 your chances of winning; the best way of securing a domain name is by filing
13 an IP Claim. (Decl. of Smiley ¶¶ 25 and 26.)

13 Defendant DotBiz.Lottery.com begins its solicitation by saying, “Get your Name in
14 the Hat and Win!” The web page explains that:

15 “NeuLevel, the registry operator for the new .biz top-level domain names has
16 opened the preregistration phase for .biz domain name extensions. They are
17 treating the .biz domain name selection process like a **lottery**. That means that
18 everyone has a **chance** at getting a really great domain name like sex.biz or
19 show.biz - just think - these names **could be worth millions!** . . . the more
20 applications/entries that you submit for a domain name, the better your **chances**
21 of **winning** the right to register that domain name. For example if there are 100
22 applications/entries submitted by different people for the same domain name,
23 if you have submitted 25 of those applications you will have a 25% of getting
24 it!” (Decl. of Smiley ¶¶ 5 and 6). [emphasis added].

21 **B. Summary of Argument**

22 An illegal lottery consists of three elements: (1) prize, (2) chance, and (3)
23 consideration. As described below, Defendants’ domain name distribution scheme is
24 comprised of those elements, and therefore constitutes an unlawful enterprise in California
25 and all other states in this country. Accordingly, there exists a substantial likelihood that
26 Plaintiffs will be successful on the merits of their complaint.

27 Unless this Court issues a preliminary injunction to enjoin Defendants’ unlawful
28 lottery scheme, Plaintiffs will suffer a “snow-ball” effect of irreparable harm. Consumers

1 are being victimized by Defendants' illegal and unfair conduct, and such harm to consumers
2 will continue and become substantially worse in the event Defendants' lottery enterprise is
3 continued as planned. On the other hand, the harm Defendants will suffer if the Preliminary
4 Injunction is issued is minimal. In fact, the Defendants will not lose any revenue, nor will
5 they be unable to sell and cause registrations of <.biz> domain names in a legal manner. The
6 injunction will prohibit only an unlawful lottery – the injunction will not enjoin the lawful
7 use or distribution of <.biz> domain names or any other domain names.

8 Given the date for the drawing, time is of the essence. Defendant NeuLevel plans to
9 begin awarding domain name prizes pursuant to the illegal lottery after September 17, 2001.
10 The issuance of Preliminary Injunction will ensure that, at the very least, consumers across
11 the country will not continue to be victimized by Defendants' unfair and illegal conduct.

12 **II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION**

13 **A. Preliminary Injunction Standard**

14 Code of Civil Procedure, sections 526 and 527, provides the circumstances in which
15 a court should issue a Preliminary Injunction. Code of Civil Procedure, section 526, provides
16 that an injunction should be granted:

- 17 (1) When it appears by the Complaint that the Plaintiff is
18 entitled to the relief demanded, and the relief, or any
19 part thereof, consists in restrained the commission or
20 continuance of the act complained of, either for a
21 limited period or perpetually.
- 22 (2) When it appears by the Complaint or affidavits that the
23 commission or continuance of some act during the
24 litigation would produce waste, or great or irreparable
25 injury, to a party to the action.

26 In addition, Business and Professions Code, section 17203, expressly authorizes the
27 issuance of a Preliminary Injunction to enjoin unfair or unlawful conduct, providing:

28 “Any person who engages, has engaged, or proposes to engage
in unfair competition may be enjoined in any court of
competent jurisdiction. The court may make such orders or
judgments, including the appointment of a receiver, as may be
necessary to prevent the use or employment by any person or
any practice which constitutes unfair competition, a defined in
this chapter, or as may be necessary to restore to any person in

1 interest any money or property, real or personal, which may
2 have been acquired by means of such unfair competition”

3 It has long been established that the Unfair Competition Law “recognizes not only the
4 public interest in protection against unfair business practices but also the Plaintiff’s right to
5 enjoin such unfair practices.” (*Metro-Goldwyn-Mayer, Inc. v. Lee* (1963) 212 Cal.App.2d
6 23, 28.) Here, violation of California Penal Code, section 319, which prohibits lotteries, is
7 a *per se* act of unfair competition pursuant to Business and Professions Code, section 17200.
8 (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838; *Samura v. Kaiser Foundation*
9 *Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1299.) As further illustrated below, this
10 Court should grant Plaintiffs’ request for a Preliminary Injunction because Defendants are
11 engaged in unfair and unlawful conduct constituting competition.

