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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11

12 The Internet Corporation for Assigned
Names and Numbers,
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Plaintiff,
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v.
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16 RegisterFly.Com, Inc., and
UnifiedNames, Inc.,
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Defendants.
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Case No. CV 07-2089 R (PLAx)

**NOTICE OF MOTION AND
MOTION FOR ATTORNEYS'
FEES AND COSTS FROM
DEFENDANTS FOR BAD FAITH
CONDUCT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

[Declaration of Samantha Eisner filed
concurrently herewith; [Proposed]
Order lodged concurrently herewith]

Hearing Date: August 6, 2007

Hearing Time: 10:00 a.m.

Judge: Hon. Manuel L. Real

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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that, on August 6, 2007 at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, in Courtroom 8 of the above entitled Court,
4 Plaintiff Internet Corporation for Assigned Names and Numbers (“ICANN”) will
5 and hereby does move this Court, pursuant to the Court’s June 15 Order and Local
6 Civil Rule 83-7, for attorneys’ fees and costs from defendants RegisterFly.Com,
7 Inc. and UnifiedNames, Inc. (collectively, “RegisterFly”).

8 This motion is brought on the grounds that RegisterFly’s bad faith in
9 resisting this Court’s orders has wasted the time of this Court and imposed severe
10 and unnecessary costs on ICANN. As a result, on June 15, 2007, this Court ordered
11 ICANN to file this Motion.

12 This Motion is based on this Notice of Motion and Motion for Attorneys’
13 Fees and Costs; the attached Memorandum of Points and Authorities; the
14 Declaration of Samantha Eisner in Support of Motion; such further papers as
15 ICANN may file in connection with the Motion; all other matters of which the
16 Court may take judicial notice; such further evidence or argument as may be
17 presented at or in connection with the hearing on the Motion; and all pleadings,
18 files and records in this Action.

19 Given the Court’s directive to file this Motion, the parties were not required
20 to meet and confer pursuant to Local Rule 7-3.

21 Dated: July 16, 2007

JONES DAY

22
23
24 By: 
Samantha Eisner

25 Attorneys for Plaintiff
26 THE INTERNET CORPORATION
27 FOR ASSIGNED NAMES AND
28 NUMBERS

1 **II. FACTS AND PROCEDURAL POSTURE**

2 This Court has been presented on numerous occasions with extensive
3 briefing on this matter. There are, however, key facts that support ICANN’s
4 Motion:

5 After ICANN filed its Complaint against RegisterFly on March 29, 2007, the
6 Court granted ICANN a Temporary Restraining Order (“TRO”). (April 16, 2007
7 TRO.) The TRO was converted to a Preliminary Injunction (“PI”) on April 26,
8 2007. RegisterFly did not appear or comply with either the TRO or the PI upon
9 entry, although ICANN served RegisterFly with all papers in support of the TRO
10 and the PI, the notices of the hearings on each separate matter, and the actual TRO
11 and PI as entered by the Court. (Declaration of Samantha Eisner in Support of
12 Motion (“Eisner Decl.”), ¶ 2.)

13 On May 2, 2007, ICANN filed an *Ex Parte* Application for Civil Contempt
14 Sanctions for RegisterFly’s failure to comply with the PI. This Court granted
15 ICANN’s application at a hearing on May 9, 2007. RegisterFly did not appear at
16 the May 9 hearing, and this Court then ordered the personal attendance of
17 RegisterFly’s president at an order to show cause regarding further contempt
18 sanctions. The Court required ICANN to personally serve RegisterFly with notice
19 of the Order to Show Cause, which was set for hearing on May 25, 2007. (*Id.*, ¶ 3.)

