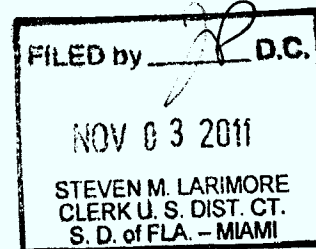


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-14052-CIV-MARTINEZ-LYNCH



JOHN ZUCCARINI,	)
	)
Plaintiff,	)
	)
v.	)
	)
NETWORK SOLUTIONS, LLC,	)
a Delaware Limited Liability Company;	)
NAMEJET, LLC,	)
a Delaware Limited Liability Company;	)
INTERNET CORPORATION	)
FOR ASSIGNED NAMES	)
AND NUMBERS, INC.	)
a California non-profit Corporation;	)
	)
Defendants.	)
_____	)

**PLAINTIFF ZUCCARINI'S RESPONSE TO THE INTERNET CORPORATION  
FOR ASSIGNED NAMES AND NUMBERS, INC., OPPOSITION TO PLAINTIFF'S  
MOTION TO COMPEL FURTHER INTERROGATORY RESPONSES**

**INTRODUCTION**

- A. Newly Discovered Evidence Demonstrates ICANN Does Have a Policy That Requires Network Solutions to Prevent Domain Names Which are the Subject of Court Proceedings, to Not Be Lost to The Registrant Through Lack of Renewal.**

Plaintiff John Zuccarini ("Zuccarini") in this Response, presents to the Court critical newly discovered evidence that clearly demonstrates the Internet Corporation for Assigned Names and Numbers, Inc. ("ICANN"), and the other Defendants were negligent in allowing the subject fourteen domain names to be auctioned without authorization from the California District Court in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND

*California 2007.*

This new evidence being ICANN's, Expired Domain Deletion Policy, which cites a “*domain name subject to litigation in a court of competent jurisdiction,*” is not subject to cancellation of that domain name's registration, if not renewed by the registrant of the domain name.

In addition, Zuccarini has found the Network Solutions, LLC (“Network Solutions”) Domain Deletion Policy on the Network Solutions website, which is though, much less explicit in fully explaining the ICANN Expired Domain Deletion Policy agreement that Network Solutions has entered into with ICANN.

The discovery of this new evidence makes it even more important that ICANN be compelled to provide responsive and substantive answers to the First Set of Interrogatories propounded upon them.

ICANN requires all registrars it accredits to abide by the terms of the Expired Domain Deletion Policy in the Registrar Accreditation Agreement that is entered into by a registrar with ICANN. This would include of course, Network Solutions.

There are two versions of ICANN's Expired Domain Deletion Policy, one dated September 11, 2004 and an updated version dated May 11, 2011 (*Exhibit A*). The language relevant to the issues of this action concerning the deletion of expired domain name is identical in both the original 2004 version and the 2011 version.

The September 11, 2004 version can be found on the ICANN website at <http://www.icann.org/en/registrars/eddp-21sep04-enp.htm>. The May 11, 2011 version can be found on the ICAN website at <http://www.icann.org/en/registrars/eddp.htm>.

Below is the relevant text from ICANN's, May 11, 2011 Expired Domain Deletion Policy:

3.7.5 *At the conclusion of the registration period, failure by or on behalf of the Registered Name Holder to consent that the registration be renewed within the time specified in a second notice or reminder shall, in the absence of extenuating circumstances, result in cancellation of the registration by the end of the auto-renew grace period (although Registrar may choose to cancel the name earlier).*

3.7.5.1 *Extenuating circumstances are defined as: UDRP action, valid court order, failure of a Registrar's renewal process (which does not include failure of a registrant to respond), the domain name is used by a nameserver that provides DNS service to third-parties (additional time may be required to migrate the records managed by the nameserver), the registrant is subject to bankruptcy proceedings, payment dispute (where a registrant claims to have paid for a renewal, or a discrepancy in the amount paid), billing dispute (where a registrant disputes the amount on a bill), domain name subject to litigation in a court of competent jurisdiction, or other circumstance as approved specifically by ICANN.*

3.7.5.2 *Where Registrar chooses, under extenuating circumstances, to renew a domain name without the explicit consent of the registrant, the registrar must maintain a record of the extenuating circumstances associated with renewing that specific domain name for inspection by ICANN consistent with clauses 3.4.2 and 3.4.3 of this registrar accreditation agreement.*

