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

16 **COUNTY OF LOS ANGELES**

17 DAVID SCOTT SMILEY, *et al.*,

18 Plaintiffs,

19 vs.

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

22 Defendants.

CASE NO. BC 254659

[Assigned to the Honorable Anthony J.
Mohr, Dept. 309]

CLASS ACTION

**DECLARATION OF RUSSELL
SMITH IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: October 10, 2001
Time: 11:00 a.m.
Dept: 309

1 I, Russell Smith, declare as follows:

2 1. I am over eighteen years of age, not a party to the above captioned action,
3 competent to testify to the matters stated in this declaration, and make this declaration from
4 personal knowledge of those matters.

5 2. I am very familiar with the Internet domain name system, domain names in
6 general, the role of the Internet Corporation for Assigned Names and Numbers (“ICANN”),
7 and the functions of domain name registries and registrars.

8 3. I am the registrant of hundreds of domain names. Additionally, I sell domain
9 names and offer domain name registration services at the web site <http://www.theNic.com>.
10 At my main web site I offer information to small businesses about setting up an Internet
11 domain at little or no cost. I also operate the web site Consumer.net, which is a portal for a
12 diverse collection of consumer based sites that includes informational sites about consumer
13 privacy, telemarketing laws, and Internet privacy. I have written several articles about
14 domain names in publications such as *Domains Illustrated*.

15 4. I am familiar with ICANN’s recent process for the selection of new generic
16 top-level domain names (“gTLDs”) and corresponding registry operators for those new
17 gTLDs. I personally reviewed several of the applications (*i.e.*, proposals) submitted to
18 ICANN by would-be gTLD registry operators. One such application I reviewed was the
19 proposal which JV Team, LLC (now known as Neulevel, Inc.) submitted to ICANN (the
20 “Neulevel Proposal”).

21 5. The Neulevel Proposal called for the distribution of <.biz> domain names in
22 the “landrush” period by means of random selection of domain name registrations pursuant
23 to a “ round-robin batch-processing cycle.” The Neulevel proposal did not call for persons
24 to pay consideration in exchange for the chance to register any <.biz> name.

25 6. In or around May, 2001, Neulevel announced its policies for the registration
26 of <.biz> domain names. To my surprise, and contrary to the Neulevel Proposal, its
27 “landrush” distribution of domain names was to be undertaken pursuant to a lottery system.
28 It is my understanding that a lottery consists of three elements: (1) prize, (2) consideration,

1 and (3) chance. Specifically, Neulevel announced that it would accept “applications” for
2 domain names for a fee (*i.e.*, consideration). Then, for each domain name for which it
3 receives multiple applications, Neulevel would randomly (*i.e.*, by chance) select a winner
4 who would be entitled to register such domain name (*i.e.*, the prize). I believe that
5 Neulevel’s “landrush” scheme constitutes an illegal lottery.

6 7. Accordingly, on May 7, 2001, I sent a letter transmitted by e-mail to Louis
7 Touton, General Counsel of ICANN, inquiring as to whether the Neulevel “landrush” scheme
8 of <.biz> domain name distribution constituted an illegal lottery. A true and correct copy of
9 my letter transmitted to Mr. Touton is attached to this declaration as Exhibit A.

10 8. Neither Mr. Touton, nor any other person from ICANN, replied to my May
11 7, 2001 letter.

12 9. On June 7, 2001, I sent a letter transmitted by e-mail to Jeffrey Neuman,
13 Director of Policy and Intellectual Property of Neulevel, wherein I inquired: “can you
14 confirm that selling ‘chances’ to obtain any particular domain name does not violate any laws
15 on holding an illegal lottery in all of the 50 states within the USA?”

16 10. Neither Mr. Neuman, nor any other person from Neulevel, responded to my
17 June 7, 2001 letter.

18 11. I was surprised that ICANN allowed Neulevel and its registrars to offer
19 domain names by means of a lottery. Consequently, on July 17, 2001, I forwarded an
20 advertisement of DotBizLottery.com to Mr. Touton, a true and correct copy of which is
21 attached to this declaration as Exhibit B.

22 12. Mr. Touton did not respond to my July 17, 2001 letter.

23 I certify and declare under the penalty of perjury under the laws of the State of
24 California that to my knowledge the foregoing is true and correct.

25 Executed this 4th day of October, 2001, at _____.

26
27 _____
28 Russell Smith

EXHIBIT A

From: admin@consumer.net [<mailto:admin@consumer.net>]
Sent: Monday, May 07, 2001 5:33 PM
To: Catherine Harrington-McBride
Cc: touton@icann.org
Subject: RE: Landrush for new top level domains

I know all about the procedures. As I stated in my message I am selling domains at my web site <http://TheNic.com>.

My question concerns selling "chances" to apply for a .biz domain. The domain will be chosen at random from all applicants at the end of the Landrush period. Some registrars are selling these application submissions or "chances" as described in the forwarded e-mail reproduced below. I am asking if this type of thing is legal or if it can be construed as an illegal lottery?

If you are not the person to ask them please direct me to the correct office. (I am copied ICANN's general counsel on this message.)

Thanks,
Russ Smith

----- Forwarded message -----
Date: Thu, 3 May 2001 12:56:31 +0200 (CEST)

From: dotNews <dotnews@dotster.com>
To: venster <marc@venster.nl>
Subject: .BIZ domain applications now at Dotster!

dotNEWS Announcement:
Dotster now accepting applications for .biz domain registrations!

www.dotster.com/biz

Dear Valued Dotster Customer,

We're pleased and excited to announce that you can now submit applications for .biz domain names at Dotster!