20 On May 22, 2007, RegisterFly finally made its appearance through the filing
21 of a Notice of Appearance. (May 22, 2007 Notice of Appearance.) On May 24,
22 2007, RegisterFly made its first substantive filing with the Court, stating that “the
23 terms of the provisional remedies sought by ICANN up to this point **have not been**
24 **objectionable** to defendants, so they chose not to oppose the temporary restraining
25 order or the preliminary injunction.” (May 24, 2007 Response of Defendants to
26 Order to Show Cause Why Permanent Injunction Should Not Issue, at 2:2-4
27 (emphasis added).) Despite its proclaimed non-objection to the TRO and PI,
28 however, RegisterFly remained in violation of numerous provisions of those orders,

1 including the requirement to post a notice to consumers on its website (PI, ¶ 11),
2 the transmission of all privacy-related registration data (PI, ¶¶ 1-3), the submission
3 of data for inspection and audit by ICANN (PI, ¶ 8), and meeting technical
4 requirements for the transmission of the data. (PI, ¶¶ 6,7; Eisner Decl., ¶ 5.)

5 At the May 25, 2007 hearing, the Court imposed further contempt sanctions
6 on RegisterFly (and its principal, Kevin Medina) and also ordered the PI to be
7 converted to a Permanent Injunction (the “Injunction”.) The Court required
8 RegisterFly to comply with all terms of the PI by June 1, 2007. (Eisner Decl., ¶ 6.)

9 On June 1, 2007, RegisterFly filed the Declaration of Kevin Medina re
10 Compliance with May 25, 2007 Order, purporting to detail for the Court how
11 RegisterFly “complied” with the PI. Mr. Medina’s declaration, however, was false
12 in several respects, which caused ICANN to file a Report on Defendants’
13 Compliance with Injunction to clarify the state of RegisterFly’s compliance.
14 (Eisner Decl., ¶ 7; see June 5, 2007 Report and supporting declarations.)

15 After ICANN filed its Report, the Court set an Order to Show Cause re
16 Compliance with Injunction for June 12, 2007. (June 8, 2007 Minute Order.) On
17 June 11, 2007, RegisterFly filed documents again purporting to prove its
18 compliance or to provide excuses for its failures to comply the Injunction. At the
19 hearing, however, ICANN made clear that RegisterFly was *still* in violation of the
20 Injunction, particularly in regards to the provision of audit data, the sufficiency of
21 the posting of the notice to consumers, and an identification of all locations where
22 RegisterFly’s data is housed. (Eisner Decl., ¶ 8.) The Court gave RegisterFly three
23 days to resolve its compliance issues, and ordered the parties to return on June 15,
24 2007. (*Id.*)

25 In RegisterFly’s June 11 papers, and again at the hearing on June 12,
26 RegisterFly told this Court that the required audit data was in the possession of a
27 third party – Tucows – and could not be produced for approximately three weeks.
28 On the afternoon of June 12, 2007, ICANN contacted RegisterFly to coordinate a

1 conference call between ICANN, RegisterFly, and Tucows to discuss the delay.
2 During the June 12, 2007 conference call, RegisterFly – through Kevin Medina –
3 admitted that Tucows was only in possession of one of the three audit data elements
4 outstanding to ICANN. *RegisterFly maintained the other two portions of the*
5 *audit data - the customer communications and billing records - and had never*
6 *provided them to ICANN.* (Eisner Decl., ¶¶ 9-10.)

7 Prior to the June 15, 2007 hearing, ICANN prepared another report for the
8 Court to update RegisterFly’s compliance with the Injunction. (See June 14, 2007
9 Supplemental Declaration of Samantha Eisner Regarding Defendants’ Compliance
10 with Court Orders.) After ICANN filed the supplemental report, RegisterFly
11 *finally* appeared to be in compliance with all pertinent provisions of the Injunction.¹
12 The last portion of compliance was obtained at the hearing, when RegisterFly
13 revealed the additional physical locations where RegisterFly’s data is housed.
14 (Eisner Decl., ¶ 11.)

15
16 ¹ ICANN is still not in a position to confirm that RegisterFly is in full
17 compliance with all terms of the Injunction. ICANN has not yet received a
18 response to recent communications seeking further clarification over a small
19 portion of the privacy related data. In addition, ICANN is still awaiting sufficient
20 data field mapping files necessary to complete a review of the files purporting to
contain the required audit data. (Eisner Decl., ¶ 12.)