Network Solutions Expired Domain Deletion Policy (*Exhibit B*), can be found on their website at <http://www.networksolutions.com/support/domain-deletion-policy/>. Network Solutions while referring to “*extenuating circumstances*,” in their policy, does not fully detail the instances in which “*extenuating circumstances*” exist and which would prevent the deletion of a domain name that is the “*subject to litigation in a court of competent jurisdiction.*” This lack of fully explaining the details of the Expired Domain Deletion Policy Network Solutions has

entered into with ICANN, could in itself be considered negligent, as how would a registrant of a domain name know fully what their rights are as it relates to the deletion of a domain name.

In consideration of this compelling new evidence, it is evident that the loss of the subject fourteen domain names through their registration at Network Solutions should never have occurred, and that Network Solutions by was negligent in allowing the fourteen domain names to expire and proceed to the auctions conducted by NameJet, LLC (“NameJet”). This loss of registration being in direct violation of the Registrar Accreditation Agreement, Network Solutions entered into with ICANN.

This new evidence also showing ICANN negligent in not having competent oversight policies in place towards Network Solutions, especially knowing the history of the lack of due diligence on the part of Network Solutions in performing their duties as it relates to the improper transfer of domain names, as demonstrated in the sex.com case in, *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003).

Further, this new evidence demonstrates the negligence on the part of NameJet, as NameJet being an extended entity in the domain name system, beholdng to the policies of ICANN to even exist and function as a company. Without ICANN, there could be no other entity conducting a business related to domain names. In consideration of this circumstance it should be incumbent upon NameJet to consider all the policies that ICANN requires registrars to enter into with ICANN, and incorporate those policies into their own. In this case an important policy, such as the one as it relates to the deletion of domain names, as NameJet's entire business model is framed around the deletion of domain names and the subsequent auctioning of them. By not having a policy in place that mirrors ICANN's, Expired Domain Deletion Policy, NameJet is as negligent as Network Solutions in allowing the fourteen domain names to be auctioned.

## **BACKGROUND**

Defendant ICANN in their Introduction to their Opposition to Compel claims Plaintiff Zuccarini is “*knowingly burdening this Court and ICANN with all-encompassing merits-based discovery requests that are inappropriate in light of ICANN's pending motion (filed on March 22, 2011) to dismiss...*” Zuccarini disagrees with this assertion, as by filing his motion to compel Zuccarini is only taking the steps necessary to try to meet the Court's November 30, 2011 deadline for completion of discovery.

Zuccarini made clear through email messages sent to counsel for ICANN and prior to the filing of the motion to compel the reasons for the filing of the motion, despite that fact that Zuccarini had in prior motions not opposed the delay of discovery. That being in communications with the Court concerning procedural matters, Zuccarini was informed the lack of ruling on the motions to dismiss, and on the motions to delay discovery till the motions to dismiss were ruled upon, were not considered by this Court as reasons to delay discovery and not meet the November 30, 2011 discovery deadline.

## **RESPONSES TO ICANN'S SPECIFIC OPPOSITION TO INTERROGATORIES**

### **1. Response to ICANN's Claim Interrogatories are Overly Broad and Seek Irrelevant Information.**

On page 6 of the ICANN's Opposition, ICANN claims “*C. Plaintiff's Interrogatories Are Overly Broad And Seek Irrelevant Information.*” In the second paragraph of page 7, ICANN states, “*As set forth in detail in ICANN's pending Motion to Dismiss, Plaintiff's amended complaint fails to allege facts sufficient to establish that ICANN created a foreseeable zone of risk of harming Plaintiff, (Mot. to Dismiss, Dkt. 19 at 14-17. ) In other words, Plaintiff has not - and cannot as a matter of law -- demonstrate that ICANN owed him a duty of care.*” Zuccarini

disagrees with these assertions by ICANN, as ICANN's Articles of Incorporation state broad and encompassing responsibilities that have been empowered to ICANN by the United States Government to administer the Internet domain name system. Responsibilities and duties that ICANN neglected and which caused harm to Zuccarini. (*Exhibit B, copied exactly as it appears on the ICANN website at <http://www.icann.org/en/general/articles.htm>*)

Contained in ICANN's Articles of Incorporation, Revised November 21, 1998, Article 3., Item (iii), *performing and overseeing functions related to the coordination of the Internet domain name system ("DNS")...*

Zuccarini believes Article 3., Item (iii), as specifically applied to this instant action, demonstrates ICANN by not having in place protocol to assure Network Solutions followed ICANN's Expired Domain Deletion Policy, to not cancel the registration of the subject fourteen domain names that were being held by a receiver in, *Office Depot, Inc. v. Zuccarini, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007*, ICANN has breached and neglected the duties placed upon them. Duties that extend to someone such as Zuccarini, who seeks fair and equitable treatment from any domain name registrar that ICANN accredits and oversees.

