AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
WILLIAM NORRIS (SBN 025989)
DAVID C. ALLEN (SBN 190479)
PHILLIP J. ESKENAZI (SBN 158976)
DAVID M. PIERCE (SBN 196649)
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Telephone: (310) 229-1000
Facsimile: (310) 229-1001

Attorneys for Defendant
NEULEVEL, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL CIVIL WEST

DAVID SCOTT SMILEY, individually and doing business as SMILEY PRODUCTIONS, et al.,

Plaintiffs,

vs.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.,

Defendants.

Case No. BC 254659

Date: September 26, 2001
Time: 1:30 p.m.
Dept.: 309

[Assigned To The Honorable Anthony J. Mohr For All Purposes]

DEFENDANT NEULEVEL, INC.'S CORRECTED BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Complaint Filed: July 23, 2001

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1999 AVENUE OF THE STARS
SUITE 2800
LOS ANGELES, CA 90067

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STATE STATUTES

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
2029 CENTURY PARK EAST
SUITE 2400
LOS ANGELES, CA 90067

I.

INTRODUCTION[1]

Plaintiffs seek to enjoin the launch of a new, much anticipated generic top level domain ("gTLD") for the Internet - "<.biz>". The relief sought would be cataclysmic to Defendant NeuLevel, Inc. ("NeuLevel") – it would shut down the registry, and would severely and irretrievably harm the federal government's effort to test new domain name allocation systems and NeuLevel's business. That shutdown would have worldwide impact, exporting California law to the farthest reaches of the globe, harming Internet users everywhere, and undermining substantial efforts by the United States government, foreign governments, and an international consensus body known as the Internet Corporation for Assigned Names and Numbers ("ICANN") to introduce new gTLDs to the Internet for the first time in over 16 years.

The plaintiffs' fundamental claim is that because the NeuLevel's method for initial assignment of domain names uses randomization, it is illegal gambling, a lottery. In fact, the NeuLevel assignment system seeks to ensure equal access to domain names for businesses large and small. Unlike a lottery, its purpose is to *avoid* exploitation by well-heeled business entities. It does so by allocating a scarce resource, new domain names, in an impartial and equitable manner. As the supporting declarations and this Memorandum demonstrate, there is simply no other fair and equitable means to accommodate the extraordinary "land rush" demand for new domain names. ICANN was involved in the development of NeuLevel's method for allocating <.biz> domain names. ICANN agreed to the method and recommended it to the United States Department of Commerce (the "DOC"), and the DOC approved of the <.biz> gTLD and loaded <.biz> into the Authoritative Root Zone File ("A Root" or "A Root Zone File"), the backbone of the internet's Domain Name System.

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[1] At the *ex parte* hearing on September 12, 2001, the Court directed that NeuLevel respond in one brief to the instant motion and the identical motion in *ePrize v. NeuLevel*, Case No. BC 257 632. In plaintiff ePrize's motion, the proffered evidence and argument is not materially different from the plaintiffs' evidence and argument in the *Smiley v. NeuLevel* case. Therefore, unless otherwise indicated by the text, the word "plaintiffs" refers to all plaintiffs in both cases.

Plaintiffs' motion should be denied. Plaintiffs have failed to establish a substantial likelihood of success on the merits for several reasons: (1) application of California law in this case violates the Commerce Clause; (2) the lottery law is not applicable and its elements are not met; and (3) the plaintiffs, having participated in what they claim is a lottery, have no standing to seek relief. Plaintiffs have also failed to establish that the balance of hardships favors issuance of a preliminary injunction. Plaintiffs' claims of injury are wholly speculative and within their control, as is evidenced by the fact that they applied for a <.biz> domain name. Indeed, it is important to note that plaintiffs suffered their alleged *injuries just a few hours before filing this lawsuit* – an egregious example of a self-inflicted wound to justify opportunistic litigation.

NeuLevel, ICANN, the other gTLD registries, the worldwide Internet public and the federal government's policies, on the other hand, will suffer great harm from an injunction. A preliminary injunction would be tantamount to a final, wrong decision on the merits.

II.

STATEMENT OF FACTS

A. History and Structure of the Internet

Since its inception in 1969, the Internet has flourished into a vast web of networks that has fueled global social and economic growth. The United States government has played the central role in developing and supporting the Internet over the last 30-plus years, and, through the DOC, retains final policy control over modifications to the Domain Name System ("DNS"), such as the addition of new gTLDs, to the Internet's central A Root Zone File. The Internet is very much an international communication medium, with millions of users throughout the world.

In 1997, President Clinton issued a Directive On Electronic Commerce, which outlined policy objectives aimed at preventing governments from placing undue restrictions upon electronic commerce and encouraging private sector management of the Internet. *See* Presidential Directive: Electronic Commerce 07/01/97. President Clinton instructed the

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
2029 CENTURY PARK EAST
SUITE 2400
LOS ANGELES, CA 90067

Secretary of Commerce to "make governance of the domain name system private and competitive and to create a contractually based self-regulating regime that deals with potential conflicts between domain name usage and trademark laws on a global basis." Presidential Directive, at *3. The privatization program was intended to study and determine whether a private organization with an international constituency could manage the domain name system and thereby reflect the global interest in the further development, growth and management of the system. Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numers, dated November 25, 1998 ("MOU"). This motion comes in the midst of that study and seeks to disrupt the exploration of methods to privatize management of the DNS.

In furtherance of these goals, ICANN agreed assist DOC in the privatization program. ICANN is a diverse, private, not-for-profit entity composed of members of the international Internet community.

B. History of the <.biz> Registry

A major issue ICANN was to address under the MOU was whether and how new gTLDs should be added to the A Root File. ICANN solicited proposals for new gTLDs from prospective registry operators. The ICANN board and its working groups solicited and reviewed thousands of comments worldwide on many issues, including problems associated with the introduction of new gTLDs and land rushes for new registry names.[2] In November 2000, ICANN selected NeuLevel to conduct the registry for the newly-introduced <.biz> gTLD. Six other registries were also selected: <.info>, <.name>, <.pro>, <.aero>, <.museum> and <.coop>. The selection criteria and process were public and open, consistent with ICANN's concensus-driven, bottom-up decision-making policy, and with the policies and criteria set forth in the MOU and a 1997 DOC policy statement regarding management to the

[2] These problems, and efforts to overcome them, are discussed in the Declaration of Louis Touton, ICANN's Vice-President, Secretary and General Counsel.

DNS. Management of Internet Names and Addresses, U.S. Dept. of Commerce, Docket No. 980212036-8146-02, 63 Fed. Reg. 31, 741, June 5, 1998 (hereinafter, the "White Paper").

NeuLevel and ICANN then began extensive negotiations aimed at assuring an equitable, technologically-feasible system for allocating <.biz>domain names, with draft documents being continually posted on the Internet, and several meetings and telephone conferences were hard with ICANN constituent groups and the World Intellectual Property Organization. As set forth in the attached declaration of Doug Armentrout, NeuLevel's Chief Executive Officer, NeuLevel devoted resources into the effort to design a process that would both be fair and not encourage multiple simultaneous applications for <.biz> names, which could clog and possibly overwhelm the registry. NeuLevel was especially cognizant of the need to prevent domain name applicants from employing abusive tactics by speculators and cybersquatters, who obtain domain names for the sole purpose of reassigning the names for a profit. *See* Armentrout Decl., ¶¶ 14, 29.

ICANN also recognized the significant land rush problems for all new gTLDs and agreed to off-line randomization of land rush applications for all new gTLDs. Armentrout Decl., at ¶ 20. On May 11, 2001, NeuLevel and ICANN executed a final Registry Agreement, which contained the complete design and business model for the <.biz> registry. *See* Registry Agreement By and Between The Internet Corporation for Assigned Names and Numbers and NeuLevel, Inc. dated May 11, 2001. From the time of NeuLevel's initial submission until the time the Registry Agreement was finalized in May 2001, NeuLevel's proposal and all pertinent documents for registering <.biz> domain names were posted on the ICANN website, were readily available for comment by anyone in the global Internet community and were discussed in many public ICANN meetings. Like <.info> and <.name>, the final registry agreement employs randomized assignment of domain names.[3] After receipt of the Registry Agreement

[3] The registry agreements for the other new gTLDs have not yet been finalized.

and reports from ICANN and the Internet Assigned Numbers Authority ("IANA") on the agreement, on June 26, 2001 the DOC loaded <.biz> into the A Root Zone File.