21 ICANN also has concerns with respect to RegisterFly’s commitment to
22 following the Injunction. For example, on July 2, 2007, ICANN logged onto
23 RegisterFly’s website only to find the notice to consumers was not visible on the
24 computer screen. ICANN immediately notified RegisterFly of this renewed
25 violation of the Injunction and reminded RegisterFly that it had a continuing
26 obligation to make sure the notice to consumers was always visible. RegisterFly
27 responded that the hiding of the notice was a “glitch” caused by updates performed
28 by a substitute webmaster while the normal webmaster was unavailable. (Eisner
Decl., ¶ 18.) The fact that a substitute webmaster is available is quite interesting,
considering that RegisterFly’s initial delay in the posting of the notice to consumers
was due to the normal webmaster being “out of town.” (See June 11 Response of
RegisterFly.Com, Inc. to Order to Show Cause at 3:7-8.)

1 RegisterFly's mode of handling the hearings also imposed extra work on
2 ICANN. At the June 12, 2007, hearing, RegisterFly indicated that it would bring
3 witnesses to June 15, 2007 hearing and seek to have a full-blown evidentiary
4 hearing. (June 12, 2007 Transcript at 12:12-13.) ICANN followed up with
5 RegisterFly on this matter, informing RegisterFly that ICANN intended to oppose
6 any attempt to have an evidentiary hearing, and inquiring as to RegisterFly's actual
7 intentions of presenting witnesses. (Eisner Decl., ¶ 13.) RegisterFly informed
8 ICANN that it had not made a determination as to the presentation of witnesses.
9 ICANN was therefore required to prepare for an argument to oppose any attempt to
10 obtain a full-blown evidentiary hearing, and to prepare for cross-examination of
11 unidentified witnesses. (Eisner Decl., ¶¶ 13-14.) In the end – and without prior
12 clarification to ICANN – RegisterFly *did not* attempt to present any witnesses at the
13 June 15, 2007 hearing. Because of RegisterFly's failure to communicate this
14 decision to ICANN, ICANN was forced to devote unnecessary attorney time to
15 preparing for the possibility of witness examination. (Eisner Decl., ¶ 14.)

16 At the end of the June 15, 2007 hearing, the Court directed ICANN to file an
17 application for attorneys' fees and costs incurred as a result of RegisterFly's
18 "malarkey" in skirting compliance with the Court's orders. (*See* June 15, 2007
19 Minute Order.)

20 ICANN's briefing and court appearances account for only a portion of the
21 time that ICANN's counsel devoted to obtaining RegisterFly's compliance with this
22 Court's orders. Due to the variety of issues and the technical requirements within
23 the Injunction, ICANN's counsel spent a substantial amount of time working with
24 ICANN staff in an attempt to decipher RegisterFly's data submissions (many of
25 which were indecipherable or simply duplicates of prior submissions) to understand
26 the outstanding compliance issues. ICANN's counsel also coordinated calls
27 between the parties to assist in working through technical issues, and performed
28 regular follow up on outstanding items with RegisterFly's counsel. Certain

1 compliance requirements, such as the provision of audit data, proved to be
2 extremely frustrating and time consuming, with RegisterFly wasting enormous
3 numbers of hours of ICANN's time in trying to simply open the submissions, only
4 to find that the submissions *were not* audit materials. (Eisner Decl., ¶ 16; *see*
5 June 5 Report on Compliance.) RegisterFly's actions and inactions multiplied the
6 time that ICANN needed to devote to this project. (*Id.*)

7 Aside from the compliance issues, RegisterFly also caused ICANN to pay for
8 attorney time to oppose a wholly groundless *ex parte* motion. On May 31, 2007,
9 RegisterFly notified ICANN that it intended to file on June 1, 2007 an application
10 for *ex parte* relief to seek a modification of the Injunction based upon "changed
11 circumstances." (Eisner Decl., ¶ 17.) RegisterFly later notified ICANN that the
12 application would not be filed until June 4. (*Id.*) When RegisterFly finally filed the
13 *ex parte* application, the papers simply reiterated the arguments that RegisterFly
14 made at the May 25 hearing -- and that the Court firmly rejected -- as to why
15 RegisterFly should not have to post a notice to consumers on its website. (*Id.*; *see*
16 June 4, 2007 *Ex Parte* Application to Modify Injunction.) Despite the complete
17 deficiency of RegisterFly's argument, ICANN still had to prepare an opposition to
18 the *ex parte* application. (Eisner Decl., ¶ 17.) This Court denied RegisterFly's
19 Application on the papers, writing "Denied. This is just a motion for
20 reconsideration. There is nothing new showing." (June 8, 2007 Order Denying *Ex*
21 *Parte* Application.)