If ICANN is going to allow the domain name registrars it accredits and empowers to exist and function, such as Network Solutions, to haphazardly apply or not apply the due diligence necessary to assure parties who have an interest in a particular domain name that is the subject of an ongoing legal proceeding, to not lose that domain name through fraud, or by simply lack of renewal, this lack of policy and oversight by ICANN is negligent in itself.

For the reasons set forth in the above, Zuccarini believes he has shown ICANN has neglected a duty bestowed upon them by the United States Government, and has created a foreseeable zone of risk that harmed the Plaintiff Zuccarini by not having in place a protocol to

assure Network Solutions followed the requirements of ICANN's Expired Domain Deletion Policy, to not have canceled the registration of the subject fourteen domain names in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007. The end result being the fourteen domain names proceeded to an automated Internet auction conducted by NameJet, from which Zuccarini and his beneficiaries received little if any benefit.

In consideration of the above, Zuccarini contends his Interrogatories are not overly broad and seek relevant information to further investigate his claims.

**2. Response to ICANN Opposition to Interrogatory Nos. 1-5: Information Relating To “Performance Reviews” Of Nearly 1,000 Accredited Registrars is Irrelevant.**

ICANN states that Zuccarini has not shown why information sought in Interrogatories 1-5 should be compelled. Zuccarini believes by ICANN not having any type of protocol in place to assure Network Solutions followed the requirements of ICANN's Expired Domain Deletion Policy, ICANN has not fulfilled it's responsibilities as stated in ICANN's Articles of Incorporation, Revised November 21, 1998, Article 3., Item (iii), *performing and overseeing functions related to the coordination of the Internet domain name system ("DNS")...*

How could ICANN perform and oversee the functions related to the coordination of the Internet domain name system, if ICANN does not monitor the actions of the domain name registrars, as the registrars, not the registry ICANN, are the entities who perform the functions necessary to allow any entity to acquire a domain name and use that domain name on the Internet.

Zuccarini addresses ICANN's First, Second and Third additional reasons.

First: Zuccarini has on pages 1-4 of his **Introduction** to this response addressed ICANN's claim related to the issue of duty, which Zuccarini believes ICANN has neglected as it relates to

this instant action.

Second: ICANN objects to compel Interrogatory Nos. 1-5 based on their believe that they have nothing to do with the Plaintiff's allegations, are overly burdensome and seek irrelevant information. Zuccarini contends none of these objections are sustainable, as such information is necessary to show a possible pattern of neglect in ICANN's oversight of the functions of the domain name registrars it accredits, which in turn would show a lack of duty on ICANN's part in their fulfilling their responsibilities as stated in ICANN'S Articles of Incorporation, Article 3., Item (iii), *performing and overseeing functions related to the coordination of the Internet domain name system ("DNS")...*”

Third: ICANN contends Interrogatory Nos. 1-5 have no time limitation and therefore are overly broad and burdensome. Zuccarini believes there should be no time limitation, especially in light of Network Solutions problems as it relates to their performance in fulfilling their duties as a domain name registrar going back over ten years in their notable improper transfer of the domain name sex.com, from it's original owner Gary Kremen to Stephen Cohen, which was ultimately heard in the action, *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003).

**3. Response to ICANN Opposition to Interrogatory Nos. 6-9: Information Relating To ICANN's “Performance Reviews” Of Network Solutions Is Irrelevant.**

ICANN contends that the information sought in Interrogatory Nos. 6-9 is not relevant as it relates to Network Solutions, and contends because Zuccarini is not a party to the Registrar Accreditation Agreement he has no rights as a non-party.