NeuLevel then entered into registrar agreements with over 80 registrars located throughout the world, including in the United States, Canada, India, Korea, Japan, China, Norway, Spain, Kuwait, and Israel. These registrars are independent entities and NeuLevel's only relationship with each of them is by contract. The form of those contracts is set forth in Appendix F to the Registry Agreement and it was negotiated between ICANN and NeuLevel. These registry-registrar agreements explicitly provide that the registrars are not agents of NeuLevel.

Pursuant to the Registry Agreement and the registrar agreements, all applications for <.biz> domain names must be submitted to NeuLevel through the registrars. There is no requirement that the applicant use a registrar from its home country. *See* Registry Agreement Exhibit F.

C. The <.biz> Registry Process

NeuLevel, like other new registries, faced a formidable problem. In the increasingly Internet-oriented world culture, NeuLevel could easily anticipate extraordinary and instantaneous online demand for many names in the <.biz> domain; i.e., the "land rush." The online cost of handling this tidal wave of data reliably and fairly is prohibitive. After this initial peak passes, however, demand will subside and can be reliably handled at reasonable cost. So, the challenge presented by the policies in the DOC's MOU and ICANN's policy of equal access is to meet the demand fairly, without giving the wealthiest or most computer powerful applicants an unfair advantage. Armetrout Decl., at ¶ 20.

NeuLevel's solution was to design an offline, pre-registration "land rush" process to treat each "start-up" application fairly and equally. Once the registry is on-line and passes this initial surge, it will handle applications on a first-come, first-served basis. During the land rush period, registrars forward customer applications to NeuLevel electronically. A nominal $2.00 fee must accompany each application submitted by a Registrar. The contract between

NeuLevel and the registrars does not permit NeuLevel to control the fees charged by the registrars. Registrars are free to charge more or less than $2.00. Since an applicant can apply on-line with a registrar located anywhere in the world, there is free market competition in the fees charged by registrars. *See* Armentrout Decl., at ¶ 20.

Registrars will accept land rush applications from May 25, 2001 until September 17, 2001. These land rush applications will be randomized so that each application receives equal, impartial treatment, regardless of its date of submission and regardless of the technical capabilities of the registrar through whom the application is submitted.[4] *See* Armentrout Decl., at ¶ 37.

After the application is received by NeuLevel, the registry will notify the applicant of any intellectual property ("IP") claims lodged with NeuLevel regarding that domain name.[5] *See* Armentrout Decl., at ¶ 35. The applicant can then decide to withdraw if it concludes that the IP claimant's rights are sufficient to prevent use of the domain name.[6] *See* Armentrout Decl., at ¶ 35. The applicant must respond to this notification to be considered further. If the applicant decides to go forward, then the application will be randomized and the randomized applications will be processed sequentially. *See* Armentrout Decl., at ¶ 36. If the domain name is available when the application is processed, the applicant will be granted the right to register the name.[7] For domain names with a single applicant, that applicant will receive the right to

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[4] NeuLevel's contract with ICANN requires that NeuLevel provide all ICANN-accredited registrars with equivalent access to NeuLevel's registration system.

[5] The purpose of NeuLevel's Intellectual Property ("IP") Claims Service is to discourage cybersquatting, a widespread and abusive practice involving exploitation of another entity's intellectual property. Cybersquatting is illegal under U.S. law, because of the international scope of the Internet, but continues to be a problem in other countries.

[6] If the applicant proceeds with registration, the IP claimant can invoke an alternate dispute resolution mechanism provided for in the Registry Agreement, and also may pursue other alternate dispute resolution procedures or litigation to enforce its IP claims. NeuLevel itself will not make any determination regarding the scope or validity of any IP claim.

[7] To register a <.biz> domain name, the applicant must pay a registration fee. Again, this fee is paid to NeuLevel by the registrar. Although NeuLevel charges $5.30 to register a <.biz> domain name, registrars are free to charge applicants a different amount and to retain any excess revenue received.

register that name. Successful applicants can register for two years with a renewal option. *See* Armentrout Decl., at ¶ 38.

Each aspect of the NeuLevel registry process is designed to achieve the smooth functioning of the registry, to accomplish the federal policy objectives associated with the addition of new top level domains, and to address specific technological and fairness concerns associated with the allocation of new domain names.

The <.biz> registry is scheduled to go live on October 1, 2001. Subsequent, <.biz> domain name applications will be accepted on a first come, first serve basis, and no application fee will be charged. The land rush will be over then. *See* Armentrout Decl., at ¶ 38.

D. The Current Lawsuit

On July 23, 2001, plaintiffs filed their original complaint in this action. Plaintiffs never served the original complaint on NeuLevel or ICANN or, to the best of NeuLevel's knowledge, on any other defendant. Plaintiffs filed their amended complaint, which is not substantially different from the original complaint, on August 13, 2001, as well as their first request for preliminary injunctive relief. Plaintiff and declarant Smiley states that he submitted a single application for <dj.biz> and a single application for <radio.biz>, each through a different registrar, on July 23, 2001 — within hours of when this action was filed. Declaration of David Smiley ("Smiley Decl.") at ¶¶ 4, 13. The fact that plaintiffs' domain name applications were deliberately submitted for the purpose of instituting litigation, coupled with the fact that the proposal for administering the <.biz> registry was publicly available and posted for comment on ICANN's website for several months prior to finalization of the Registry Agreement, reveal this litigation as a lawyer-driven lawsuit that is designed to impede global Internet progress and opportunity. This lawsuit is a deliberate scheme implemented at the last minute in order to do the most harm to that progress.

III.

ARGUMENT

In order to obtain a preliminary injunction, plaintiffs must prove: "(1) a likelihood of success on the merits; and (2) greater interim harm to the plaintiff if the injunction were denied than to the defendant if the injunction were granted." *Hunt v. Superior Court of Sacramento County*, 21 Cal. 4th 984, 999 (1999); *Cohen v. Board of Supervisors*, 40 Cal. 3d 277, 286 (1985). The balance of harms includes an inquiry as to whether legal remedies are adequate. As discussed in more detail below, plaintiffs have not met their burden. Preliminary injunctive relief therefore must be denied.

A. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claim.

Plaintiffs are unlikely to prevail on their claim that the <biz> application process is an illegal lottery for several reasons. First, plaintiffs' § 17200 claim violates the Commerce Clause and the Supremacy Clause of the U.S. Constitution. Second, the <biz> land rush application process is not gambling, the activity the anti-lottery law was designed to combat. It is a permissible allocation of a scarce resource. Third, the plaintiffs, as alleged lottery participants, have unclean hands. Long-standing doctrines preclude the relief they seek. Fourth, even assuming *arguendo* the lottery law applies, plaintiffs have not proved that the statutory elements are present.

1. Enforcement Of The State Laws At Issue Here To NeuLevel's Domain Name Allocation System Violates The Supremacy Clause.

The Supremacy Clause of the United States Constitution dictates that the acts of Congress and of federal agencies acting within their congressionally-delegated authority are the supreme law of the land. *U.S. Const. Art. VI, cl. 2.* Pursuant to this authority, where a state seeks to regulate by its penal code an activity undertaken by the federal government pursuant to one of the constitutionally-enumerated powers of Congress, the state law is unconstitutional. *McCulloch v. State of Maryland*, 17 U.S. 316 (1819). *McCulloch* controls, and the state law at issue here is unconstitutional as the plaintiffs would have this Court apply it.

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
2029 CENTURY PARK EAST
SUITE 2400
LOS ANGELES, CA 90067

In *McCulloch*, the State of Maryland's penal code made it a crime for a bank to fail to pay a stamp tax on promissory notes. *Id.* at 317-18, 329. The State sought to enforce its statute against McCulloch, a cashier employed by the Bank of the United States, a private, for-profit corporation authorized by Congress. *Id.* at 318-19, 334-35, 424-25. Although the Supreme Court did not find in the Constitution any authority for Congress to establish a bank or to create a for-profit corporation, the power of Congress to so act was found in Article I, Section 8 ("the Power To lay and collect Taxes . . . To borrow Money on the credit of the United States [and] To regulate Commerce with foreign Nations, and among the several States . . ."), as well as the "Necessary and Proper" clause, which is found at the end of Section 8. Having identified an enumerated federal power, the Supreme Court found the Maryland statute unconstitutional. *Id.* at 407-08, 411-12. As stated by Chief Justice Marshall, the lesson of *McCulloch* is instructive here:

> The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not.
>
> * * *
>
> The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any way control, the operations of the constitutional law enacted by Congress to carry into execution the powers vested in the general government.