12 The decision whether to grant a Preliminary Injunction is based on two interrelated
13 factors: (1) the likelihood Plaintiffs will prevail on the merits at trial; and (2) the interim
14 harm Plaintiffs will likely sustain if the injunction is denied as compared to the harm that the
15 Defendants will suffer if the injunction is issued. (*California Correctional Peace Officer*
16 *Assn. v. State of California* (2000) 82 Cal.App.4th 294, 302.) In this case, the evidence
17 submitted in support of the instant motion illustrates that Defendants are engaged in a lottery
18 which the Penal Code and Business & Professions Code proscribe. Likewise, the evidence
19 shows that Plaintiffs are suffering, and unless Defendants’ conduct is enjoined, will continue
20 to suffer irreparable harm.

21 **B. Plaintiffs will Prevail on the Merits on their Business and Professions**
22 **Code Section 17200 Cause of Action**

23 In order to prevail on a Business and Professions Code, section 17200, claim,
24 Plaintiffs must demonstrate that Defendants are engaged in “unfair competition.” “[U]nfair
25 competition means and includes any unlawful, unfair, or fraudulent business act or practice
26 and unfair, deceptive, untrue or misleading advertising. . . .” (Bus. & Prof. Code, § 17200.)
27 “An unlawful business activity includes anything that can properly be called a business
28 practice and that at the same time is forbidden by law.” (*People v. McKale* (1979) 25 Cal.3d

1 626, 631 [internal quotation marks omitted].) In this case, Defendants’ creation and
2 implementation of a lottery for the distribution of <.biz> domain names constitutes a business
3 practice which is unfair and unlawful because California Penal Code, section 319, *et. seq.*
4 expressly forbids such practices. Thus, Plaintiffs should prevail on the merits of their claim.

5
6 **1. The <.Biz> Domain Name Distribution Scheme is an Unlawful Lottery**

7 California’s Unfair Competition Law prohibits any practices forbidden by law, be it
8 civil, federal, state, etc. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th
9 553, 560.) The Penal Code makes it unlawful to operate a lottery, sell tickets, and aid and
10 assist in a lottery scheme. (Pen. Code, §§ 319-322.)

11 Penal Code, section 319, defines a lottery as “any scheme for the disposal or
12 distribution of property by chance, among persons who have paid or promised to pay any
13 valuable consideration for the chance of obtaining such property or a portion of it or for any
14 share or any interest in such property, upon any agreement, understanding, or expectation that
15 it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or
16 gift-enterprise, or by whatever name the same may be known.” The Penal Code provides that
17 to operate a lottery, sell lottery tickets, and aid or assist in a lottery scheme is a crime. (Pen.
18 Code., §§ 320-322.)

19 A lottery consists of three elements: (1) a prize; (2) distribution of the prize by chance;
20 and (3) consideration. (*Western Telcon, Inc. v California State Lottery* (1996) 13 Cal.4th 475,
21 484.) The process created and implemented by the Defendants satisfies all three elements.

22 **2. Defendants’ Scheme Satisfies All Elements of a Lottery**

23 **a. The Prize is the <.Biz> Domain Name**

24 A “[p]rize encompasses property that the [lottery] operator offers to distribute to one
25 or more winning participants and not to keep for himself.” (*Hotel Employees and Rest.*
26 *Employees Int’l Union v. Davis* (1999) 21 Cal.4th 585, 592.) Undisputably, one lucky
27 winner for each requested <.biz> domain name will receive the right to register the domain
28 name for which it has applied. The winners will be able to control and use their respective

1 domain names exclusive of the rights of others. Each and every domain name represents an
2 address distinct from others on the Internet, and thus a considerable value to the holder. The
3 winner of each domain name will have the exclusive right to use, transfer, sell, trade, gift,
4 and dispose of its domain name prize. Additionally, the winner of each domain name will
5 be able to market its name to the public, and establish goodwill associated with the domain
6 name which will benefit such winner's business. The Defendants, as well as the applicants,
7 understand that a domain name has significant and unique value, and constitutes the ultimate
8 "prize" for the lucky winner.