Zuccarini disagrees with Network Solutions assertion that as a non-party, or third party that Zuccarini has no rights. ICANN by recognizing the need to prevent the deletion of domain names that are “*subject to litigation in a court of competent jurisdiction,*” ICANN concedes it recognizes



such actions and logically it must also then recognize the parties to such actions, as how can an action exist without the parties to the action, as Zuccarini was a party in, *Office Depot, Inc. v. Zuccarini*, (06-80356) 488 F. Supp. 2d 920 - Dist. Court, ND California 2007.

Zuccarini has also addressed issues raised in this opposition, in his response, **2. Response to ICANN's Claim Interrogatory Nos. 1-5: Information Relating To "Performance Reviews" Of Nearly 1,000 Accredited Registrars is Irrelevant.**

**4. Response to ICANN Opposition to Interrogatory Nos. 10-15: Information Regarding Affirmative Defenses Not Yet Plead Cannot Be Compelled.**

Zuccarini inadvertently omitted the word "amended" in Interrogatory Nos. 10-15. In all of Interrogatory Nos. 10-15, the phrase "*plaintiff's complaint*" should have read, "*plaintiff's amended complaint.*"

In consideration of ICANN's response to the directly above referenced issue and ICANN's stating they have not yet answered the amended complaint, Zuccarini rephrases Interrogatory Nos. 10-15 as follows:

10. With reference to each affirmative defense you alleged in your Memorandum In Support of its Motion to Dismiss (Dkt. 19) and Reply Memorandum In Support of its Motion to Dismiss ( Dkt. 40) to Plaintiff's Amended Complaint, please set forth all facts which support that defense.

11. With reference to each affirmative defense you allege in your Memorandum In Support of its Motion to Dismiss (Dkt. 19) and Reply Memorandum In Support of its Motion to Dismiss (Dkt. 40) to Plaintiff's Amended Complaint, please identify each person who has knowledge relating to any fact supporting that defense.

12. With reference to each affirmative defense you allege in your Memorandum In Support of its Motion to Dismiss (Dkt. 19) and Reply Memorandum In Support of its Motion to

Dismiss (Dkt. 40) to Plaintiff's Amended Complaint, please identify each document relating to that defense.

13. With reference to each denial set forth in your Memorandum In Support of its Motion to Dismiss (Dkt. 19) and Reply Memorandum In Support of its Motion to Dismiss (Dkt. 40) to Plaintiff's Amended Complaint, please set forth each fact upon which you base that denial.

14. With reference to each denial set forth in your Memorandum In Support of its Motion to Dismiss (Dkt. 19) and Reply Memorandum In Support of its Motion to Dismiss (Dkt. 40) to Plaintiff's Amended Complaint, please identify each person who has knowledge of any fact relating to that denial.

15. With reference to each denial set forth in your Memorandum In Support of its Motion to Dismiss (Dkt. 19) and Reply Memorandum In Support of its Motion to Dismiss (Dkt. 40) to Plaintiff's Amended Complaint, please identify each document relating to that denial.

ICANN lastly states the Motion to Compel does not explain what additional information could be compelled at this time.

Zuccarini believes the revised Interrogatory Nos. 10-15 are each self explanatory in the information requested. All the interrogatories request facts and documents specifically related to ICANN's affirmative defenses and denials. In addition to identifying each person who has knowledge of the affirmative defenses and denials in the revised Interrogatory Nos. 10-15.

**5. Response to ICANN Opposition to Interrogatory Nos. 16-25: Information Regarding "Hold Or Locked Status" Policies For Domain Name Registrations That Are Subject To Legal Proceedings Is Irrelevant.**

ICANN again claims that Zuccarini has not established that ICANN has a duty to oversee Network Solutions or any other registrars' actions so as to prevent the injury alleged.

Zuccarini has addressed this issue on pages 1-4 of his **Introduction** to this response and

in, ***2. Response to ICANN's Claim Interrogatory Nos. 1-5: Information Relating To "Performance Reviews" Of Nearly 1,000 Accredited Registrars is Irrelevant.***

Specifically ICANN'S Articles of Incorporation, Revised November 21, 1998, bestow upon ICANN their responsibilities and duties and stated in, Article 3., Item (iii), *performing and overseeing functions related to the coordination of the Internet domain name system ("DNS")... ”*

It would be impossible for ICANN to fulfill their responsibilities and duties to perform and oversee the functions to coordinate the Internet domain name system if it did not oversee the actions and performance of the domain name registrars it accredits.


