

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NETSPHERE, INC.,	§	
MANILA INDUSTRIES., INC., AND	§	
MUNISH KRISHNAN	§	
	§	
PLAINTIFFS,	§	
	§	
V.	§	CIVIL ACTION NO. 3:09-CV-0988-F
	§	
JEFFREY BARON AND	§	
ONDOVA LIMITED COMPANY,	§	
	§	
DEFENDANTS.	§	

**THE RECEIVER’S REPLY IN SUPPORT OF
HIS SECOND MOTION TO ENFORCE STAY**

In its response, ICANN threatens Fabulous. ICANN first laments that Fabulous has generally complied with this Court’s Stay—*i.e.*, by not transferring most of the domain names that were the subject of improper default decisions. Then, ICANN, obviously offended by Fabulous’ compliance with the Stay, threatens Fabulous with punishment. This threat punctuates the need not only for an order voiding these specific default decisions but also for expedited relief. By issuing the requested order as soon as possible, the Court will ensure that Fabulous maintains the status quo and does not submit to ICANN’s pressure to transfer names.

The Receiver also reports that only 4 of the 22 domain names are both profitable and, as a result of the illegal defaults, in the hands of other registrants. With respect to those 4 names, the Receiver seeks an order requiring ICANN and the registrar holding those 4 names (Fabulous) to return them to the Receiver (“Return Order”).

A. ICANN, by threatening Fabulous, demonstrates a further and immediate need for voiding the illegal defaults.

As set forth in the Receiver's motion, the Court previously stayed (the "Stay") all UDRP proceedings [See Docket No. 124 at pp. 12-13; Docket No. 739 at p. 4.] (the "Key Factual Basis"). As also set forth in the Receiver's motion, the Court may void the illegal defaults (the "Key Legal Basis"). See, e.g., *Barcelona.com v. Excelentisimo Ayuntamiento*, 330 F.3d 617, 625 (4th Cir. 2003); *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 26 (1st Cir. 2001); *Weber-Stephen Prods. Co. v. Armitage Hardware & Bldg. Supply, Inc.*, No. 00-C-1738, 2000 WL 562470, at *2 (N.D. Ill. May 3, 2000); *Eurotech v. Cosmos European Travels Aktiengesellschaft*, 213 F. Supp. 2d 612, 617 n.10 (E.D. Va. 2002).

Importantly, ICANN's response to the motion takes issue with neither the Key Factual Basis or the Key Legal Basis. Rather, it makes a not-so-subtle threat to the LLCs' registrar, Fabulous, for abiding by the Stay and complying with this Court's Receivership Order:

The Registrar Accreditation Agreement that ICANN enters into with each ICANN-approved registrar, including Fabulous.com, requires the registrar to comply with UDRP decisions. As highlighted in the Receiver's second motion to enforce the stay, Fabulous.com's apparent failure to transfer these domain names pursuant to the UDRP panel decisions and its Registrar Accreditation Agreement may be cause for ICANN to initiate a contractual compliance review of Fabulous.com.

[Docket No. 772 at n.3.] The Receiver reads this to mean that if Fabulous complies with the Court's Stay and refuses to transfer domain names, ICANN will take some serious contractual action against Fabulous. Naturally, one's first thought would be: *How is it that ICANN, which previously purported to lack the ability to threaten WIPO with punishment for failing to comply with this Court's Order, now seems very much empowered to punish Fabulous for doing the opposite?*

In any event, the more *practical* question is: *How can the Court and the Receiver avoid a risk that Fabulous, having now received ICANN's threat, will suddenly submit to ICANN and begin transferring names?* Fortunately, ICANN provides that answer as well (in its December 12, 2011 brief filed in this Court):

This is not to say that the Receiver is without remedy. The most logical party to effectuate the relief sought by the Receiver is actually Fabulous.com, the registrar of . . . the domain name registration[s] at issue in the proceedings. In the event a court of competent jurisdiction orders Fabulous.com not to transfer [the disputed domain names], and Fabulous.com complies with that order, whether or not a UDRP decision says that the domain should be transferred, Fabulous.com would still be deemed in compliance with the UDRP and its Registrar Accreditation Agreement with ICANN.