22 **III. LEGAL STANDARD**

23 The Court has discretion to impose an award of attorneys' fees and costs to
24 opposing counsel for bad faith conduct and/or the willful disobedience of a court
25 order. Civil L.R. 83-7(b); *B.K.B. v. Maui Police Department*, 276 F.3d 1091, 1108
26 (9th Cir. 2002) ("conduct that is tantamount to bad faith is sanctionable [under the
27 court's inherent powers]") (citation omitted). A party's entire course of conduct in
28

1 litigation is appropriately the subject of a Court's inherent sanctions power.
2 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51-52, 11 S. Ct. 2123, 2136 (1991).

3 The inherent, discretionary sanctioning power of the of the Court under
4 L.R. 83-7 is a separate, though complementary, grant of sanctioning power from the
5 powers granted under Rule 11 of the Federal Rules of Civil Procedure or 28 U.S.C.
6 § 1927. *See Chambers*, 501 U.S. at 50 (courts may use inherent powers to sanction
7 bad faith conduct even when that conduct may be sanctioned under a statute or
8 rules).

9 **IV. ARGUMENT**

10 **A. This Court Ordered ICANN to File This Motion Because of**
11 **RegisterFly's Bad Faith Conduct.**

12 On June 15, 2007, at the end of the *fourth* sanctions hearing in just over a
13 month, this Court *sua sponte* directed ICANN's counsel to file an application for
14 attorneys' fees and costs for the time spent obtaining RegisterFly's compliance with
15 Court orders. (June 15, 2007 Hearing; June 15, 2007 Minute Order.) From the
16 very first time that RegisterFly appeared before this Court, this Court made clear
17 that mere non-objection to the entry of the Court's rulings is meaningless if the
18 orders are not followed. (May 25, 2007 Hearing at 6:10-20.) At the multiple
19 hearings on this matter, this Court continually expressed its frustration with
20 RegisterFly's conduct, commenting on RegisterFly's continued "excuses" for non-
21 compliance. (*See* June 12, 2007 Hearing at 6:5-10.) ICANN appreciates this
22 Court's courtesy in allowing ICANN to recoup the fees and costs that ICANN
23 incurred due to RegisterFly's actions.

24 **B. RegisterFly's Bad Faith and Willful Violation of This Court's**
25 **Orders Supports the Imposition of Fees as Sanctions.**

26 RegisterFly's actions support a finding a bad faith sufficient to impose
27 sanctions in this case. RegisterFly willfully avoided and violated this Court's
28 orders, from the time of the entry of the TRO – an order that RegisterFly was aware

1 of, did not object to, and yet refused to comply with. (May 24, 2007 Response of
2 Defendants to Order to Show Cause Why Permanent Injunction Should Not Issue,
3 at 2:2-4.) Indeed, RegisterFly's lack of "objection" proved to be meaningless:
4 RegisterFly did not comply with the Court's orders for several weeks, requiring
5 ICANN to file its May 2, 2007 Application for Civil Contempt Sanctions. Had
6 RegisterFly complied with each of the orders issued by this Court – starting with
7 the TRO – ICANN would not have needed to institute any contempt or sanctions
8 proceedings.

9 After the May 9, 2007 Order imposing sanctions on RegisterFly, it still took
10 RegisterFly *over a month* to come into a status even close to substantial compliance
11 with the Court's orders. RegisterFly's continued attempts at selective compliance
12 and avoidance of this Court's orders required ICANN's participation in *three*
13 additional hearings.

14 **1. Fees and costs incurred in filing the initial application for**
15 **sanctions:**

16 For the briefing of the May 2, 2007 Application, and attendance at the
17 May 9, 2007 hearing, ICANN incurred legal fees of \$20,824.03² and related costs
18 of \$576.49 (including service costs for orders after the hearing.)³ ICANN's civil
19 contempt application raised issues of ICANN's ability to obtain access to
20 information contained on RegisterFly's servers, and required extensive research and
21 planning. (Eisner Decl., ¶ 19.)

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25 ² ICANN is prepared to make redacted portions of the relevant bills available
26 to the Court in the event the Court wishes to undertake an *in camera* review of
27 reasonableness of the requested attorneys' fees. (Eisner Decl., ¶ 26.)

28 ³ A summary of all costs claimed in this Motion is attached as Exhibit G to
the Eisner Decl.

1 2. Fees and costs incurred from May 9, 2007 through May 25,
2 2007 related to obtaining RegisterFly's compliance:

3 After the hearing, ICANN had to prepare for the Court's mandated Order to
4 Show Cause re Further Sanctions, set for May 25, 2007. During that time,
5 RegisterFly retained counsel, and ICANN began working with RegisterFly's
6 counsel to work towards obtaining RegisterFly's compliance with the entirety of
7 the PI. In preparation for and attendance at the May 25, 2007 hearing, ICANN
8 incurred legal fees of \$8,548.94. ICANN also incurred estimated costs of \$261.00.
9 (Eisner Decl., ¶ 20.)

10 3. May 26, 2007 – June 12, 2007: Fees incurred in continued
11 enforcement efforts:

12 At the Court's May 25, 2007 hearing, the Court imposed a June 2, 2007
13 deadline for RegisterFly to achieve compliance with all terms of the Injunction. In
14 that short period of time, ICANN devoted a significant amount of attorney time to
15 working with RegisterFly to obtain compliance, including a futile series of
16 conversations regarding the audit data, and frequent communication regarding
17 RegisterFly's insufficient attempts at posting the notice to consumers on its
18 website.

19 On June 1, 2007, RegisterFly filed the Declaration of Kevin Medina
20 regarding RegisterFly's compliance with the Court's orders. The declaration,
21 however, did not reveal that RegisterFly was *still* in violation of the Court's orders.
22 ICANN therefore prepared a Report on RegisterFly's compliance, filed on June 5,
23 2007. The Court set a further hearing on sanctions against RegisterFly for June 12,
24 2007. Up to the time of the hearing, ICANN continued to work to identify and
25 clarify the items necessary for RegisterFly to achieve full compliance with the
26 Court's orders. For the time period from May 26, 2007 through the June 12, 2007
27 hearing, ICANN incurred \$13,087.16 in legal fees for its work in attempting to
28 obtain RegisterFly's compliance with the Injunction and providing reports to the

1 Court on RegisterFly's insufficient conduct. ICANN also incurred related
2 estimated costs of \$115.50. (Eisner Decl., ¶ 21.)

3 **4. June 12, 2007 – June 15, 2007: Fees incurred in the final**
4 **stages of enforcement:⁴**

5 At the June 12, 2007 hearing, upon learning that RegisterFly was still not in
6 compliance with many of the terms of the injunction, including the notice to
7 consumers and the audit data turnover, the Court set a further hearing for June 15,
8 2007. Immediately after the June 12, 2007 hearing, ICANN resumed its efforts to
9 determine how RegisterFly could fulfill its obligations under the Injunction.

10 At the same time, ICANN had to determine how to defend itself against the
11 potential that RegisterFly would seek to make the June 15, 2007 hearing a full-
12 blown evidentiary proceeding (as RegisterFly specifically requested at the June 12
13 hearing). RegisterFly, although on notice of the fact that ICANN intended to
14 oppose an evidentiary proceeding, failed to inform ICANN that RegisterFly would
15 *not* actually seek to present witnesses. ICANN was therefore required to prepare an
16 argument to oppose the evidentiary hearing, as well as to prepare outlines for
17 witness cross-examination – witnesses that RegisterFly refused to identify.
18 Between ICANN's continued efforts to obtain RegisterFly's compliance, and the
19 preparation for the hearing, ICANN incurred legal fees in the amount of \$11,050.92
20 to prepare for and attend the June 15, 2007 hearing. This amount includes the fees
21 that ICANN incurred in preparing a Supplemental Declaration Regarding
22 Compliance for the Court. ICANN also incurred related estimated costs of
23 \$115.50. (Eisner Decl., ¶ 22.)