Id. at 429, 436 (emphasis added).

Here, Congress created the National Science Foundation ("NSF") and, along with the Department of Defense, empowered NSF to spend the public's money to create and foster the Internet, including promotion of interstate and international commerce and communication, as well as advances in the infrastructure of the Internet, like the Domain Name System at issue here. *See, e.g.*, National Science Foundation Act, 42 U.S.C. § 1862(a)(4) (Congress directed NSF "to foster and support the development and use of computer and other scientific methods

and technologies, primary for research and education in the sciences"); 42 U.S.C. § 1870(c) (NSF authorized to contract out performance of NSF functions); High Performance Computing Act, 15 U.S.C. § 5501 *et seq.* (Congress directed NSF to "provide computing and networking infrastructure support for all science and engineering disciplines and support basic research and human resource development in all aspects of high-performance computing and advanced high-speed computer networking"); Scientific and Advanced Technology Act, 42 U.S.C. § 1862(g) (Congress amended the National Science Foundation Act to authorize NSF to allow commercial activity on the Internet). *See also* Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (1998). Taken together, 42 U.S.C. §§ 1870(c), 1862(a)(4) and 1862(g) provided NSF with plenary authority to enter into contracts for the management of the Domain Name System.[8] By a Memorandum of Agreement dated September 9, 1998, the NSF transferred responsibility for the DNS to the United States Department of Commerce ("DOC").

The High Performance Computing Act directs the DOC's National Institute of Standards and Technology ("NIST") to, among other things:

> (A) conduct basic and applied measurement research needed to support various high-performance computing systems and networks; [and]
>
> (B) develop and propose standards and guidelines, and develop measurement techniques and test methods, for interoperability of high performance computing systems and networks and for common user interfaces to systems; . . .

15 U.S.C. § 5524(a)(1)(A) and (B). By Presidential Directive dated July 1, 1997, President Clinton directed the Secretary of Commerce "to support efforts to make the governance of the domain name system private and competitive and to create a contractually based self-regulatory

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[8] *See, e.g.*, National Science Foundation Act, 42 U.S.C. § 1862(a)(4) (Congress directed NSF "to foster and support the development and use of computer and other scientific methods and technologies, primary for research and education in the sciences"); 42 U.S.C. § 1870(c) (NSF authorized to contract out performance of NSF functions); High Performance Computing Act, 15 U.S.C. § 5501 *et seq.* (Congress directed NSF to "provide computing and networking infrastructure support for all science and engineering disciplines and support basic research and human resource development in all aspects of high-performance computing and advanced high-speed computer networking"); Scientific and Advanced Technology Act, 42 U.S.C. § 1862(g) (Congress amended the National Science Foundation Act to authorize NSF to allow commercial activity on the Internet). *See also* Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (1998).

regime that deals with potential conflicts between domain name usage and trademark laws on a global basis." Presidential Directive: Electronic Commerce 07/01/97, 1997 WL 367091, *3 ¶ 5.

On November 25, 1998, pursuant to President Clinton's directive, DOC entered into a Memorandum of Understanding ("MOU") with the Internet Corporation for Assigned Names and Numbers ("ICANN"), another defendant in this action.[9] Pursuant to the MOU, DOC and ICANN agreed to jointly design, develop and test the mechanisms, methods and procedures that should be in place and the steps necessary to transition management responsibility for DNS function, including a plan for expanding the number of top-level domain names. *See* Memorandum of Understanding, at V.A.1-3. In essence and purpose, by way of the MOU, DOC sought ICANN's assistance to achieve government policy goals. The <.biz> top-level domain name and NeuLevel's position as an Internet registry are direct products of this joint effort. *See* Registry Agreement. ICANN agreed to this of assigning domain names in the <biz> registry and recommended it to the DOC. The DOC approved of it by directing that <.biz> be loaded into the A Root Zone File approved by ICANN and the DOC. *Id.*

In short, Congress has prescribed and the Executive Branch has undertaken the management of the DNS. Plaintiffs now attempt to regulate such federal management of the Domain Name System by subjecting it to the restrictions of California's lottery laws. This is tantamount to regulating the federal government itself. At a minimum, it interferes with the express policy objectives of the federal government. Accordingly, issuance of a preliminary injunction based on a Section 17200 claim and an alleged Penal Code violation would violate the Supremacy Clause of the Constitution. *U.S. Const. Art. VI, cl. 2* ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the

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[9] DOC's authority to enter into the MOU is found in section III thereof. *See* MOU (Appendix of Non-California Authority) at section III, *citing, inter alia*, 15 U.S.C. § 1525; 47 U.S.C. § 902; and the White Paper, 63 Fed.Reg. 31,741.

Contrary notwithstanding."); *McCulloch v. State of Maryland, supra. See also Man Hing Ivory and Imports, Inc. v. Deukejian*, 702 F.2d 760, 763-64 (9th Cir. 1983) (Relying on section 6(f) of the Endangered Species Act, 16 U.S.C. 1535(f) ("the Act"), the Court struck down as unconstitutional a California Penal Code provision that prohibited the importation or sale of specified animal parts and products to the extent that it sought to penalize importation of animal body parts permitted by the Act and the implementing regulations); *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758 (9th Cir. 1983) (same).

2. Courts Addressing State Attempts to Regulate The Internet Have Found That Such Regulation Violates the Commerce Clause.

In its negative or "dormant" aspect, the Commerce Clause prohibits discrimination aimed directly at interstate commerce and foreign commerce, and bars state regulations that, although facially neutral, unduly burden interstate commerce. *U.S. Const. Art II, § 8*; *American Libraries Assoc. v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997). To determine whether a state regulation is unduly burdensome, a court must weigh the burden on interstate commerce against the putative local benefits derived from the statute. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 382 (1983); *Pataki*, 969 F. Supp. at 177. The burden on interstate commerce will ordinarily be found unreasonable where the state regulation substantially impedes the free flow of interstate or foreign commerce or governs "those phases of the national commerce which, because of the need of national uniformity, demand their regulation, if any, be prescribed by a single authority." *Partee* at 382-383 (quoting *Southern Pacific Co. v. State of Arizona* 325 U.S. 761, 767 (1945)). In addition, where the practical effect of a state regulation is to control conduct beyond the boundaries of the state, the regulation violates the Commerce Clause regardless of whether the statute's extraterritorial reach was intended by the state legislature. *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989).

a) Several Courts Have Held that State Regulation of the Internet Violates the Commerce Clause.

In *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), the Tenth Circuit held that a state statute prohibiting the communication of sexually explicit materials to minors over the Internet violated the Commerce Clause for three reasons: (1) the statute impermissibly regulated conduct beyond the borders of the state; (2) the statute placed an undue burden on interstate commerce in relation to its putative local benefits; and (3) enforcement of the statute would subject Internet users to inconsistent obligations. *Id.* at 1161-1163. According to the Tenth Circuit, New Mexico's attempt to regulate Internet communications constituted a per se violation of the Commerce Clause because communications over the Internet cannot be limited to the geographic boundaries of a state, so the practical effect of New Mexico's law was to regulate interstate conduct occurring outside the state. *Id.* at 1161. In addition, the court held that the burden on interstate commerce outweighed the local benefit of protecting minors from sexually explicit materials, because the state's limited jurisdiction and the practical difficulties of prosecuting those whose only contact with New Mexico is over the Internet meant that the statute could not effectively shield minors from the majority of pornographic materials originating in foreign countries and out-of-state. *Id.* at 1161-1162. Finally, the court held that "[t]he internet, like . . . rail and highway traffic . . ., requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations." *Id.* at 1162 (quoting *Pataki* at 182).

In concluding that New Mexico's regulation of Internet communications violated the Commerce Clause, the Tenth Circuit relied heavily on *American Libraries Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). In *Pataki*, the court granted a preliminary injunction against enforcement of a similar New York law prohibiting the communication of sexually explicit materials to a minor over the Internet. In so holding, the court emphasized the unique nature of the Internet as a decentralized forum where "geography . . . is a virtually

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SUITE 2400
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meaningless construct." *Id.* at 169. Focusing on the distinctive characteristics of the Internet in its Commerce Clause analysis, the court stated:

> The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations. Without the limitation's imposed by the Commerce Clause, these inconsistent regulatory schemes could paralyze the development of the Internet altogether.

Id. at 181; *See also PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mi. 1999).

b) The Burden of Applying California's Unfair Competition Laws to the <.biz> Registering Far Outweighs the State's Interest in Promoting Competition.