[Docket No. 737 at pp. 5-6.]

ICANN seems to be making the Receiver's point. By issuing an order (a) voiding the 22 defaults and (b) ordering that, for those names not already transferred, Fabulous shall not transfer them (the "Voidance Order"), Fabulous can comply with the Court's Stay presumably without the risk of contractual repercussions from ICANN. Thus, the Receiver urges that the Court issue the Voidance Order and do so as soon as possible.

B. The Receiver seeks the return of 4 domain names.

In its response, ICANN confirmed that 4 of the 22 domain names (apple.com, publicstorage.com, pulicstorage.com, and puplicstorage.com) are both profitable and have actually been transferred as a result of the illegal default decisions issued by WIPO. [Docket No. 772 at p. 3; Docket No. 772-1 at ¶ 6.]¹ ICANN's response recognizes that Fabulous, the current

¹ According to Damon Nelson (court-Appointed Manager of the LLCs), a 5th transferred name (wetafx.com) is:

- a money-losing domain name, *i.e.*, domain name whose renewal fees exceed revenues (and required by the Court not to be renewed) [Docket No. 177]; and
- not a future profitable domain name, *i.e.*, not a domain name that could be developed into a profitable name with proper development efforts in the future.

registrar of these 4 names, can, in fact, implement an order transferring the names back to the Receiver. [See Docket No. 772 at 6 (recognizing that a “registrar, pursuant to a court order . . . has the discretion and authority to change the registration information and thus effectuate a ‘transfer’ of a domain name to a new registered name holder”).] Thus, the Receiver would request an order requiring ICANN and Fabulous to return the 4 Transferred Names to the Receivership Parties from whom they were transferred pursuant to illegal defaults issued by WIPO (the “Return Order”).

REQUESTED RELIEF

Based on the foregoing, the Receiver requests that the Court enter the Voidance Order, the Return Order, and order that ICANN and Fabulous shall, within 2 business days of the issuance of the Voidance Order and Return Order, each submit a written report confirming full compliance with the Voidance Order and Return Order.²

Respectfully submitted,

/s/ Barry M. Golden

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**ATTORNEYS FOR THE RECEIVER,
PETER S. VOGEL**

[See the Declaration of Damon Nelson attached hereto as Exhibit A.] Thus, the Receiver will not seek to re-obtain the domain name wetafx.com.

² The Receiver is submitting (and is serving on all counsel of record, ICANN, and Fabulous) an updated order reflecting the requested relief.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and exhibits thereto were served via the Court's ECF system on all counsel of record on January 5, 2012. I also certify that a true and correct copy of the foregoing document and exhibits thereto were served via e-mail on ICANN's counsel on January 5, 2012. I also certify that a true and correct copy of the foregoing document and exhibits thereto (as well as a copy of the ICANN's response) were served via e-mail and Federal Express on Fabulous on January 5, 2012. A copy of the underlying motion was previously served on Fabulous via e-mail and Federal Express on December 14, 2011.

/s/ Peter L. Loh

Peter L. Loh

Exhibit A

DECLARATION OF DAMON NELSON

I, Damon Nelson, state and declare as follows:

1. I have over 20 years of experience in computer programming, web design, and Internet business.

2. I served 18 months as the registrar for the domain names at issue as part of the bankruptcy proceedings for Ondova Limited Company (“Ondova”). My duties at Ondova included responding to hundreds of Uniform Domain Name Dispute Resolution Policy (“UDRP”) actions, cease and desist demands, and complaints of trademark infringement.

3. I also manage my own domain name portfolio of over 400 domains containing websites for e-commerce, video, blogs, and “domain parking” and consults with clients concerning their online marketing campaigns.