9 **b. The "Chance" to Win a Prize Is The Random Selection**

10 "Chance" means winning and losing depends on luck and fortune rather than, or at
11 least more than, judgment and skill." (*Ibid.*) Defendant NeuLevel admitted it will randomly
12 select one winner from a pool of multiple applicants and distribute domain names
13 accordingly. (Decl. of Smiley ¶ 20.) Each application submitted increases the applicant's
14 "chance" of winning. (See Decl. of Smiley ¶¶ 7, 14, 25; Decl. of Drogmund ¶ 7.) Here,
15 Defendants' lottery scheme is dominated by "chance" because once a Plaintiff submits an
16 application, no skill or judgment of the applicant is involved to win. (See generally, *In re*
17 *Allen* (1962) 59 Cal.2d 5, 6.) The applicant's skill, or lack thereof, has no bearing on the
18 ultimate outcome. Instead, the sole factor of winning a <.biz> domain name is predicated
19 upon the "luck-of-the-draw".

20 **c. The Consideration is the Fee Charged for the Chance**

21 "Consideration" is the fee (in the form of money or anything else of value) that a
22 participant pays the operator for entrance." (*Hotel Employees and Rest. Employees Int'l*
23 *Union v. Davis, supra*, 21 Cal.4th at p. 592 citing *Cal. Gas. Retailers v. Regal Petroleum*
24 *Corp.* (1958) 50 Cal.2d 844, 853-854, 857-862.) Here, Plaintiffs paid "consideration" in the
25 form of a monetary fee to Defendants for a chance to win a <.biz> domain name. For
26 example, Plaintiff Smiley paid "consideration" in the form of \$5.00 to Defendant Dotster,
27 Inc., for the chance to register <radio.biz>, and \$5.00 to Defendant, Dotbizlottery.com for
28 the chance to register <dj.biz>. (Decl. of Smiley ¶¶ 4, 10, 11 and 17; Decl. of Drogmund

1 ¶¶ 5 and 12). For each lottery ticket sold (*i.e.*, each domain name “application” submitted),
2 Defendant Neulevel receives \$2.00 in consideration therefor.

3 Moreover, during the first week of the application process, Defendants were touting
4 the fact that they had already received millions of applications (*i.e.*, therefore millions of
5 dollars) for the <.biz> lottery. Hence, the evidence submitted demonstrates that Plaintiffs
6 have paid valuable consideration to Defendants (operators of the lottery) for a chance to win
7 a prize.

8 **3. Defendants Admit that the Domain Names are Going to be**
9 **Distributed Pursuant to a Lottery**

10 The Court need only look at the Defendants’ own web sites to determine that the
11 enterprise in which they are engaged in is an illegal lottery. For example, Defendant
12 DotBizLottery.com’s web site proclaims: “Get your name in the hat and Win!”
13 Additionally, Defendant DotBizLottery.com describes the lottery:

14 NeuLevel the registry for the operator for the new <.biz> top
15 level domain names has opened the pre-registration phase for
16 <.biz> domain name extensions. They are treating the <.biz>
17 domain name and selection process like a lottery. That means
18 that every one has a chance of getting a really great domain
19 name like sex.biz or show.biz- just think- these names could
20 be worth millions. (Decl. of Smiley ¶¶ 5 and 6)

21 Like DotBizLottery, Defendant Dotster’s web site describes the lottery process as
22 follows:

23 You may submit as many applications per domain as you like.
24 Submitting more applications means you will have a better
25 chance of winning the domain in the random application
26 selection process. An independent third party selected by the
27 .biz Registry will randomly select from all registration
28 applications once the application phase is over (scheduled for
September 2001). The more applications you submit for your
requested .biz domains, the better your chance of receiving
them during the drawing. However, there are no guarantees,
no matter how many applications you submit, that you will
receive the domain. (Decl. of Smiley ¶¶ 14 and 15)

29 The evidence submitted demonstrates that Defendants admit they have created,
30 implemented and profited from a lottery – an illegal enterprise. Whether the Defendants
31 created the scheme intentionally or out of pure ignorance is irrelevant. Defendants’ lottery
32 scheme is unlawful, and therefore a violation of the Unfair Competition Law. Accordingly,

1 Plaintiffs will be successful on the merits of their claim.

2 **C. Plaintiffs have Suffered and will Continue to Suffer Substantial Harm if**
3 **the Illegal Lottery is Allowed to Continue**

4 The general purpose of a Preliminary Injunction is the preservation of the status quo
5 pending a final determination on the merits of the action. (*Continental Baking Co. v. Katz*
6 (1968) 68 Cal.2d 512, 528.) In determining whether to issue a Preliminary Injunction, the
7 Court will consider the harm to Plaintiffs if the injunction is not issued. (*Shoemaker v.*
8 *County of Los Angeles* (1995) 37 Cal.App.4th 618, 633.) In considering the irreparable harm
9 to Plaintiffs, the court performs a “balance-of hardships” analysis. (*Lubavitch Congregation*
10 *v. City of Long Beach* (1990) 217 Cal.App.3d 1388, 1392.) “The more likely it is that
11 Plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur
12 if the injunction does not issue.” (*King v. Meese* (1987) 43 Cal.3d 1217, 1227.) In fact, the
13 court may issue a Preliminary Injunction solely on the strength of the Plaintiffs’ likelihood
14 to prevail on the merits at trial. (*Lubavitch Congregation v. City of Long Beach, supra*, 217
15 Cal.App.3d at p. 1392; *King v. Meese, supra*, 43 Cal.3d at p. 1227.)

16 Given this generous standard, a Preliminary Injunction should be granted because
17 Plaintiffs have illustrated a likelihood of success at trial, and as described below, will suffer
18 irreparable injury as a result of Defendants’ illegal lottery scheme.

19 **1. Plaintiffs and Consumers Are Victims of Defendants’ Penal Code**
20 **Violations**

21 The fact that Defendants have engaged, and continue to engage, in an unfair business
22 practice which is prohibited by law is a *per se* violation of Business and Professions Code
23 § 17200 *et seq.*, thereby causing harm to consumers. (*Saunders v. Superior Court, supra*, 27
24 Cal.App.4th at p. 838; *Samura v. Kaiser Foundation Health Plan, Inc., supra*, 17
25 Cal.App.4th at p. 1299.) Here, Defendants have engaged in a massive lottery which is
26 unlawful and inherently unfair to Plaintiffs. Unless this Court grants a Preliminary Injunction
27 precluding the distribution of the <.biz> domain names by a lottery, Defendants will continue
28 to operate an unlawful enterprise in violation of Penal Code, section 319, *et. seq.* Thus,

1 Defendants will continue to accept application fees and continue to profit from their unlawful
2 business practices at the expense of innocent consumers.

3 The very nature of the lottery scheme is one designed to inflict harm to consumers by
4 encouraging consumers to pay valuable consideration for nothing in return. Plaintiffs are
5 encouraged to purchase multiple “applications” to increase their “chances” of winning their
6 requested domain name. (Decl. Smiley ¶¶ 7, 14, 25; Decl. of Drogmund ¶ 7.) As a result,
7 Plaintiffs are left with a “Hobson’s choice”: either continue to purchase applications to
8 increase their chances of winning a <.biz> domain name; or buy only one application and
9 hope for the best. In either scenario, the only way for a person to obtain a <.biz> domain
10 name is to participate in Defendants’ illegal lottery distribution scheme. Hence, Defendants
11 continue to profit from an inherently “unfair” and “unlawful” business practice which causes
12 harm to Plaintiffs.

13 This leads to a second problem. Currently, the only way to obtain a <.biz> domain
14 name is to participate in Defendants’ lottery. Every day that Defendants are allowed to
15 perpetuate their illegal lottery is another day that Defendants have violated the anti-lottery
16 laws. More importantly, Defendants continue to hoodwink consumers into participating in
17 their lottery scheme, thereby profiting at the expense of the consumers. This creates an
18 ongoing harm which is impossible to value and can only be remedied by the imposition of
19 a Preliminary Injunction.

20 21 **2. Plaintiffs Will Suffer Irreparable Harm To Their Businesses**

22 If Defendants are allowed to distribute the domain name prizes through their unlawful
23 lottery distribution scheme on September 18, 2001, Plaintiffs, and consumers alike, will
24 suffer substantial irreparable harm with respect to their businesses, consumer relations, and
25 goodwill.

26 First, domain name winners will likely start production and/or expansion of their
27 businesses in reliance upon their newly received <.biz> addresses, but have to relinquish
28 them when the domain names are distributed legally. Plaintiffs will expend energy, money,

1 and time in developing their web site addresses, advertising their new addresses, developing
2 consumer relations through their addresses, and hiring employees.

3 For instance, in the event Plaintiff Skyscraper wins the domain name
4 <comicbook.biz>, it plans to expand its business by creating a web site offering comic books
5 on the Internet via that domain name. Skyscraper intends to hire new employees to run this
6 web site and fill incoming orders, pay substantial amounts and expend energy in designing
7 and perfecting a consumer friendly <comicbook.biz> web site, enter into third party contracts
8 to advertise the new web site address, purchase the necessary equipment to run the business,
9 and possibly accept bank loans to finance the enterprise. However, it is likely that
10 Skyscraper will be forced to abandon the domain name because it was distributed pursuant
11 to an illegal lottery. As a result, Plaintiff Skyscraper will suffer irreparably because its
12 businesses--predicated upon the receipt of the <.biz> name--will be destroyed. Compounded
13 by the thousands of <.biz> domain names that will be required to be returned, Plaintiffs'
14 irreparable injury is of astronomical proportions that will likely open a "Pandora's box" of
15 litigation.

16 Second, Plaintiffs will suffer irreparable harm by a loss of a potential business
17 expectancy if the illegally distributed <.biz> domain names must be eventually returned.
18 Consumers who once patronized Plaintiffs' businesses on the Internet will be unable to locate
19 Plaintiffs to conduct future transactions. This will encumber and damage Plaintiffs' business
20 practices because it will create the impression that Plaintiffs are no longer engaged in that
21 particular business, or worse yet, have gone out of business. As a result, Plaintiffs will be
22 cast with the incurable stigma of a bankrupt or defunct business. In either case, Plaintiffs'
23 customers will likely look elsewhere for those services, instead of seeking out Plaintiffs'
24 particular businesses.

25 Additionally, the issuance of a Preliminary Injunction will likely prevent consumer
26 confusion. Courts have consistently employed the Unfair Competition Law as a vehicle for
27 preliminarily enjoining conduct which even *potentially* causes consumer confusion or
28 deception. (See generally, *Metro-Goldwin-Mayer, Inc. v. Lee, supra*, 212 Cal.App.2d at p.

1 29.) When the domain names are eventually recalled and re-distributed—in a legal and fair
2 method—the names will most likely be distributed to different applicants. This will cause
3 confusion among consumers because different businesses will now own the <.biz> addresses.
4 Hence, the unwitting consumer--thinking that he is dealing with a business entity with which
5 he has had prior business relations--will actually be conducting business with an unknown
6 entity. This will not only cause a loss to Plaintiffs' businesses, but potentially cause damage
7 to the consumer who is confused over the change in ownership of the <.biz> address.

8
9 **3. Plaintiffs Will Suffer Irreparable Harm Because Defendants'
10 Lottery Scheme "Unfairly" Distributes Invaluable Domain Names
11 By Chance**

12 The Internet is a tremendous force in today's society which has spawned new and
13 innovative ways to conduct business in world-wide proportions. Domain names are the key
14 to finding businesses, consumers, information, entertainment, news, and data on the Internet.
15 For this reason, each Internet Domain Name has a value that is impossible to quantify. In
16 recent years, domain names have been sold for millions of dollars. (*See supra*, p. 2)

17 The reason for this is simple: to obtain a <.biz> domain name with a common word
18 prefix almost insures that the domain name will be extremely valuable. When consumers
19 conduct searches on the Internet, they enter common words, such as "books," "art," "music,"
20 "food," etc. (*See Panavision International v. Toeppen*, (9th Cir. 1998) 141 F.3d 1316, 1319
[a domain name is the simplest way of locating a web site by performing key word search].)

21 If Defendants are allowed to distribute domain names through their lottery scheme,
22 consumers will be irreparably harmed because they will forever lose the opportunity to fairly
23 secure one of the valuable <.biz> domain names. Instead, only those persons lucky enough,
24 or rich enough to purchase multiple applications, will benefit. This is a value that cannot be
25 measured by monetary damages, nor be cured by restitution.

26 **D. Defendants Will Not Suffer Any Harm If a Preliminary Injunction Issues
27 Because They Can Distribute the Domain Names by Lawful Means**

28 Finally, the issuance of the Preliminary Injunction will not cause harm to Defendants.

1 The <.biz> domain names are not perishable goods that will spoil if not quickly distributed,
2 nor will they lose any value if distributed pursuant to lawful means. An injunction will
3 simply allow the time necessary to insure that the continuing harm to Plaintiffs ceases, and
4 the integrity and lawfulness of the process is upheld. In any event, Defendants can cause
5 registrations, sell, and administer <.biz> domain names in a legal fashion.