The reasoning in *Johnson* and *Pataki* applies with even greater force to the present case, where plaintiffs seek to regulate not merely a particular use of the Internet, but the infrastructure of the Internet itself. As the court stated in *Pataki*,

> The Internet . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations. Regulation on a local level, by contrast, will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities.

Pataki at 182. *Cf. Ford Motor Co. v. Texas Dept. of Transportation* [2001 WL 984676](5th Cir. 2001) (conceding that laws that directly regulate Internet activities may run afoul of the Commerce Clause because of the need for national uniformity in Internet regulations).[10]

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[10] In *Hatch v. Superior Court*, 80 Cal. App. 4th 170 (2000) and *People v. Hsu*, 80 Cal. App. 4th 170 (2000), the courts distinguished *Pataki* in upholding against Commerce Clause challenges California's law against communicating sexually explicit material to minors over the Internet "for the purpose of seducing a minor." These case are distinguishable because they deal only with regulation of Internet users, and not with regulation of the Internet itself. Moreover, the state law at issue in *Hatch* and *Hsu* had a geographically limiting component – the intent-to-seduce requirement – that was not present in *Pataki* and does not apply to the present case.

Historically, courts have invalidated state statutes that constitute direct regulation of an instrument of commerce. For example, in *Southern Pacific*, the United States Supreme Court invalidated an Arizona law that limited the number of cars permitted on trains travelling within the state. The Court found that breaking up and remaking the long trains upon entering and leaving the state delayed traffic and diminished volume on the railroad, thereby impeding the efficient operation of the railroad. *Id.* at 772. The Court held that this burden outweighed the state's interests in railroad safety. *Id.* at 782. In so holding, the Court emphasized that "the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Id.* at 767.

Moreover, the nature of the Internet's governance makes compliance with 50 different state laws and a multitude of foreign laws a practical impossibility. The U.S. government has made a policy choice to permit the global Internet to be governed through international consensus. White Paper at 14. ICANN was chartered to represent the diverse interests within the Internet community, and to continue the tradition of cooperation within the Internet community. NeuLevel devised the <.biz> application process with the oversight of ICANN, and with extensive opportunity for public comment. This process followed the President's and the DOC's blueprint.

Application of state lottery laws to the NeuLevel land rush unquestionably would be burdensome. There is substantial variation among the lottery laws of the various states. Similar variations exist among state unfair competition-type statutes. The variations among the laws of foreign countries are even greater. Because it would be impossible for NeuLevel to have multiple systems for domain name registration, the practical effect of allowing the states to regulate the application process would be to force defendants to follow the most restrictive jurisdiction's laws. In this way, plaintiffs' attempt to apply California's unfair competition and lottery laws to the land rush will be felt everywhere in the world. This extraterritorial effect

constitutes a per se violation of the Commerce Clause. *See Pataki; ACLU v. Johnson; PSINet; Cyberspace.*

Subjecting the <.biz> application process to state regulation would impose a substantial burden on interstate and, indeed, international commerce. This burden far outweighs California's interest in promoting fair competition through section 17200 and it is unconstitutional as the plaintiffs would have this court apply it.

3. Anti-Lottery Law Does Not Apply To The <.biz> Application Process.

Courts in California and other states have long recognized that whether a particular practice comes "'within the scope and purpose of the enactments against lotteries'" must be determined in light of the intent behind those statutes — "'to prevent citizens from indulging in [a] species of gambling.'" *Ex parte Shobert*, 70 Cal. 632, 634 (1886), quoting *Kohn v. Koehler*, 96 N.Y. 362 (1884). As the Oregon Supreme Court explained,

> The principal charge against lotteries is that they penalize the poor, who in ill-advised hope or desperation buy most of the tickets . . ."
>
> * * *
>
> To attempt to interpret the anti-lottery laws without considering the circumstances which spawned them would eviscerate the legislative mandate that the Court is to seek the legislature's intent.

Cudd v. Aschenbrenner, 377 P.2d 150, 154-55 (Or. 1962) (citations omitted).

Thus, even if a particular practice seemingly embodies the basic elements of a lottery — chance, prize and consideration — that "alone does not lead to the conclusion that" the practice is an illegal lottery. *Knight v. State of Mississippi*, 574 So.2d 662, 668 (Miss. 1990) (ruling that bingo does not constitute a lottery). To hold otherwise would "absurd[ly]" sweep within the scope of anti-lottery laws innocuous games and business enterprises (e.g., the stock market and life insurance) that cannot properly be labeled as "gambling." Id. Stated differently, "[t]he

fallacy . . . lies in the mechanical application of preconceived notions of 'prize, chance and consideration[.]'. . . Those words were not written in a vacuum." *Cudd*, 377 P.2d at 156.

Rejecting the mechanical application of anti-lottery laws, courts have held that allocation systems that charge application fees and employ random limited goods or resources do not constitute illegal lotteries. For example, in *Polonsky v. City of South Lake Tahoe*, 121 Cal. App. 3d 464 (1981), the court held that a city's system for randomly allocating a limited number of available sewer permits, in which applicants paid a non-refundable fee without a guarantee of obtaining a permit, did not violate California Penal Code § 319 — the very same anti-lottery statute relied upon by plaintiffs in this action. Similarly, in *Daub v. New York State Liquor Authority*, 257 N.Y.S.2d 655 (S.Ct. Suffolk County 1965), the court held that the issuance of liquor licenses through a system of random selection from a pool of applicants that had paid a $50 fee was not an illegal lottery.

The <.biz> land rush application process plainly is not a gambling scheme, but rather a *Polonsky*-style system for allocating a limited resource and effectuating the orderly expansion of the Internet under a government sanctioned plan. On the basis of past experience and with the aid of public comment, NeuLevel concluded that the <.biz> application process was the most practical and fair method of launching the distribution of <.biz> domain names, and ICANN acting pursuant to the DOC's move, agreed that the process was reasonable. *See* Armentrout Decl., at ¶¶ 12-25. The randomization is "a mere processing incident" for the purpose of assigning a limited good, *See Daub*, 257 N.Y.S.2d at 662, that will have no effect where there is only one applicant for a given domain name. Both the <.info> and <.name> registries employ similar randomization methods for their land rushes. *See* Armentrout Decl., at ¶ 20. Moreover, the $2.00 application fee will not be sufficient to recoup the costs of developing the system to handle the land rush applications match them to the IP claims database. *See* Declaration of Tim Switzer, NeuLevel's Vice-President.

In sum, the plaintiffs' argue for a reflexive application of Penal Code § 319. By so doing, they ignore the purpose for which the anti-lottery statutes were enacted. When

examined within its proper context, it is clear that the <.biz> land rush application process has nothing whatsoever to do with the evils of gambling, and everything to do with the complex task of efficiently and equitably allocating unique domain names, which are a scarce resource..

4. Even If Anti-Lottery Statutes Were Applicable, Plaintiffs Are Not Entitled to Equitable Relief.

A plaintiff cannot seek judicial help in remedying his participation in an allegedly illegal activity. *See Beck v. American Health Group Int'l, Inc.*, 211 Cal. App. 3d 1555, 1563 (1989). If a plaintiff's cause of action is premised on his participation in an illegal lottery, "the doors of the courts are closed to [him]." *Holmes v. Saunders*, 114 Cal. App. 2d 389, 391 (1952) (no action in the courts for conversion of automobile won in lottery). *See also Kelly v. First Astri Corp.*, 72 Cal. App. 4th 462, 488 (1999). ("California has a strong, broad and long-standing public policy against judicial resolution of civil disputes arising out of gambling contracts or transactions."); *Kyne v. Kyne*, 16 Cal.2d 436, 438 (1940). ("This rule has been rigidly enforced. . .")

No aspect of NeuLevel's registration process is illegal. If plaintiffs' contention that the process is illegal is correct, however, plaintiffs' claims are barred by their admissions that they knowingly participated in the process.

5. Plaintiffs Are Unlikely To Establish The Elements Of A Lottery.

Even if the purpose of the anti-lottery law is disregarded, and even if plaintiffs are permitted to challenge the legality of an activity in which they voluntarily participated, plaintiffs still are unlikely to succeed on their merits because the three elements of a lottery — prize, chance and consideration— are not present in the <.biz> land rush application process.

a) Domain Names Are Not Property, and Therefore Do Not Constitute a "Prize" Under California Law.

Penal Code § 319 defines a lottery as "any scheme for the disposal or distribution of property by chance ...." Pen. Code § 319. Because domain names are not property, a system for allocating domain names cannot be a lottery. *Hotel Employees and Rest. Employees Int'l*

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SUITE 2400
LOS ANGELES, CA 90067

Union v. Davis, 21 Cal.4th 585, 592 (1999). Courts have consistently concluded that domain names are not property. *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir. 1999) (registration of domain names "squarely on the 'service' side of the product/service distinction"); *Kremen v. Cohen*, 99 F.Supp.2d 1168, 1173 (N.D. Cal. 2000) (domain names are not protected property and cannot be the subject of a conversion action); *Dorer v. Arel*, 60 F.Supp.2d 558, 561 (E.D. Va. 1999)(" a domain name registration is the product of a contract for services between the registrar and registrant); *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 529 S.E.2d 80 (Va. 2000) (domain name not among garnishable property because "a domain name registrant acquires the contractual right to use a unique domain name for a specified period of time"); *Zurakov v. Register.com*, No. 600703-01 at 3 (N.Y. Sup. Ct. July 27, 2001)(registrant's rights in a domain name sound in contract, not property). Moreover, a domain name lacks intrinsic value; it derives any value from use, marketing, and promotion after it is registered. *See Dorer* 60 F. Supp.2d at 561 n. 9 (domain name is a valueless address with potential to become valuable depending on its use). A domain name is a service that translates alphanumeric data into blocs of numbers to locate an IP address. *See* Amentrout Decl., at ¶ 5.

Plaintiffs argue that certain ".com" domain names have sold for substantial amounts of money or are on the market for large sums. This argument is unavailing for several reasons. First, it proves nothing about the value of a <.biz> name. Second, plaintiffs ignore a critical feature of the <.biz> registry that prohibits registration for speculative purposes.[11] And third, the businesses who register these names will not realize any gain beyond what was paid for them – for both tax and accounting reasons. *See* Declaration of Troy Watkinson ("Watkinson Decl."), at ¶ 6 (right to register not income or a prize for tax purposes) and Declaration of Gerard Davies ("Davies Declaration"), at ¶ 8. (Generally Accepted Accounting Principles

[11] This element of the system was intended to prevent just the type of speculation in domain names cited by plaintiffs. *See* Appendix L of the Registry Agreement.

("GAAP" do not recognize any gain or increase in value above cost upon receipt of the right to register domain name).[12]

In like circumstances, the U.S. Internal Revenue Service has ruled that similar rights are not income or lottery prizes. In Revenue Ruling 67-135, the IRS examined the award of federal oil and gas leases. The Bureau of Land Management ("BLM") posts a list of leases available, and any citizen who pays a nonrefundable filing fee and pays a refundable first year's rent may apply for the lease. If there are multiple applications for a single lease, the lease is awarded by random drawing.[13] The IRS determined that the value of the lease in excess of the cost to obtain the lease, if any such added value exists, is not a "prize" and therefore is not properly included in the taxpayer's gross income. Rev. Ruling 67-135.1967-1 C.B.20. *See* Watkinson Decl., at ¶ 5. Similarly, GAAP require that a domain name be carried at the cost of its acquisition — in this case, the registration fee. *See* Davies Decl., at ¶ 8.

b) Plaintiffs Cannot Establish the Existence of a "Chance."

Plaintiffs have not established, nor can they establish, the second requirement for a lottery — the existence of "chance" — because the presence of "chance" is contingent upon applications being submitted by one or more other applicants for the same <.biz> domain names. Plaintiffs have the burden of proof. Plaintiffs have neither alleged nor offered evidence showing that any other applicants have, in fact, applied for the names that plaintiffs seek.[14] Therefore, the statutory element of "chance" has not been established.

Chance also is not the dominant factor in determining which applicant is assigned a particular domain name. A program or game cannot be considered "as one of chance solely

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[12] Additionally, Plaintiffs cannot claim potential trademark or other intellectual property rights in their requested domain names, because <dj.biz>, <radio.biz>, <comicbook.biz>, <trafficschool.biz>, and <comedy.biz> are generic marks not entitled to protection. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

[13] Pursuant to plaintiffs' argument, the BLM allocation of scarce oil and gas leases would be another illegal lottery authorized by Congress.

[14] It is worth noting that one domain name sought by plaintiff Smiley <dj.biz> — is not available at all. Under the registry agreements, no two character <.biz> names may be registered because of the potential confusion with Internet country codes (dj is the country code for Djiboudi.) *See* Registry Agreement Appendix K. So, he cannot prevail with respect to that name because it is not available for registration.

because chance is a factor in producing the result." *People v. Settles*, 29 Cal. App. 2d 781, 787 (1938). "Chance," the California Supreme Court has explained, "means that winning or losing depend on luck and fortune rather than, or at least more than, judgement and skill." *Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 21 Cal.4th 585, 592 (1999). In other words, "[t]he test is not whether the game contains an element of chance or an element of skill but which of them is the dominant factor in determining the result of the game." *In re Allen*, 59 Cal.2d 5, 6 (1962) (holding that game of bridge is not a lottery).

Chance is not the dominant factor in the selection process. The first and most important step in the application process for a <.biz> domain name is the selection of the name. If only one entity applies for a particular domain name, the applicant automatically obtains the right to register the name and, therefore, there is no chance involved. Judgement greatly influences whether or not it will be necessary to employ the randomized selection process. Choice of a fanciful domain name (e.g., <skyscrapercomics<.biz>>), as opposed to a generic domain name (e.g., <comicbook<.biz>>), can significantly influence whether the applicant obtains the right to register the domain name. Thus, at the outset, an applicant's choice of a domain name is a major factor in determining the outcome – unless the applicant's purpose is to violate registry rules and engage in speculation.

Even when multiple applications necessitate the use of randomized selection, chance still may not be the determining factor. The applicant who is assigned the right to register a particular domain name must still contend with applicable intellectual property rights from anywhere in the world. For example, if plaintiffs applied for and were assigned <cocacola<.biz>>, use of the name would surely be successfully challenged as infringing the COCA-COLA trademark. Moreover, to overcome less-obvious trademark challenges, a successful applicant must either employ knowledge of international trademark law or negotiate the purchase of such rights.

c) Plaintiffs Have Failed to Establish the Element of "Consideration."

To prove the element of consideration, plaintiff must bring forth evidence that establishes a participant must pay to play. There are over 80 registrars and thousands of resellers who are taking <.biz> applications. Plaintiffs have the burden of proof to show likelihood of success on the merits and, with respect to the element of consideration, must show that each registrar and reseller charges a non-refundable fee for a domain name application. Plaintiffs have offered no evidence on this subject.

Plaintiffs attempt to prove "consideration," through the $2.00 application fee. The fee has two aspects. First, the fee entitles the applicant to intellectual property claim notices, a service designed to minimize cybersquatting disputes. *See* Armentrout Decl., at ¶ 24. Second, the fee provides cost recovery to NeuLevel for the land rush application process. *Id.*, at ¶ 24. The fee has the further benefit of preventing seeks to prevent abusive practices that would give some registrars and their customers an unfair advantage. Therefore, the payment is not "consideration" under the lottery statute. *Polonsky*, 121 Cal. App. 3d at 466-67 (finding a city's charge of a non-refundable application fee for a limited number of sewage permits where the number of applicants exceeded the number of available permits was not a lottery because the fee covered the administrative costs of processing applications and was therefore not "consideration" for a "chance" to obtain the permit), *See also United States Postal Service v. Amada*, 200 F.3d 647 (9th Cir. 2000) (no consideration, and thus no lottery, when the amount paid by participants, which correlated with processing expenses, was paid "in exchange for services," not for a "chance" to receive a "prize").[15]

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[15] In their memorandum, plaintiffs rely extensively (indeed, virtually exclusively) on statements contained on the web sites of certain registrars regarding how the <.biz> application process works to support their assertion that the fee is consideration for a chance to obtain the right to register a domain name. The persons making those statements are not agents of, nor are they in any way controlled by, NeuLevel. Thus, the statements cannot be ascribed to NeuLevel and are of no evidentiary value. *See People v. Pacific Land Research Co.*, 20 Cal.3d 10, 21 (1977). As set forth in the attached affidavit of Armentrout Decl. at ¶ 22-24, the statements of registrars relied upon by plaintiffs fundamentally misconceive the nature of the application process and, particularly, the nature of the application fee that registrars must pay NeuLevel. In addition, plaintiffs have not sought to include any of the

B. The Balance of Hardships Favors NeuLevel.

1. Plaintiffs Fail to Demonstrate That They Will Suffer Any Irreparable Injury in the Absence of a Preliminary Injunction.

Contrary to plaintiffs' multiple unsupported and highly speculative contentions, it is clear that the balance of hardships in this case dictates denial of plaintiffs' motion.

a) The Self-Inflicted Nature Of Plaintiffs' Alleged Injury Precludes A Finding Of Irreparable Harm

Injunctive relief is an equitable remedy. The law holds that a self-inflicted injury cannot constitute irreparable harm. *See United States v. Superior Court*, 19 Cal. 2d 189 (1941) (finding no proof of irreparable harm where, *inter alia*, any injury suffered by plaintiffs was self-inflicted). *See also Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995); *Barton v. District of Columbia*, 131 F.Supp.2d 236, 247 (D.D.C. 2001); *Fiba Leasing Co. v. Airdyne Indus., Inc.*, 826 F. Supp. 38, 39 (D. Mass. 1993).

Just hours before handing the complaint to the Clerk of this Court, plaintiff Smiley purposefully manufactured his own "injury" and did so with the mistaken belief that he was engaging in an illegal scheme. In October 2000, NeuLevel and ICANN made public their plan for the launch of the new <.biz> domain name and invited public comment on all aspects of the plan, including the idea of randomized selection. *See* Armentrout Decl., at ¶ 12. At no time did plaintiffs ever object to any aspect of the <.biz> application process prior to it being finalized on May 11, 2001. *See* Smiley Decl., at ¶¶ 4, 13. Because plaintiffs created their own "injury" as part of a litigation strategy, no qualifying irreparable harm exists and the equitable powers of this Court should be reserved for less concocted claims..

b) Plaintiffs Have Adequate Legal Remedies.

Plaintiffs brand the <.biz> application process a *per se* violation of Business and Professions Code § 17200 *et seq.* and assert that, unless the process is stopped, NeuLevel will

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registrars in the preliminary injunction, but instead have sought improperly to put the burden on NeuLevel to control the actions of these independent actors.

continue to profit from the allegedly illegal scheme. This argument, even if correct, does not establish irreparable injury. At most, it fixes a right to pursue money damages.

Plaintiffs also assert that, absent an injunction, "consumers" will suffer irreparable harm because "consumers" are faced with a Hobson's choice of purchasing multiple applications for a single domain name and thereby allegedly increasing their chances of obtaining that name, or submitting a single application. Plaintiff's Memo at 11.[16] Plaintiffs make no allegation that they, or anyone else for that matter, submitted multiple applications for any single <.biz> domain name.[17] Further, even if the hypothetical injury plaintiffs pose were to exist, it clearly is not irreparable. In the unlikely event that NeuLevel's application process were eventually held to violate California's lottery law, the amounts paid to apply for a domain name could be refunded. It is blackletter law that a "mere monetary loss does not constitute irreparable harm." *Friedman v. Friedman*, 20 Cal. App. 4th 876, 890 (1993); *Tahoe Keys Property Owners' Assoc. v. State Water Resources Control Bd.*, 23 Cal. App. 4th 1459, 1471 (1994) ("If the plaintiff may be fully compensated by the payment of damages in the event he prevails, then preliminary injunctive relief should be denied."). Start-up costs and other business costs constitute run-of-the-mill damages that are fully capable of being compensated monetarily. *See Wooley v. Embassy Suites, Inc.*, 227 Cal. App. 3d 1520, 1535 (1991) ("The mere fact that the precise amount of damages may be difficult to prove does not provide the basis for injunctive relief.").

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[16] Interspersed throughout plaintiffs' arguments are misplaced allegations of class injury and consumer injury. The <.biz> registry is a restricted registry limited to use by businesses. Appendix L to the Registry Agreement provides that registrations for the <.biz> TLD "must be used or intended to be used primarily for bona fide business or commercial purposes . . ." *See* Registry Agreement Appendix L, at 1. That does not implicate consumer protection laws. Thus, allegations of consumer injury should also be disregarded. Additionally, this Court has not yet been asked and should not certify a class in this action. Therefore, statements of class injury are rank speculation and should not be considered by the court.

[17] Again, with respect to this issue, plaintiffs improperly seek to rely on statements made by entities other than NeuLevel.

c) Plaintiffs' Speculative and Hypothetical Business Losses Cannot Support a Claim of Irreparable Injury.

Plaintiffs' attempt to construct future injury involves elaborate speculation. Plaintiffs allege that (1) if they obtain one or more of their desired <.biz> domain names[18]; (2) they will devote capital to build value for those domain names; (3) after which the <.biz> Registry will be declared illegal; (4) the remedy fashioned will be to reallocate already-distributed <.biz> domain names; (5) customers who patronized the originally-distributed <.biz> web sites (assuming they were up and running) will perceive the underlying business as bankrupt or defunct; and (6) plaintiffs will be injured by loss of expended capital and loss of business expectancy. *See* Plaintiff's Memo at 10-13. Plaintiffs have had months to prepare this lawsuit, but they offer no testimony and no documentary evidence on their ability to make such investments of money and these forecasted losses.

The law is clear that speculation as to future harm does not establish an irreparable injury that justifies an injunction. *Gleaves v. Waters*, 175 Cal. App. 3d 413, 421 (1985); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984); *See Lezama v. Justice Court*, 190 Cal. App. 3d 15, 20 (1987) (party seeking a preliminary injunction must show a "serious risk of irreparable harm"). Plaintiffs' argument that their prospective businesses — businesses that do not yet exist — will be irreparably injured is built on supposition. This parade of horribles, offered without a shred of evidentiary support, cannot support a finding of irreparable harm. *See Goldie's Bookstore*, 776 F.2d 486 (allegation that plaintiff would lose goodwill and "untold" customers was speculative and did not constitute irreparable harm).

[18] If NeuLevel allocated domain names by auction, plaintiffs have proffered no evidence that they have the financial means to out-bid others for the names they seek or win a first-come, first serve race.

d) Irreparable Injury Cannot Be Based on a Theoretical Lost Opportunity to Obtain a Specific Domain Name.

Plaintiffs' claim that they will be injured by the loss of "the opportunity to fairly secure" one of the "invaluable" <.biz> domain names with a common word prefix, *e.g.*, <comicbook.biz> (Plaintiffs' Memorandum, at 13). The speculation continues. First, even if the <.biz> application process were abandoned and a new system were instituted, there is no reason to believe, *and more to the point there is no evidence*, that plaintiffs would succeed in obtaining their desired domain names through that new system, or even that they would stand any better chance to obtain them. For example, if the <.biz> domain names were assigned on a first-come, first-serve basis, plaintiffs' opportunity to obtain a domain name such as "comicbook<.biz>" is not only unknown, it is unknowable. Thus, plaintiffs' argument that they are being irreparably injured by the present <.biz> application process is also speculative[19]

Second, no basis exists for plaintiffs to claim that the domain names for which they have applied are "invaluable." (*See* Plaintiffs' Memorandum, at 13). As explained earlier, case law recognizes that a domain name lacks any intrinsic value; its value depends on how the person who controls the domain name develops its value through marketing and other efforts to develop secondary meaning and value. Thus, even if plaintiff Skyscraper were to obtain the domain name "comicbook.com", the domain name would be valuable only if Skyscraper had substantial resources or investors and properly developed its value. This requires substantial investment of money.[20] Furthermore, plaintiffs' bald assertion that "[n]o other domain names can serve as an adequate substitute" (*See* "Declaration of Brett Drogmund (Drogmund Decl.") at ¶ 15; Smiley Decl., at ¶ 15; Smiley Decl., at ¶ 28) is absurd. It takes little effort to think of other adequate substitutes — "<comicbooks.biz>", "<thecomicbook.biz>", "<comics.biz>",

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[19] In that case, the names could easily go to applicants who have the technological sophistication to generate thousands of application on an almost instantaneous basis. There is no evidence of this ability in plaintiffs.

[20] This point is evident in that the comparable domain name <comicbook.com> automatically routes the viewer to the site <cinescape.com/0/Comics_2.asp>. Thus, the value of <comicbook.com> appears to be minimal.

"<comicbookworld.biz>", just to name a few. Again, plaintiffs' argument for an irreparable injury is sheer speculation; there is no evidence of any lost value.[21]

Finally, plaintiffs may very well be assigned the <.biz> domain names they have requested, even if others also have submitted applications to register the same name. Moreover, if there are no other applicants for the domain names requested by plaintiffs, plaintiffs' ability to secure the desired <.biz> names is a certainty, and they will suffer no injury at all and indeed will not have been involved in a random selection process that could be challenged later.