ICANN also contends Interrogatory Nos. 16-25 lack a relevant time period. Zuccarini believes there should be no limit on the time period for such information requested, as any information related to this issue would be relevant and crucial to determining the facts of the allegations made in this instant action.

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**CONCLUSION**

In consideration of the above, Plaintiff Zuccarini respectfully requests that the Court order ICANN to provide responsive answers to the First Set of Interrogatories and to revised Interrogatory Nos. 10-15.

Respectfully Submitted, this 2nd day of November, 2011.

By:   
JOHN ZUCCARINI, Pro Se  
190 SW Kanner Highway  
Stuart, FL 34997  
(772) 631-3887  
raveclub@comcast.net

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiff John Zuccarini's Response to Defendant ICANN's Opposition to Plaintiff's Motion to Compel Further Interrogatory Responses, was served by first class mail, postage prepaid, on November 2, 2011, on all counsel or parties of record on the service list and by email to their respective addresses.

  
John Zuccarini

**SERVICE LIST**

**Network Solutions, LLC and NameJet, LCC**

Jamie M. Roos  
Stein Sperling Bennett De Jong Driscoll & Greefeig, PC  
25 West Middle Lane  
Rockville, MD 20851  
jhertz@steinsperling.com

Timothy B. Hyland  
Stein Sperling Bennett DeJong Driscoll & Greenfeig PC  
25 West Middle Lane  
Rockville, MD 20851  
thyland@steinsperling.com

**Internet Corporation for Assigned Names and Numbers, Inc.**

Maria H. Ruiz  
Kasowitz, Benson, Torres & Friedman LLP  
1441 Brickell Avenue, Suite 1420  
Miami, FL 33131  
mruiz@kasowitz.com

Kathleen P. Wallace  
Jones Day  
555 S. Flower Street  
50th Floor  
Los Angeles, CA 90071  
kwallace@jonesday.com

**Exhibit A**

## Internet Corporation for Assigned Names and Numbers

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### Expired Domain Deletion Policy

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11 May 2010

The Expired Domain Deletion Policy is an ICANN Consensus Policy applicable to all ICANN-Accredited Registrars. It has been incorporated in the current (21 May 2009) Registrar Accreditation Agreement as follows:

3.7.5 At the conclusion of the registration period, failure by or on behalf of the Registered Name Holder to consent that the registration be renewed within the time specified in a second notice or reminder shall, in the absence of extenuating circumstances, result in cancellation of the registration by the end of the auto-renew grace period (although Registrar may choose to cancel the name earlier).

3.7.5.1 Extenuating circumstances are defined as: UDRP action, valid court order, failure of a Registrar's renewal process (which does not include failure of a registrant to respond), the domain name is used by a nameserver that provides DNS service to third-parties (additional time may be required to migrate the records managed by the nameserver), the registrant is subject to bankruptcy proceedings, payment dispute (where a registrant claims to have paid for a renewal, or a discrepancy in the amount paid), billing dispute (where a registrant disputes the amount on a bill), domain name subject to litigation in a court of competent jurisdiction, or other circumstance as approved specifically by ICANN.

3.7.5.2 Where Registrar chooses, under extenuating circumstances, to renew a domain name without the explicit consent of the registrant, the registrar must maintain a record of the extenuating circumstances associated with renewing that specific domain name for inspection by ICANN consistent with clauses 3.4.2 and 3.4.3 of this registrar accreditation agreement.

3.7.5.3 In the absence of extenuating circumstances (as defined in Section 3.7.5.1 above), a domain name must be deleted within 45 days of either the registrar or the registrant terminating a registration agreement.

3.7.5.4 Registrar shall provide notice to each new registrant describing the details of their deletion and auto-renewal policy including the expected time at which a non-renewed domain name would be deleted relative to the domains expiration date, or a date range not to exceed ten (10) days in length. If a registrar makes any material changes to its deletion policy during the period of the registration agreement, it must make at least the same effort to inform the registrant of the changes as it would to inform the registrant of other material changes to the registration agreement (as defined in clause 3.7.7 of the registrars accreditation agreement)."

3.7.5.5 If Registrar operates a website for domain name registration or renewal, details of Registrar's deletion and auto-renewal policies must be clearly displayed on the website.