Dotster is the first registrar to offer .biz domain applications according to the exact specifications and protocols developed by NeuLevel, the registry selected by ICANN for .biz domains. And, because this service is from Dotster, you can trust that it's a legitimate way of getting a head start on your .biz applications.

During the application phase, you may submit as many applications per domain name as you wish. Dotster will submit all applications to the NeuLevel registry.

Then, during the registry's Name Selection phase, one application for each domain will be selected at random by an independent third party accounting firm chosen by the registry. Although there are no guarantees, the more applications you submit, the better your chance of getting your .biz domains!

.biz application pricing schedule:

1-10 applications \$5.00 each
11-50 applications \$4.50 each
51-100 applications \$4.00 each
More than 101 applications \$3.50 each

If your .biz application is selected, Dotster will automatically charge your card \$30

for a two-year registration.

Don't miss out on this exciting opportunity to increase your chances of securing a

great .biz domain! Visit www.dotster.com/biz or e-mail us at info@dotster.com for more information.

Dotster Privacy Statement

Dotster values our relationships with customers. Because we want to keep you informed of new services and happenings at Dotster and in the domain registration industry, we send our customers e-mail newsletters and brief updates on an occasional basis. Our mailing list is never rented or sold to anyone.

To Unsubscribe: If you would prefer not to receive these mailings in the future, please reply to this message and type "Remove" in the subject line. We'll make sure to remove your name from our customer mailing list.

Forward to a Friend! Please feel free to forward this newsletter to friends and family who may be interested in Dotster and its services. For new subscriptions, just send an e-mail to dotNews@dotster.com with the word "Subscribe" in the subject line.

If you have questions, comments or concerns about this news announcement, please send them to dotNews@dotster.com. Thank you.

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EXHIBIT B

From: admin@consumer.net [mailto:admin@consumer.net]
Sent: Wednesday, July 18, 2001 1:09 AM
To: halloran@icann.org; touton@icann.org; michael@palage.com; shepherd@arborlaw.com; CMCBRIDE@ftc.gov; NameCritic [watch-dog@inreach.com]; Martin B. Schwimmer; John Berryhill Ph.D. J.D.; fromkin@law.miami.edu
Subject: FW: [ADV] Dot Biz Domain Name Lottery

The ICANN-approved/FTC-condoned world-wide lottery is underway!

-----Original Message-----

From: ledzeppelin@DomainMarketingMailers.com [mailto:ledzeppelin@DomainMarketingMailers.com]
Sent: Tuesday, July 17, 2001 9:59 PM
To: whois@consumer.net
Subject: [ADV] Dot Biz Domain Name Lottery



Only Days Left to Submit!



NeuLevel, the registry operator for the new .biz top-level domain names. They are treating the .biz domain name selection process like a lottery. That means that everyone has a chance at getting a really great domain name like sex.biz or show.biz - just think - these names could be worth millions!

Visit DotBizLottery.com Now!

In cases where there is more than one application for a domain name, NeuLevel will use a random selection process to assign it to an applicant (kind of like a lottery). Therefore, the more applications/entries that you submit for a domain name, the better your chances of winning the right

.Biz Means Business!

.Biz Names are Global!

.Biz domain names will be as popular as .com domain names!

Everyone has a chance at getting a name worth millions!

.Biz entries are as low as \$3.25 US!

Protect your name before a cybersquatter does!

.Biz domain names are available at www.DotBizLottery.com

to register that domain name. For example if there are 100 applications/entries submitted by different people for the same domain name, if you have submitted 25 of those applications you will have a 25% of getting it! If you are the only applicant for a domain name, NeuLevel will award that name to you.

Want a **.Info, .Name** or **.Pro** Domain Name?

Submit as many applications as you want - it's quick and easy!! Just fill out a short form and select the number of times you would like us to submit it - then we'll take care of the rest. The more applications you request - the better your chances of getting your domain name. Check out our pricing structure below - the more applications/entries that you request, the more discount you will receive!

Visit DotBizLottery.com Now!

.biz!
.biz! **.biz!**

If you get your domain name you will only need to pay \$33 per year per domain name. Please note the minimum registration period for a new .biz name is two years - so you'll be paying \$66 to register your domain name.

When you apply for a .biz domain name with DotBizLottery.com, this does not guarantee that you will be successful in getting that name. There may be more than one application for the same domain name that is submitted by different DotBizLottery.com customers and different registrars.

When you submit an application with us, we may contact you at a later time to obtain additional information.

Discounts are only available on orders for multiple applications for the same .biz domain name on a per order basis.

Fee is non-refundable.

The minimum registration period for a .biz domain name is two years. If we are successful in securing your domain name it will automatically be registered for two years.

Visit DotBizLottery.com Now!

Thank you for your time,
DomainMarketingMailers.com
Independent DotBizLottery.com affiliate

This is an opt-in e-mail from DomainMarketingMailers.com. If you feel you have received this e-mail by mistake and do not wish to receive offers from our clients, please click here <http://DomainMarketingMailers.com/remove.asp>

If for some reason the "remove" function above is not available or not working properly, please notify DomainMarketingMailers.com immediately at customerservice@DomainMarketingMailers.com or by calling toll-free 866-696-2635.

This mail is in accordance with all applicable state laws.

Any attempts to disrupt the removal email address etc., will not allow us to be able to retrieve and process the remove requests.

Per the proposed H.R. 3113 Unsolicited Commercial Electronic Mail Act of 2000, further transmissions to you by the sender may be stopped at NO COST to you by forwarding this e-mail to <http://DomainMarketingMailers.com/remove.asp>