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26 ⁴ As noted above, ICANN is still attempting to work with RegisterFly to
27 clarify outstanding issues related to the audit data and privacy registration data, and
28 ICANN cannot certify that RegisterFly is in compliance with the Injunction at this
time.

1 **5. Fees incurred by ICANN in opposing RegisterFly’s**
2 **improper Ex Parte Application:**

3 As described above, on June 4, 2007 RegisterFly filed a wholly groundless *ex*
4 *parte* application. (See June 4, 2007 *Ex Parte* Application to Modify Injunction.)
5 The Application reiterated the arguments RegisterFly presented to this Court at the
6 May 25, 2007 relating to RegisterFly’s request to be relieved from posting a notice
7 to consumers on its website. (*Id.*) This Court denied RegisterFly’s Application on
8 the papers alone, writing “Denied. This is just a motion for reconsideration. There
9 is nothing new showing.” (June 8, 2007 Order Denying *Ex Parte* Application.)
10 ICANN incurred \$8,242.89 in attorneys’ fees in preparing its opposition to
11 RegisterFly’s baseless *ex parte* Application. (Eisner Decl., ¶ 23.)

12 **6. Continued efforts at compliance: Fees incurred by ICANN**
13 **since the June 15, 2007 hearing:**

14 Since the June 15 hearing, ICANN has incurred at least \$979.89 in attorneys’
15 fees relating only to ICANN counsel’s continued efforts in assuring compliance
16 with the Injunction. ICANN continues to work to resolve the outstanding privacy
17 related data issues and the need for revised data field mapping to review the audit
18 data submissions. (See discussion *supra* at n.1.) In addition, the July 2, 2007
19 hidden notice to consumers issue (also detailed at n.1) required ICANN’s counsel’s
20 intervention to bring RegisterFly back into compliance. (Eisner Decl., ¶ 24.)

21 **V. CONCLUSION**

22 RegisterFly’s bad faith and willful misconduct in failing to comply with this
23 Court’s orders, and its bad faith conduct in the entirety of this litigation have
24 severely taxed the resources of this Court and ICANN. Awarding ICANN its
25 attorneys’ fees and costs incurred specifically in connection with opposing
26 RegisterFly’s bad faith conduct is an appropriate sanction under law.

1 ICANN respectfully requests the Court grant this Motion and award ICANN
2 \$62,733.83 in attorneys' fees and \$1,068.49 in costs incurred as a direct result of
3 RegisterFly's conduct.

4 Dated: July 16, 2007

JONES DAY

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6 By: 
7 Samantha Eisner

8 Attorneys for Plaintiff
9 THE INTERNET CORPORATION FOR
10 ASSIGNED NAMES AND NUMBERS
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PROOF OF SERVICE BY PERSONAL DELIVERY

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On July 16, 2007, I caused to be served the foregoing document:

**NOTICE OF MOTION AND MOTION FOR
ATTORNEYS' FEES AND COSTS FROM
DEFENDANTS FOR BAD FAITH CONDUCT;
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT**

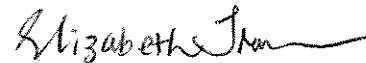
on the interested party by placing a true copy in envelope(s) addressed as follows:

Heather McCloskey, Esq.	Attorney for Defendant,
Ervin Cohen & Jessup LLP	RegisterFly.Com, Inc.
9401 Wilshire Blvd., 9th Floor	
Beverly Hills, CA 90212	

I caused such envelope(s) to be delivered by hand to the addressee(s).

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 16, 2007, at Los Angeles, California.



Elizabeth Tran