6 Defendants are in the business of registering and distributing domain names. The
7 proposed injunction will not prevent Defendants from continuing their business. Defendants
8 can employ many lawful alternative means of distributing <.biz> domain names. The
9 injunction would not prohibit Defendants from distributing domain names on a first-come
10 first-serve basis⁴, a competitive bidding process (*i.e.*, an auction), or from randomly selecting
11 domain name registrants from a pool of applications accepted without consideration. These
12 examples neither violate the Penal Code nor the Business and Professions Code. Instead,
13 Defendants have chosen to distribute the names through their unlawful lottery system for one
14 simple reason: to make money at the expense of consumers. Unless enjoined, the Defendants
15 will continue their unlawful means of domain name sales, as opposed to the many legal
16 alternatives available to them.

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28 ⁴Most domain names currently available, including domain names under the <.com>, <.org>, and <.net> TLDs, have been distributed for years on a first-come-first-serve basis.

1 **III. CONCLUSION**

2 For the foregoing reasons, Plaintiffs are entitled to a Preliminary Injunction and
3 respectfully ask this Court to issue an order enjoining Defendants from:

- 4 1. Offering the chance to register a domain name in exchange for consideration;
5 2. Distributing, assigning, causing registration of, and/or transferring a
6 domain name pursuant to a lottery system (*i.e.*, a system comprised of
7 prize, consideration, and chance);
8 3. Spending, distributing, encumbering, assigning, and/or transferring money
9 that Defendants have received from consumers/businesses as consideration
10 for the chance to register a domain name; and
11 4. Not prohibiting domain name registrars and other third parties, which
12 Defendants have accredited or empowered to offer domain names, from
13 offering the chance to register a domain name in exchange for consideration.

14 Dated: August 20, 2001

Respectfully Submitted,

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16 ATTORNEYS AT LAW, LLP

17 ENGSTROM, LIPSCOMB & LACK
18 A PROFESSIONAL CORPORATION

MASRY & VITITOE
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19 By:

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am and was at all times mentioned employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10100 Santa Monica Boulevard, 16th Floor, Los Angeles, CA 90067-4107.

On **August 21, 2001** I served the foregoing documents described as **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS OF DAVID SMILEY; BRETT DROGMUND; AND PAUL A. TRAINA** on the interested party(ies) in this action by placing ___ the original X a true copy thereof enclosed in the sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

- BY MAIL: I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.
- BY PERSONAL DELIVERY: I caused to be delivered such envelope by hand to the offices of the addressee.
- VIA FACSIMILE
- VIA EXPRESS MAIL

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. It is deposited with U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

STATE [X]
FEDERAL []

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of an attorney permitted to practice before this Court, at whose direction this service was made.

Executed on **August 21, 2001** at Los Angeles, California.

Luz E. Calderon

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SERVICE LIST

Smiley v. ICANN, et al.
Los Angeles County Superior Court, Central District
Case No. BC 254659

Attorney		Party
Internet Corporation for Assigned Names & Numbers c/o C.T. Corp. 818 West Seventh Street Los Angeles, California 90017		Defendant
NeuLevel, Inc. c/o Commonwealth Legal Services 4701 Cox Road Suite 301 Glen Allen, VA 23060-6802		Defendant
Network Solutions, Inc. c/o C.T. Corp. 818 West Seventh Street Los Angeles, California 90017		Defendant
Dotster, Inc. c/o Alan L. Engstrom 1317 S. 13th Ave., P.O. Box479 Kelso, WA 97626		Defendant
Dotbizlottery.com c/o Stuart Mercer 9841 Airport Blvd. Suite 700 Los Angeles, California 90045-5409		Defendant
Internet Names Worldwide(US),Inc. c/o Aimee Kushner 2020 Stuart Street Berkely, CA 94703		Defendant
Verisign, Inc. c/o Dana Evan 13390 Shorebird Way Mountain View, CA 94043		Defendant
Alldomains.com c/o Christopher Bura 2261 Morello Avenue, Suite C Pleasant Hill, California 94523		Defendant