3.7.5.6 If Registrar operates a website for domain registration or renewal, it should state, both at the time of registration and in a clear place on its website, any fee charged for the recovery of a domain name during the Redemption Grace Period.

3.7.5.7 In the event that a domain which is the subject of a UDRP dispute is deleted or expires during the course of the dispute, the complainant in the UDRP dispute will have the option to renew or restore the name under the same commercial terms as the registrant. If the complainant renews or restores the name, the name will be placed in Registrar HOLD and Registrar LOCK status, the WHOIS contact information for the registrant will be removed, and the WHOIS entry will indicate that the name is subject to dispute. If the complaint is terminated, or the UDRP dispute finds against the complainant, the name will be deleted within 45 days. The registrant retains the right under the existing redemption grace period provisions to recover the name at any time during the Redemption Grace Period, and retains the right to renew the name before it is deleted.

For information on the effect of this policy on the 2001 version of the RAA see <http://www.icann.org/en/registrars/eddp-21sep04-enp.htm>.



**Exhibit B**

## Network Solutions

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### Policies

#### Domain Deletion Policy

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Domain names are registered for fixed periods that are subject to renewal. If a customer has selected our "auto-renew" feature for a domain name registration, we will attempt to automatically renew the domain name registration approximately sixty (60) to ninety (90) days prior to the domain name registration expiration date (subject to the terms related to the "auto-renew" feature found in our Service Agreement and on our web site). If a Network Solutions reseller has selected the "auto-renew" feature on behalf of their customer(s), we will attempt to automatically renew the domain name approximately 15 days prior to the expiration date. If a customer has not selected our "auto-renew" feature for a domain name registration, we send several communications to customers and/or the agents acting on their behalf to alert them that their domain name registration services will expire on a certain date. If a customer does not renew the domain name registration by the expiration date, the domain name registration is subject to deletion at any time after that. In an effort to help our customers avoid unintentional deletion of their domain name registration(s), we may, but are not obligated to, provide our customers with a "grace period" after their domain name registration services expiration date(s) (a "grace period" begins on the day after the date of expiration). We currently endeavor to provide a grace period that extends 35 days past the expiration date, to allow the renewal of domain name registration services. During this period a customer can renew a domain name registration; however, a grace period is not guaranteed and can change or be eliminated at any time without notice. Consequently, every customer who desires to renew his or her domain name registration services should do so in advance of the expiration date to avoid any unintended domain name deletion.

If an expired domain name registration is not renewed during any grace period provided by us, pursuant to our Service Agreement, rather than delete the domain name registration, we may, in our sole discretion, renew and transfer the domain name registration to Network Solutions or to a third party on the customer's behalf. This renewal and transfer process is called a "Direct Transfer." We will not attempt to complete a Direct Transfer of a domain name registration after expiration if the customer to whom the domain name is registered has notified us by email at [backorderservice@networksolutions.com](mailto:backorderservice@networksolutions.com) stating that he or she does not want us to proceed with such a transfer. In this case, the domain name registration will be deleted. A customer's failure to notify us that they do not want us to complete a Direct Transfer constitutes that customer's consent to the Direct Transfer.

If an expired domain name registration is not renewed as outlined above, absent extenuating circumstances, we will delete the domain name registration. Registry Operators may provide registrars with the ability to "redeem" a deleted domain name registration for a customer, and we, in turn, may (but are not obligated to) provide customers with an ability to redeem a particular domain name registration. Such a Redemption Grace Period (RGP) is not guaranteed and customers should renew their domain name registration services in advance of the domain name registration expiration date(s) to avoid deletion of domain name registration services. Currently, some Registry Operators provide an RGP for 30 days from the date of deletion. If we decide to provide the redemption service to a customer, we charge a fee of \$250 to redeem and renew a domain name registration during the RGP. If the domain name registration is not redeemed by the expiration of the RGP, it is then placed on "Pending Delete" status for five additional days, after which it is deleted and the domain name character string is then once again available for registration.

In the event that a domain name registration is the subject of a Uniform Domain Name Dispute Resolution Policy (UDRP) proceeding and expires or is deleted during the course of the dispute, the party that filed the UDRP proceeding has the option to renew or restore the domain name registration under the same commercial terms as the original customer. If the case ultimately is terminated or the arbitrator finds against the filing party, the name will be deleted within 45 days.