In sum, plaintiffs fail to present evidence of any serious risk of an immediate irreparable harm. Instead, there is evidence of self-inflicted injuries and speculation about future losses, both of which cannot serve as the basis for injunctive relief as a matter of law.

2. NeuLevel Is Certain To Suffer Substantial Injury Should a Preliminary Injunction be Granted.

Courts considering a preliminary injunction must also consider the harm imposed on the defendant should an injunction issue. An injunction is only justified "when the trial court determines that a greater injury will result to the moving party if the injunction is denied than will result to the opposing party if the injunction is denied." *Paradise Hills Assoc. v. Procel*, 235 Cal. App. 3d 1528, 1536 (1991). As demonstrated below, the harm caused to NeuLevel by shutting down its business far exceeds any harm that can be claimed by the plaintiffs should an injunction not issue.

The harm to NeuLevel, from an injunction, is extraordinary and irreparable. Failure of the <.biz> registry to go live on time is perhaps the greatest threat to the success of the business plan and could even jeopardize the future of the company. Both <.info> and <.biz> are the first new gTLDs to be introduced in more than ten years.[22] It is part of a "proof of concept"

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[21] The magnitude of this speculation is highlighted by recent events with, <.com> businesses. Despite millions invested and spent (some would say wasted), most <.com> businesses have little or no value.

[22] The <.info> and <.biz> registries are scheduled to go live in the early fall of 2001. Five other registries have been selected but have later launch dates.

approach adopted by the ICANN and DOC to explore the best means to add gTLD's without destabilizing the Internet. *See* Armentrout Decl., at ¶ 11. *See* Declaration of Louis Tonton (filed in conjunction with ICANN's opposition to this motion). Both <.biz> and <.info> are expected to provide direct competition to <.com> and thus for many businesses, a second opportunity to secure a simple and highly desirable, business oriented, second level domain name. The <.info> registry has the same basic structure as <.biz> as well as an imminent launch date. No injunction has been sought against <.info>, however. If <.biz> is enjoined and <.info> is launched, NeuLevel's ability to gain market share will be irreparably diminished. *See* Declaration of Tim Switzer ("Switzer Decl.") at ¶ 6-8. This is because the first days of operation are critical in establishing credibility and market share for a new registry. *See* Armentrout Decl., at ¶¶ 42-44; Switzer Decl., at ¶ 6.

The investment worldwide in this registry is enormous. NeuLevel itself spent millions of dollars in marketing and advertising to aggressively promote the October 1 launch date. In the past 60 days, there have been hundreds of articles on the <.biz> launch in the press and, NeuLevel's executives have appeared on radio and television on numerous occasions. *See* Switzer Decl., at ¶ 6. NeuLevel entered into contracts with registrars around the world that contemplated an October 1, 2001 launch date. The registrars, many of whom are defendants in this case, have also spent millions of dollars and made countless promotional efforts concerning the October 1 launch May 24, 2001. As an example, Register.com placed full-page ads in *The Wall Street Journal* and *USA Today* promoting the October 1 launch on May 24, 2001. Tens of thousand of intellectual property claims have been received by NeuLevel from various intellectual property owners, all premised upon an October 1 launch date. The terms and conditions for those claims explicitly reference an October 1 start date. Millions of people have submitted domain name applications in anticipation of the September 17 application date cutoff and the October 1 start. All of these customers expect NeuLevel to begin service at that time.

The loss of crucial revenue and the confusion and doubt among the Internet community, which would surely arise from an injunction in this case, would be certain to adversely impact

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LOS ANGELES, CA 90067

crucial investment in NeuLevel and it would slow the company's growth by adversely impacting attempts to expand NeuLevel's business, for example by developing additional value added services to differentiate the <.biz> product from other top level domains, like <.info>, com, .org and .net. *See* Switzer Decl., at ¶ 7.

NeuLevel's success is predicated in part on providing an alternative name space for businesses that did not obtain their name of choice in the earlier .com, .org and .net name spaces. If the <.biz> launch is delayed, NeuLevel's opportunities can be materially eroded because competing registries, including both <.info> and country code TLDs and alternative roots will have an enhanced ability to gain market share at NeuLevel's expense. *See* Switzer Decl., at ¶ 8. NeuLevel's timing in the market and the October 1 launch date are not an accident; the company worked diligently to secure this favorable launch date for specific reasons. *See* Armentrout Decl., at ¶ 43; Switzer Decl., at 6-8. Since information about its processes has been publicly available for many months, the timing of this motion either reflects a lack of diligence by the plaintiffs or a deliberate decision to wait until maximum damage can be inflicted upon NeuLevel by allowing these investments to be made and then threatening the launch immediately before it is scheduled to occur.

Plaintiffs' contention that the requested preliminary injunction will not harm NeuLevel because domain names do not lose value over time is naive. Plaintiffs fail to understand that NeuLevel is not auctioning or otherwise marketing names at a marked-up price. Instead, NeuLevel's business plan makes the names equally available to all potential users, and prohibits registration for the purpose of resale. In short, NeuLevel does not engage in, permit or profit from market speculation over domain names.

The plaintiffs' contention that the domain names can be distributed by other means, also misses the mark entirely. Starting a new registry at a very low price in an environment of high demand for new names requires an offline, initial registration phase. In designing this system, NeuLevel knew that 22 million registrations exist in the .com domain and it expected hundreds of thousands to millions of applications for some of those names. Armentrout Decl., at ¶¶ 13-

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15. It also knew that sophisticated applicants would dedicate computers to generate applications continuously, pointed at multiple registrars, in an effort to be the first applicant. *See id.* at ¶ 21. This is demonstrated by the fact that such efforts are ongoing with respect to expiring domain names on existing registries, and those systems cannot handle the volume of applications for the smaller volume of expiring names, much less re-registering the entire universe of names as NeuLevel effectively must do. Armentrout Decl., at ¶ 15. Design of a system to handle multiple applications for 22 million names on an instantaneous, first come first served basis is impossible and cost prohibitive. Armentrout Decl., at ¶¶ 23-24.

Lastly, plaintiffs claim that NeuLevel can force the registrars to accept applications in a "lawful" manner. As Appendix F to the NeuLevel Registry Agreement shows, NeuLevel's agreements with the registrars are based upon the registry agreement itself. *See* Armentrout Decl., at ¶ 45. NeuLevel has an arm's length relationship with these registrars, based solely on contracts that presume the registry agreement will be performed as written. NeuLevel has no power to force the registrars to act in any manner except as provided by contract and of course, the plaintiffs fail to show such power.[23] And, even if they did, such showing would be irrelevant.

Thus, there is little doubt that NeuLevel's injury from an injunction would be far more serious that any injury claimed by the plaintiffs. In addition to enormous losses in wasted advertisements and marketing, for which NeuLevel has no prospect of recovery, the success of the company's competitive strategy depends upon the October 1, 2001, rollout date. *See* Armentrout Decl., at ¶ 48. Even if the failure to meet the rollout date did not result in the demise of the company, the tremendous losses in terms of public trust, good will and competitive opportunity would be impossible to measure. *See, e.g., eBay, Inc. v. Bidder's*

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[23] Further, NeuLevel's contract with the various registrars requires NeuLevel to accept <.biz> applications so long as the registrars remit the $2.00 fee. The requested preliminary injunction runs afoul of these registrar agreements, yet its terms do not seek to enjoin any behavior on the part of the registrars. The registrars are not agents of NeuLevel over whom NeuLevel exercises any control. It is certainly unfair to place NeuLevel in the untenable position of breaching its registrar agreements.

Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) ("harm resulting from lost profits and lost customer goodwill is irreparable because it is neither easily calculable, nor easily compensable . . .").

Clearly, an injunction visits great harm upon NeuLevel, with no potential for that harm to be compensated, in sharp contrast to the plaintiffs' alleged harm, which is speculative, prospective, can be redressed by money damages, and is totally within their control. The balance of relative harms tips strongly in NeuLevel's favor and away from any injunction.

C. The Requested Preliminary Injunction Is Adverse to the Public Interest.

In addition to the harm to the defendant should an injunction be imposed, courts also consider the effect of a preliminary injunction on the public interest and give that factor great weight in determining whether the injunction should issue. *See, e.g., Tahoe Keys Property Owners' Assoc. v. State Water Resources Control Board*, 23 Cal. App. 4th 1459 (1994) (injunction denied because of its likely adverse effect on public interest); *Socialist Workers 1974 California Campaign Committee*, 53 Cal. App. 3d 879, 889 (1976) (affirming denial of preliminary injunction where public interest weighed against injunction). There is considerable public harm that would flow from an injunction, as amply demonstrated by ICANN's papers in opposition to this motion.

In *Tahoe Keys*, the court was confronted with a request for an injunction that would have prevented the collection of fees for a California-Nevada environmental mitigation fund to preserve Lake Tahoe. Recognizing that the mitigation of environmental degradation was a "matter of significant public concern," the court concluded that "injunctive relief which would deter or delay defendants in the performance of their duties would necessarily entail a significant risk of harm to the public interest." *Id.* at 1473.

Similarly, in *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582 (1964), a group of residents sought a preliminary injunction against the operation of jet airplanes. Although the court recognized that the new machines could disrupt those living in the neighborhood, the court concluded that the extraordinary remedy of a preliminary injunction

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
2029 CENTURY PARK EAST
SUITE 2400
LOS ANGELES, CA 90067

was not justified because the "national interest in commerce, transportation and defense is furthered by the operation of scheduled passenger, freight and postal jet carriage into and out of San Diego." *Id.* at 552. The same national interest in commerce, transportation, and defense that the California Supreme Court described in that case mandates that the court deny the injunction sought here. *See*, supra. § 111(A)(1) and (2).

Without question, the relief sought by the plaintiffs will have a great impact on the development of the Internet, a matter of immense international public concern, as the world increasingly relies on the Internet. By indefinitely delaying the distribution of millions of <.biz> domain names, the injunction will disrupt a carefully created global strategy to introduce new gTLDs. Millions of businesses have applied through the worldwide registrar network for these names and are expecting them to be assigned in a matter of days.

Moreover, two other registries are preparing to go online. Both have different business plans, but both, by necessity, employ randomization processes; in other words, in all of the new gTLD registries, where there are competing applications for identical domain names before the registry goes live, the successful application will be chosen at random. *See* Armentrout Decl., at ¶ 20. The only fair way to allocate scarce resources to the public is a random drawing. It is done for sewer permits, liquor licenses and mineral rights on federal lands.

Delaying gTLD expansion as plaintiffs seek, without identifying (or NeuLevel being aware of) another, superior allocation system that accounts for all of the competing policy considerations at work here will profoundly damage the global Internet community because it will effectively disrupt any present ability to introduce new gTLDs, while simultaneously (1) allowing for equal worldwide access (shared registries), (2) accounting for and handling the substantial, instantaneous land rush demand and (3) proceeding in a fair and equitable manner – all of which are MOU and federal policies. The resulting harm is that during the pendency of this litigation, the domains .com, .net and .org will continue to be the only unrestricted gTLDs available worldwide and Internet users around the world will not have access to <.biz> domain names, or to any new gTLD domain names. With continuation of that "status quo" (i.e. no new

gTLD's), existing domain names will become even more expensive and harder to obtain everywhere in the world. This is precisely what the United States and the Internet community have worked hard to remedy. In fact, such a result is antithetical to the clearly articulated federal policy goals of "robust competition" and "global participation in the management of Internet names and addresses." White Paper at 19; *See PG Media v. Network Solutions, Inc.*, 51 F.Supp.2d 389, 406 (S.D.N.Y. 1999) (United States has a clearly articulated policy for management of the DNS with which a court should not interfere). The international, anti-competitive harms the plaintiffs' proposed relief would cause are substantial and completely unjustifiable.

"[I]n determining the availability of injunctive relief, the court must consider the interests of third persons and of the general public. *Loma Portal* at 553. In this case, those third party interests are businesses and individuals from around the world who await the benefits of new gTLDs. Their interests require that the injunction sought here be denied.

D. The Requested Preliminary Injunction Is Overbroad.

As described in detail above, an examination of the merits and a balance of hardships shows without a doubt that a preliminary injunction is not appropriate in this case. However, even if plaintiffs were to convince the Court that they had shown likelihood of success on the merits and greater irreparable injury, the injunction requested by plaintiffs should not issue.[24] Plaintiffs seek to have the Court preliminarily enjoin NeuLevel from: (1) offering the chance to register a domain name in exchange for consideration; (2) distributing, assigning, causing registration of, and/or transferring a domain name pursuant to a lottery system; (3) spending, distributing, encumbering, assigning, and/or transferring money that Defendants have received from consumers/businesses as consideration for the chance to register a domain name; and (4) not prohibiting domain name registrars and other third parties from offering the chance to register a domain name in exchange for consideration.

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[24] NeuLevel hereby adopts ICANN's discussion of the problems of the plaintiffs' proposed order.

Whether intended by the plaintiffs, the proposed injunction effectively shuts down the registry. No injunction should issue, but if one does, it should be limited to the specific domain names plaintiffs seek. A broader injunction deprives hundreds of thousands of applicants across the globe of their ability to have their applications processed. These other applicants have not objected to NeuLevel's system and are injured if the application process is delayed.

Although plaintiffs purport to bring this case as a class action, no class has yet been certified, and NeuLevel believes that no class can be certified because plaintiffs simply can not adequately represent the interests of the majority of members in the purported class. Further, no class could be certified as to applicants outside the State of California. *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214 (1999). Because there are substantial issues regarding whether this case is appropriate for class treatment and, particularly the adequacy of these plaintiffs to represent the interests of the class, due process requires that any preliminary injunction be limited to matters affecting these plaintiffs.

Finally, any preliminary injunction entered against NeuLevel should not burden NeuLevel with the onus of controlling the domain name registration activities of the registrars.

IV.

CONCLUSION

For the foregoing reasons, NeuLevel respectfully requests that the Court deny the instant motion.

Dated: September 17, 2001

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
WILLIAM A. NORRIS
DAVID C. ALLEN
PHILLIP J. ESKENAZI
DAVID M. PIERCE

By David M Pierce
David M. Pierce
Attorneys for Defendant
NEULEVEL, INC.

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
2029 CENTURY PARK EAST
SUITE 2400
LOS ANGELES, CA 90067

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am 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:10351 Santa Monica Blvd., Suite 101A, Los Angeles, California 90025. On September 17, 2001, I served the foregoing document(s) described as:

DEFENDANT NEULEVEL, INC.'S CORRECTED BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

on interested parties in this action by placing ☐ the original ☒ true copy(ies) thereof enclosed in sealed envelopes ☐ as follows: ☒ as stated on the attached mailing list: [SEE ATTACHED SERVICE LIST]

☒ BY PERSONAL SERVICE *(C.C.P. 1011(a); Los Angeles County Local Rule 9.8(d))* I delivered such envelope(s) by hand to the offices of the addressee(s).

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (FEDERAL) 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 September 17, 2001, at Los Angeles, California.

[Print Name Of Person Executing Proof] [Signature]

SERVICE LIST

Walter J. Lack
Paul A. Traina
Stephen R. Terrell
Engstrom, Lipscomb & Lack
10100 Santa Monica Boulevard, 16th Floor
Los Angeles, CA 90067-4107

Stuart M. Richter
Steven S. Fleischman
Katten Muchin Zavis
1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067-6042

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am 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: 2029 Century Park East, #2400, Los Angeles, California 90067. On September 14, 2001, I served the foregoing document(s) described as:

DEFENDANT NEULEVEL, INC.'S CORRECTED BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

on interested parties in this action by placing ☐ the original ☒ true copy(ies) thereof enclosed in sealed envelopes ☐ as follows: ☒ as stated on the attached mailing list: [SEE ATTACHED SERVICE LIST]

☒ BY EXPRESS MAIL *(C.C.P. § 1013(c))* I am readily familiar with the firm's practice of collection and processing correspondence for mailing with Federal Express. Under that practice it would be deposited with Federal Express on that same day thereon fully prepaid at Los Angeles, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on that date following ordinary business practices.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (FEDERAL) 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 September 17, 2001, at Los Angeles, California.

Christina O'Meara
[Print Name Of Person Executing Proof]

Christina O'Meara
[Signature]

SERVICE LIST

Derek A. Newman
Newman & Newman
1001 Fourth Avenue, Suite 2560
Seattle, WA 98154
Facsimile: (206) 624-6348

Edward L. Masry
David E. Weeks
Nicholas Siciliano
Masry & Vititoe
5707 Corsa Avenue, 2nd Floor
Westlake Village, CA 91362
Facsimile: (818) 991-6200