4. I hold Bachelor of Science and Masters in Business Administration degrees from Texas A&M University with specific course emphasis in engineering, computer programming, marketing, and investing.

5. I am the Permanent Manager of Novo Point, LLC and Quantec, LLC (the “LLCs”), having been so appointed by the United States District Court for the Northern District of Texas in the matter styled *Netsphere, Inc., et al. v. Jeffrey Baron, et al.*, Civil Action No. 3:09-CV-0988-F (the “Lawsuit”).

6. On December 17, 2010, the Court entered an *Order Requiring Non-Renewal of Money-Losing Domain Names* regarding domain names in Quantec, LLC’s portfolio, stating *inter alia*:

There is a legitimate and lawful basis to liquidate the domain names. Specifically, among the more than 200,000 domain names, there exist thousands of domain names whose costs of upkeep and maintenance for the past year (including, for example but without limitation, annual registrar-renewal fees) exceed the revenue those domain names generated for the same past year (the “Money Losing Domain Names”). . . . The Court



hereby Orders that the Receiver identify the Money Losing Domain Names and instruct the registrar not to renew them.

(the "Non-Renewal Order"). [Docket No. 177 in the Lawsuit.]

7. Prior to on or about January 11, 2011, Quantec, LLC was the registrant of the domain wetafx.com.

8. The domain wetafx.com is a Money Losing Domain Name and is, therefore, subject to the Non-Renewal Order. While wetafx.com was under the control of and being monetized by Quantec, LLC it earned well below the cost of its annual registration fee (\$7.62). Specifically, during the months of October through December 2010, wetafx.com earned less than \$.05 per month or about \$.60 on an annual basis.

9. The domain wetafx.com is also not a future profitable domain name, *i.e.*, not a domain name that could be developed into a profitable name with proper development efforts in the future. In other words, wetafx.com's value is not increased when considering a variety of subjective criteria that would indicate it has strong potential to generate revenue exceeding its costs of upkeep and maintenance. Specifically, its value is not increased when considering the following: (1) the length of the domain name; (2) the "look and feel" of the domain name, meaning its appeal to the human eye and ear; (3) the spelling of the domain name; (4) the "keyword relevance" of the domain name, meaning it contains commonly-searched words; and (5) the Google.com search-ranking statistics of the domain name. The term "wetafx" does not possess the "look and feel" needed for future branding as a name or website. The length is 6 digits which could have value, but the spelling does not match a dictionary word.

10. I have also obtained a third party valuation of wetafx.com from a widely used domain valuation service called Estibot.com. Estibot values the domain at \$0.00. (A true and correct copy of the Estibot.com valuation is attached hereto as Exhibit A-1.)



11. Because wetafx.com is (a) a Money Losing Domain Name and, therefore, subject to the Non-Renewal Order, (b) not a future profitable name, and (c) has received a third party valuation of \$0.00, if the domain name were to be transferred back to Quantec, LLC, I would recommend to the Receiver that it not be renewed, *i.e.*, deleted from Quantec, LLC's portfolio.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 5, 2012.


Damon Nelson

EXHIBIT A-1-ESTIBOT APPRAISAL FOR WETAFX.COM

EstiBot.com Domain Appraisal - "wetafx.com"
Generated on 2011-02-28 by Damon Nelson

A report containing the appraisal, sales and type-in metrics has been generated for wetafx.com and is displayed below.

Domain Details:

Domain:	wetafx.com
SLD:	wetafx
Keywords:	wetafx

Appraisal Overview:

EstiBot.com Value:	\$ 0 USD
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Search Overview:

Average Search Results (keyword):	13,600
Average Search Results (sld):	13,600
Average Search Ads (keyword):	0

Type-in Score:

Overture (domain):	0
Overture (sld):	0
Overture (keyword):	0
Word Tracker (keyword):	0

Traffic Rank:

Alexa Traffic Rank:	0
Alexa Trend:	0
Google Page Rank:	5

Search Details:

