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UNIVERSITY COMMUNICATIONS, INC.,  
d/b/a PEGASUS WEB TECHNOLOGIES and  
JASON SILBERGLATE,

Plaintiffs,

– vs. –

NET ACCESS CORPORATION,

Defendant and

KENNETH ELLMAN,

Defendant and Real Party in Interest  
and Indispensable Party.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MORRIS COUNTY

DOCKET NUMBER MRS-L-3626-08

CIVIL ACTION

**PLAINTIFFS' / COUNTERCLAIM  
DEFENDANTS' PRETRIAL ORDER  
SUBMISSION**

The parties to this action, by their attorneys, having appeared before the Court at a pretrial conference on the date below, the following action was taken:

**1. NATURE OF ACTION:**

Remaining issues in case are counterclaims by defendant Net Access Corporation (“NAC”) and purported “real party in interest” Kenneth Ellman for alleged charges due pursuant to invoices rendered by NAC to plaintiff University Communications, Inc. (“UCI”) and guaranteed by plaintiff Silverglate, and certain tort claims by both defendants as set forth below.

**2. ADMISSIONS AND STIPULATIONS:**

1) Plaintiff University Communications, Inc., d/b/a Pegasus Web Technologies (“UCI”), is a corporation formed under the laws of the State of New Jersey, whose principal place of business, at the time of the filing of the Amended Complaint, was at 1719 Route 10, Suite 220, Parsippany, New Jersey 07054.

2) Plaintiff, Jason Silvergate, is an individual residing at 509 Hampton Hill Road, Franklin Lakes, New Jersey.

3) Silvergate is the President and sole shareholder in UCI.

4) UCI was formed by Silvergate while a student at Rutgers UCI in 1997.

5) UCI is in the business of web-hosting and provides Internet access resources to its clients.

6) At all relevant times, UCI rented co-location space for its servers from NAC and purchased Internet Protocol (“IP”) user activity from NAC.

7) NAC also issued free IP addresses to UCI so that UCI could provide such addresses to its clients.

8) UCI took the co-location space, IP traffic and IP addresses its secured from NAC and sold them to its customers, in the form of dedicated servers and virtual hosting.

9) A “dedicated server” is a rented service from a web-hosting business. The user rents the server, the software, and an Internet connection from the hosting company that maintains it. “Virtual hosting,” in turn, is a service through which customers are allowed

to keep their websites on UCI's server, but allows customers to use their own domain names.

10) UCI thus provided the equipment and services required to host and maintain files for websites and to provide fast Internet connections to those sites.

11) At the time of the filing of the Amended Complaint, UCI had approximately 3,000 wholesale customers. These customers bought their co-location space, IP traffic and IP addresses from UCI wholesale, and then resold them to individuals and small businesses.

12) There were at the time of the filing of the Amended Complaint more than 450,000 individuals and small businesses worldwide that secured Internet access from UCI's wholesale customers and were therefore indirect customers of UCI.

13) Because of the nature of the services provided by UCI, interruption in the services provided to UCI at the time of the filing of the Amended Complaint would have had severely detrimental effects not only on UCI, but on its direct and indirect customers.

14) Pursuant to its contracts with its customers, an interruption of more than eight hours at the time of the filing of the Amended Complaint would have resulted in UCI owing substantial financial penalties to its customers, potentially up to a sum of \$250,000.

15) In addition, each of the individual and small businesses who rely on UCI, either directly or indirectly, for Internet access, would have been harmed by such an extended

outage.

16) Because Internet “up time” is so critical to the product supplied by UCI, it may be presumed that UCI customers would have sought service from another source after any interruption, even one as short as several hours.

17) It would be difficult, if not impossible, for UCI to replace customers who left after an interruption of service.

18) The reason for this is that customers of web hosts communicate frequently over the Internet to exchange information about the reliability of web hosts. If UCI could not provide service, its reputation as a provider of reliable consistent service would have been severely damaged, and the damage to its reputation would increase in proportion to the length of the interruption.

19) Indeed, if the interruption were longer than eight hours, UCI would effectively have been put out of business.

20) In 1998, plaintiff Silverglate left college to devote his full-time efforts to the UCI business.

21) For a period of three to four months, Silverglate ran the business out of his bedroom at his parents’ home. Thereafter, for a period of several months, he ran the business out of the basement of his parents’ home.

22) Between 1998 and 2001, UCI was recognized as one of the top 25 Web Hosts in the world by various industry publications.

- 23) Beginning in May 1999, UCI contracted with NAC for specified services.
- 24) In particular, NAC supplied a T1 line to the office maintained by Silverglate in his parents' house.
- 25) In addition, UCI used NAC's facilities to co-locate some of its equipment.
- 26) In 2000, Silverglate moved the operations to basement space leased from NAC at 1719 Route 10, Parsippany, New Jersey ("the Parsippany premises").
- 27) In April 2002, UCI's operations were relocated from the basement of NAC's building to the second floor. The April 2002 move doubled the amount of space available to UCI.
- 28) The space leased by UCI from NAC to conduct its operation was contiguous to NAC's operational space.
- 29) In addition, UCI's 1500 servers were located in NAC's data center.
- 30) On the front of each UCI server was a list of the IP addresses and domain names of the UCI customers using that server.
- 31) NAC employees had free access to the data center and to the servers.
- 32) Initially, NAC cooperated with UCI in setting rates and payment terms for Internet access which were conducive to growing UCI's business.
- 33) During the course of the relationship between UCI and NAC, the parties signed several Network Access Agreements ("Agreements").

34) UCI entered into the Agreements without legal counsel.

35) One Agreement, dated October 18, 2002, was originally for a 16 month term (the “October 2002 Agreement”).

36) In early 2003, NAC announced its intent to unilaterally raise the prices charged to UCI.

37) On April 29, 2003, the parties entered into another Network Access Agreement (the “April 2003 Agreement”).

38) The April 2003 Agreement provided in Paragraph 5 that it would renew as follows:

This Agreement automatically renews for three months unless cancelled by CUSTOMER 60 days prior to contract expiration/renewal. This contract will continue to renew for three month terms until CUSTOMER notifies NAC in writing to cancel this service with previously defined 60 day cancellation notice. ACCEPTANCE is defined as, and the term begins when IP packets can be passed OR when customer takes occupancy.

39) In the summer of 2002, UCI and NAC began discussions about structuring their business relationship in a new way.

40) At the time of the filing of the Amended Complaint, NAC invoiced UCI approximately \$18,000 for 60 megawatt hours of power per month.

41) In the months following the increase in rates in April 2003, UCI began to have difficulty making timely payments to NAC.

42) On November 20, 2003, NAC sent a proposed Security Agreement and Personal Guaranty to Silverglate and insisted that he sign it that day.

43) Silverglate refused to sign the Security Agreement and Personal Guaranty until securing legal counsel to review them.

44) Silverglate and his counsel stayed up until 3:30 a.m. on the evening of November 20-21, 2003 negotiating with NAC.

45) The Security Agreement and Personal Guaranty granted NAC a security interest in certain property of UCI identified therein.

46) In addition, Silverglate personally guaranteed up to \$250,000 of UCI's obligations to NAC.

47) NAC filed Notice of the Security Interest with the U.C.C. Section of the New Jersey State Department of Treasury.

48) During 2003-2004, UCI paid NAC through credit cards.

49) In March 2004, NAC advised UCI that it would no longer accept such payments.

50) In March 2004, NAC advised UCI that it had calculated and intended to recoup historical interest of more than \$23,000 for late payment on past invoices.

51) In April 2004, NAC advised UCI that UCI did not meet its creditworthiness

standards under Paragraph 2 the Security Agreement and Personal Guaranty.

52) NAC then changed the payment terms for UCI from 15 days net to 10 days net and to require payment within five days thereafter.

53) According to NAC, it was entitled to terminate service to UCI under the Security Agreement and Personal Guaranty because UCI did not meet NAC's "creditworthiness" standards.

54) At the time of the filing of the Amended Complaint, the approximate monthly payments UCI made to NAC included \$55,000 for IP traffic bandwidth; \$20,000 for co-location fees; and \$18,000 per month for power.

55) Following this "creditworthiness" determination, the original Complaint was filed in this matter in April of 2004, but not served.

56) The parties at this time were participating in negotiations.

57) Plaintiffs filed their Amended Complaint and an application for an Order to Show Cause with Temporary Restraints on June 15, 2004.

58) By Order to Show Cause dated June 25, 2004, the Court ordered as follows:

(a) Pending the return date set forth below, the defendant [is] temporarily restrained as follows:

(i) NAC shall not disconnect, reduce, modify or change the facilities and services currently provided to UCI under the April 2003 Agreement.



(ii) NAC shall continue to provide only NAC 8001-type services to UCI.

NAC shall not modify the terms of the April 2003 Agreement or increase any rates, costs, charges or fees currently being paid to NAC under the April 2003 Agreement or in connection with the April 2003 Agreement except increases in costs, charges or fees (but not rates) related to increased volume of use by UCI to the extent provided under the April 2003 Agreement.

(iii) NAC shall not interfere with UCI's removal of UCI's equipment and other tangible and intangible personal property from the premises UCI currently occupies.

(iv) NAC shall use good faith commercially reasonable efforts promptly to assist UCI in integrating the two separate "Pegasus" uplinks currently used by UCI and to take such other similar steps as UCI reasonably deems necessary to effectuate the orderly transfer of UCI's equipment and other tangible and intangible personal property to its new location.

(v) NAC shall permit UCI to continue utilization through any carrier or carriers of UCI's choice of any IP addresses that were utilized by, through or on behalf of UCI under the April 2003 Agreement during the term thereof (the "Prior UCI Addresses") and shall not interfere in any way with the use of the Prior UCI Addresses, including, but not limited to: (I) by reassignment of IP address space to any customer; aggregation and/or BGP announcement modifications, (II) by directly or indirectly

causing the occurrence of superseding or conflicting BGP Global Routing Table entries; filters and/or access lists, and/or (III) by directly or indirectly causing reduced prioritization or access to and/or from the Prior UCI Addresses,

(vi) provide UCI with a Letter of Authorization (LOA) within seven (7) days of UCI's written request for same to the email address/ticket system (networkffinac.net), and

(vii) permit announcement of the Prior UCI Addresses to any carrier, IP transit or IP peering network.

59) The Court's subsequent Order dated July 9, 2004 provided that the fact that UCI was ordered to render a check payable to "Kenneth Ellman" for outstanding invoices "is not a waiver of the plaintiffs' position that there has not been a valid sale or assignment to Mr. Ellman of the April 2003 Agreement and Security Agreement between NAC and UCI."

60) Defendants opposed UCI's application, and in particular filed papers urging that the requested relief, in particular UCI's request for an injunction directing the transfer of IP addresses from NAC to UCI, would wreak havoc on the governance and technological integrity of the Internet.

61) ARIN is the regional registry of IP numbers for North America, South America, the Caribbean, and sub-Saharan Africa. ARIN provides services related to the technical coordination and management of Internet number resources.

62) Raymond A. Plzak, President and Chief Executive Officer of ARIN at the time, issued the following statement:

From: Ray Plzak <plzak@arin.net. Date: 7/1/2004 2:30PM. To: [Nanog\(g\),nanog.org](mailto:Nanog(g),nanog.org)

On Tuesday, 29 June, I assigned the ARIN General Counsel the task to review and prepare the necessary filings to either intervene formally or as an amicus in the case filed in the Superior Court of New Jersey Chancery Division for Morris County No.: MRSC-87004. ARIN's interest in reviewing this dispute was two fold:

- a. Determine whether the global and regional policies regarding the use of Internet Numbering Resources have been violated; and
- b. Determine whether the Registration Service Agreements which both the Plaintiff and the Defendant have signed with ARIN have been violated.

The pleadings in this case have been carefully reviewed by the ARIN General Counsel. As a result of that review we have preliminarily determined that neither the policies nor Registration Service Agreements have been violated. Therefore we have concluded that it is not appropriate for ARIN to intervene

formally or as an amicus in this case.

The parties to the dispute are the Plaintiff, a company known as University Communications dba Pegasus Web Technologies, which provides web hosting and internet access services to customers, and its principal; and the Defendant, Net Access Corporation, an ISP that supplied number resources, obtained from ARIN to the Plaintiff.

ARIN has no interest in the 'who shot John' allegations between Plaintiff and Defendant regarding claims of breach of contract, breach of duty of good faith and fair dealing, and etc.

Stripped to its essence, it is clear that Plaintiff no longer wants to do business in the long run with Defendant, and appears to be following ARIN and Internet customary procedures to renumber client accounts in a manner that will permit its internet customers to seamlessly continue their use of the Internet, whether the number was originally issued to the Defendant, then provided to the specific member of the public by the Plaintiff, or is now being renumbered by the Plaintiff.

It does take time to renumber, and it appears the real issue in this suit is Plaintiffs attempt to obtain from the Court what it believes is sufficient time to accomplish this task. We express no opinion whether the Plaintiff might have moved faster in this regard and

avoided this dispute, because those facts are not fully known to us. We have carefully reviewed the arguments provided and do not believe the arguments by the Plaintiff sought any relief inconstant with obtaining time to renumber, consistent with ARIN's and the Internet community's normal expectations. That is also the overall thrust of the Order to Show Cause With Temporary Restraints issued by the Court.

There is language in the Order that if taken out of context of the arguments and spirit of the Order might have raised some concern. For example the Order does not clearly expire in several months consistent with the requested time to renumber. However, we have concluded it is not a problem when read in context and ARIN can at any point raise in any Court its objection to an open ended requirement that numbers supplied by business A to business B must be maintained in perpetuity and not renumbered.

Therefore, we have concluded that the recent intense discussion was fueled by a characterization of the litigation by one of the parties in a manner that was intended to and did raise community concerns, that we do not agree are implicated at this time. We will continue to monitor this and other litigation that might genuinely raise these concerns, and will alert the community to such cases when we find them so courts can be educated about these policies.

Raymod A. Plzak

President & CEO ARIN

63) Following a July 14, 2004 hearing, this Court made the following factual findings in a written opinion dated July 16, 2009.

- i. NAC is an Internet Service Provider (ISP) with more than 20,000 direct customers.
- ii. Defendant NAC maintains a large network in the region composed of a full mesh of OC12 (622 Megabit) and gigabit Ethernet (1000 megabit) links throughout its coverage area.
- iii. The network infrastructure is maintained by the Network Operations Center in Parsippany, NJ.
- iv. Plaintiff UCI is a customer of NAC under a Network Access Agreement Contract dated April 29, 2003 and a Security Agreement dated November 20, 2003. UCI has been a NAC customer since 1999.
- v. By way of background, the Internet grew out of a U.S. Department of Defense network.
- vi. When the administrative task of assigning Internet addresses grew too large, the Internet Assigned Names and Numbers Authority ("IANA") was established as the custodian of Internet addresses. In 1997, the

American Registry of Internet Numbers ("ARIN"), an independent, nonprofit corporation, was established to provide IP registration services, ARIN services North America, the Caribbean and sub-Saharan Africa and is responsible for the registration, administration, and conservation of IP address space in these geographical areas. NAC contracts with ARIN for IP allocations. UCI received its initial IP allocations under an Agreement with ARIN in March 2003.

- vii. UCI exercised its contractual right to terminate the Network Access Agreement with NAC as of May 17, 2004 by letter dated May 17, 2004.
- viii. Thereafter, the parties engaged in negotiation over the orderly termination and transition, including the removal of UCI's equipment from NAC's Network Operations Center and sums due under the Agreement.
- ix. After negotiations broke down, UCI initiated the current litigation based upon breach of contract and breach of the implied covenant of good faith and fair dealing, as well as seeking injunctive relief.
- x. UCI sought temporary restraints arguing that based upon disputes between the parties regarding the interpretation of the Agreement and amounts due, NAC indicated a willingness to terminate Internet access to UCI.

- xi. Thus, UCI's application for temporary restraints was based upon its concern that NAC would shut down UCI's Internet service upon receipt of or soon after the termination notice.
- xii. UCI argued that NAC has incentive to interrupt UCI's Internet access and destroy UCI's business because NAC could then immediately pick up the customers lost by UCI.
- xiii. Further, UCI stated that Internet access is critical to its business and any interruption would have devastating effects on UCI and its customers, UCI pointed out that even a 16-hour delay would put it out of business.
- xiv. Moreover, UCI explained that it serves over 400,000 direct and indirect customers; including small businesses that would be severely damaged if an interruption occurred.
- xv. Additionally, UCI argued that the grant of temporary restraints would impose no potential harm on NAC because it would only be compelled to comply with its contractual obligations in the interim,
- xvi. NAC submits that on or about June 11, 2003, it transferred to Kenneth Ellman the Network Access Agreement and the Security Agreement between NAC and UCI/Jason Silvergate.
- xvii. A temporary restraints hearing was scheduled for June 17, 2004, however, Kenneth Ellman delivered a Notice of Removal and the



matter was removed to the Federal District Court.

- xviii. Plaintiffs filed an Order to Show Cause in the United States District Court on June 22, 2004. Judge Pisano found that there was no federal question jurisdiction and remanded the matter.
- xix. NAC does not argue that termination of UCI's service would not lead to irreparable harm.
- xx. Rather it argues that the crisis that UCI finds itself in is of its own making due to mismanagement and a failure to begin the re-numbering process early enough.
- xxi. UCI has set out with specificity allegations that NAC abused its discretion under the express terms of the contract thereby breaching the implied covenant of good faith and fair dealing.
- xxii. Given the . . . announcement by ARIN, the Court finds NAC's arguments regarding whether the Plaintiffs' right to restraints pending their renumbering efforts are "unsettled" or would create chaos in the Internet community to have little weight.
- xxiii. As noted above, UCI has demonstrated that irreparable harm will occur or is likely to occur if service is terminated by NAC before the numbering process is complete.
- xxiv. Interruption of service would harm thousands of UCI customers as well as UCI's business. Such a foreseeable outcome is certainly within the

paradigm of irreparable harm, As stated previously, "acts destroying a complainant's business, custom and profits do an irreparable injury and authorize the issue of a preliminary injunction" during the renumbering process, given UCI's unsettled condition at this time.

xxv. Accordingly, the Court finds that the balance of hardships under these circumstances mandates the continuation of "customer" status in order to minimize the potential harm to NAC inherent in the continued use of NAC's IP addresses. Further, NAC's cross-motion to modify/vacate restraints is rendered moot by this decision and is hereby denied. Ms. Tolomeo, Esq. will submit a form of order to memorialize this opinion.

64) The Court's subsequent Order dated July 30, 2004 provided that those provisions in the Network Access Agreement dated April 30, 2003 and the Security Agreement and Personal Guaranty regarding co-location and costs of co-location, provisions regarding the amount of bandwidth purchased and any other provision in conflict with that Order "no longer apply."

65) On July 30, 2004, the Court, having considered the moving papers, along with opposition papers submitted on behalf of the defendants, and the oral argument of counsel on July 14, 2004, and for other good cause shown, ordered as follows:

- (b) For the period from July 17, 2004 through and including August 17, 2004, defendants Net Access Corporation and Kenneth Ellman shall:
  - (i) Provide only NAC 8001-type service to UCI via an 1000 mbps multimode fiber connection, rate limited to 50 mbps, originating

in Newark, New Jersey, for 50 megs of bandwidth at the rate of \$100/meg (totaling \$5,000 for service from July 17 - August 17, 2004).

- (ii) Permit UCI to continue utilization through any carrier or carriers of UCI's choice of any IP addresses that were utilized by, through or on behalf of UCI under the April 2003 Agreement during the term thereof (the "Prior UCI Addresses") and shall not interfere in any way with the use of the Prior UCI Addresses, including, but not limited to: (I) by reassignment of IP address space to any customer; aggregation and/or BGP announcement modifications, (II) by directly or indirectly causing the occurrence of superseding or conflicting BGP Global Routing Table entries; filters and/or access lists, and/or (III) by directly or indirectly causing reduced prioritization or access to and/or from the Prior UCI Addresses, (c) provide UCI with a Letter of Authorization (LOA) within seven (7) days of UCFs written request for same to the email address/ticket system ([network@nac.net](mailto:network@nac.net)), and (d) permit announcement of the Prior UCI Addresses to any carrier, IP transit or IP peering network.

66) The Court's Order of July 30, 2004 also provided that "In order to assist in the evaluation of any liability claims subsequently submitted, plaintiffs and defendants shall keep and maintain the following documents/information: (a) all router and TACACS logs; (b) all configurations before and after any changes are

made to the routing equipment; and (c) all rancid logs.”

67) The Court’s Order of July 30, 2004 also provided that “Defendant shall cease and desist from making false and defamatory statements about plaintiffs in any public forum, including on the Internet.”

68) In the interim, Kenneth Ellman arranged, and publicized, a public auction of the various secured assets owned by UCI but secured by the terms of the Security Agreement and Personal Guaranty, to be held in September, 2004.

69) In a subsequent Order, dated September 27, 2004, the Court enjoined the auction and restrained defendants from scheduling any further auctions, on the ground that plaintiffs “have raised bona fide questions concerning the Security Agreement.”

70) The Court specifically wrote, in that September 27, 2004 Order, “Plaintiffs ha[ve] raised genuine issues of material fact with respect to enforcement of [the] Security Agreement which *pro se* defendant relies upon. A plenary hearing is necessary. Until then an auction sale is prohibited.”

### **3. PLAINTIFFS’ FACTUAL CONTENTIONS:**

1) There is not and never has been a bona fide purchase or any other legal assumption by Kenneth Ellman of any cognizable interest in any right of NAC such that he has any right to appear in this action in any manner.

2) Kenneth Ellman and NAC’s attorney, Feng Li, participated in an

extensive fraud on the Court with respect to their misrepresentation regarding Kenneth Ellman's purported "ownership" of the Network Access Agreement and Security Agreement.

3) As UCI became more successful and more reliant upon NAC's provision of space and services, NAC began to take advantage of its leverage over UCI by imposing increasingly unreasonable terms.

4) In March of 2004, NAC's Alex Rubenstein told plaintiff Silverglate that he audited the lists of IP addresses and domain names of UCI customers set out on the lists appended to each UCI server at the NAC data center on a daily basis.

5) NAC possessed virtually all of the bargaining power in its relationship with UCI.

6) NAC drafted the form Agreements with no virtually no input from UCI.

7) NAC offered the Agreements to UCI on a "take-it-or-leave-it" basis.

8) As UCI's business continued to expand, its anticipated needs grew, as did its needs for assurances about its continued physical and connectivity capacity to provide the services its growing customer based required.

9) NAC's leverage over UCI, which at this point depended entirely on NAC for the provision of all services to its customers, concomitantly grew as UCI's needs and growth grew.

10) In the Summer of 2002, UCI approached NAC in an effort to structure

their business relationship in a way that was mutually beneficial to both parties.

11) NAC was aware that UCI's business was growing exponentially and was quite successful.

12) NAC, in contrast, had invested resources in dial-up services and IP backbone infrastructure. NAC's current business model was declining and they needed to find alternate measures to recoup lost revenue.

13) In a meeting attended by two principals of NAC, Alex Rubenstein and Blake Ellman, along with plaintiff Silverglate and UCI's then-Chief Operating Officer Edmund Barna, Silverglate and Barna divulged UCI's operational system and business plan regarding a new product entitled "Dedicated Now."

14) The specific information conveyed by UCI to NAC included UCI's growth plan, its customer base, and its equipment needs.

15) Barna and Silverglate presented a plan for UCI and NAC to form an affiliate relationship in which NAC would provide UCI with increased co-location, moderate network support needs, and bandwidth for UCI to market their "Dedicated Now" brand in the hosting market. This would increase the monthly revenue attained by NAC from UCI and allow both companies to increase revenues and profits together.

16) NAC rejected UCI's proposal.

17) At the foregoing meeting, UCI also advised NAC that it needed more

space.

18) NAC could not or would not provide space sufficient to meet all UCI's anticipated needs.

19) During the meeting, Rubenstein stated in words or substance to Silverglate and Barna, "When are you going to shut the f\*\*\* up already, sell your business to us (NAC) and come work for me?"

20) This comment reflected NAC's goal of acquiring UCI, instead of providing it with services pursuant to an arms' length contractual relationship.

21) Following the meeting NAC undertook to, and did, investigate how it could develop and provide the same products as UCI.

22) In November 2002, UCI introduced its new product, "Dedicated Now.Com."

23) Dedicated Now.com fueled explosive growth for UCI. UCI's revenues doubled between 2001 and 2002. Between 2002 and 2003, UCI's revenues increased by more than 70%.

24) UCI's profitability, however, was limited due to the increase in rates and other charges by NAC.

25) Following the meeting where UCI explained their business model to NAC, NAC called vendors of UCI's "Dedicated Now" business model to secure identical parts and equipment, establish relationships and otherwise appropriate

UCI's plan for its own use.

26) In early 2004, NAC began offering a product entitled "15 Minute Servers" which directly competed with UCI's "DedicatedNow" product.

27) NAC not only used the precise methods and equipment in connection with the "15 Minute Servers" product used by UCI for its "DedicatedNow" product, but NAC has contacted UCI's customers to lure them to the competing service.

28) As soon as it became apparent that UCI was growing, and especially after the success of "DedicatedNow" product, NAC attempted to absorb UCI into its own business.

29) When UCI resisted those efforts, NAC consistently increased the financial pressure of UCI in an attempt to either drive UCI out of business or exploit UCI's success for its own financial gain.

30) As a result, despite its success, UCI's profitability remained low and its dependence on NAC increased.

31) In early 2003, NAC announced its intent to unilaterally raise the prices charged to UCI.

32) UCI had no bargaining power to reject the price increase and terminate the Agreement, because UCI was dependent upon NAC for continued Internet access service, co-location and IP address space.

33) UCI entered into the April 2003 Agreement despite its considerable



reservations regarding the one-sidedness of the terms, particularly NAC's unilateral right to raise rates upon 60 day's notice.

34) UCI nonetheless believed that it had no choice but to sign the April 2003 Agreement, because it could not relocate its entire operation while providing uninterrupted service to its customers in the time period between its deadline to give notice of termination of the October 2002 Agreement and the contractual end of the provision of services under that Agreement.

35) One of NAC's purposes in raising rates was to pressure UCI into agreeing to a long-term contract.

36) Approximately one-and-a-half months after the April 2003 Agreement was executed, NAC offered UCI lower rates if it would sign a long-term contract.

37) UCI refused to do so, because NAC could no longer satisfy UCI's expanded business needs.

38) The price reflected in the April Agreement was a 33% percent increase over the price incorporated in the October 2002 Agreement, even though the cost to NAC of providing bandwidth had not increased in the interim.

39) The price for bandwidth charged by NAC in the April 2003 Agreement was well above market price.

40) The price for bandwidth charged by NAC in the April 2003 Agreement was also well above the price charged by NAC to virtually all its other customers.

- 41) “Power” as defined in the Agreements is “electricity.”
- 42) NAC also charged inflated amounts for the electricity it provided to UCI.
- 43) At the time of the filing of the Amended Complaint, UCI paid NAC approximately \$18,000 for 60 megawatt hours of electricity per month.
- 44) Market price for such electricity was far lower than that rate.
- 45) In the months following the steep increase in rates in April 2003, UCI began to have difficulty making timely payments to NAC.
- 46) In the past, NAC accepted late payments were without reservation.
- 47) Although UCI was not in default under the Network Access Agreement, NAC insisted that plaintiff Silvergate immediately execute a Security Agreement and Personal Guaranty.
- 48) In particular, on November 20, 2003, NAC sent .the proposed Agreement to Silvergate and demanded that he sign it that day.
- 49) Silvergate insisted, over NAC’s objections, upon securing legal counsel to review the Agreement.
- 50) NAC suggested that it would cut off UCI’s service if the Agreement was not executed immediately.
- 51) Silvergate and his counsel stayed up until 3:30 a.m. on the evening of November 20-21, 2003 negotiating with NAC in order to keep UCI’s service in

place.

52) During the course of the negotiation, Silverglate inquired several times whether NAC was willing to sell bandwidth to UCI on a long-term basis, if UCI did not also use co-location space.

53) The response by Ellman and Rubenstein was that NAC wanted “all of the business of UCI or none of UCI’s business.”

54) When Silverglate asked why NAC would not separately sell bandwidth and co-location, as NAC did to many other customer, Mr. Ellman stated, “We will not give up our only leverage to keep you here.”

55) When the Agreement was signed, the parties agreed that it would be held in escrow until a Rider was completed and added to it.

56) The Rider was never completed.

57) Despite the failure of the parties to fulfill this condition, NAC filed Notice of the Security Interest with the U.C.C. Section of the New Jersey State Department of Treasury.

58) UCI frequently paid the charges due NAC via credit card. Reimbursement by the credit card companies was less a 3% service charge.

59) NAC’s March 2004 notice that UCI could no longer use credit cards to pay its invoices was made without advance notice.

60) NAC's change of its credit card policy was a unilateral modification of the April 2003 Agreement.

61) At all relevant times, NAC included a "Labor" charge on invoices to UCI amounting to 3% of the other monthly charges.

62) This 3% corresponded to the typical 3% service charge incurred by vendors who process customer payments via credit card, such as UCI's payments to NAC.

63) The "Labor" charges were added, although NAC knew that no labor charges had been incurred, to improperly and illegally pass on to UCI the credit card service charges incurred by NAC in accepting credit card payments from UCI.

64) NAC's March 2004 notice to UCI that NAC would demand payment by UCI of "historical" interest of more than \$23,000 for late payment on unspecified invoices was a break with the parties' past practice, their mutual understandings and was completely arbitrary.

65) UCI decided by late 2003 to move its operations elsewhere because of the increasingly oppressive relationship it had with NAC.

66) At this time UCI began to invest substantial sums of money in constructing larger, state-of-the art facilities for its operations in Clifton, New Jersey.

67) UCI had also begun the laborious process of renumbering its customers' IP addresses in anticipation of an eventual move.

68) In fact UCI had been actively engaged in the renumbering process of UCI renumbering the IP addresses since August 2003.

69) UCI had approximately 60,000 IP addresses from NAC that needed to be renumbered.

70) Although UCI secured its first allotment of IP addresses from ARIN in mid-2003, the allotment granted was just over 4,000 addresses, less than 8% of the addresses needed to fully renumber;

71) The full allotment of IP addresses necessary for renumbering were not received by UCI until June, 2004.

72) UCI spent seven to eight months developing the software necessary to renumber this massive quantity of IP addresses.

73) UCI also had to completely redesign its system to support the renumbering during the period from September 2003 to April 2004.

74) The actual process of renumbering began in April 2004 and was pursued nearly full time by 2-3 UCI employees for approximately three months.

75) The move was also motivated by NAC's inability to adequately supply all UCI's space needs, as well as operational problems caused by fire, flood, frequent power outages, and repeated air conditioning failures at the site.

76) UCI's growth was limited from 2003 to the time of the filing of the Amended Complaint because of the foregoing problems.

77) In order to preserve its options, UCI filed, but did not serve, the original Complaint in this Action during the course of negotiations with NAC.

78) During these negotiations, NAC agreed to provide UCI time to renumber IP addresses numerous times between late May and mid-June.

79) During this period, it appeared that the parties had reached agreement resolving their disputes, only to have NAC renege.

80) Significantly, the very entity charged with the assignment of IP addresses, after careful evaluation of the positions of both parties to this litigation, issued a public statement indicating that it would not intervene because the relief sought by plaintiffs and granted by this Court in the June 25th Order did not violate ARIN's policies or contracts.

81) In addition, ARIN concluded that NAC had mischaracterized the dispute.

82) UCI originally informed NAC that it intended to vacate the NAC premises on or about May 30-31, 2004 (Memorial Day weekend).

83) UCI attempted to negotiate with NAC to resolve any outstanding issues under the April 2003 Agreement so that there could be a smooth transition during its move.

84) NAC, however, failed to negotiate in good faith with UCI to accomplish this.

85) As a result, the planned move over Memorial Day weekend was

postponed to June 6, then indefinitely until the Court's intervention made the move feasible.

86) At the time of the filing of the Amended Complaint, NAC would not agreed on a monetary figure as a penalty for early termination under Paragraph 8 of the April 2003 Agreement.

87) Without agreement as to and payment of the amounts due under the Agreement, including the termination penalty, UCI could move out of the NAC's Parsippany premises between NAC has a right to place a lien on UCI's equipment.

88) Thus, at the time of the filing of the Amended Complaint, NAC was impeding UCI's ability to move and to conclude the business relationship between the parties in all the foregoing ways.

89) Silverglate would have been personally liable for in excess of \$1 million on his guaranty if UCI had been forced out of business by NAC.

90) Any interruption of Internet service or placement of a lien on UCI's equipment would have severely harmed UCI's business.

91) NAC also had the ability to severely damage UCI's business by precipitously cutting off UCI's access to IP addresses being used by UCI after UCI left the Parsippany premises.

92) At the time of the filing of the Amended Complaint approximately 50% of UCI's IP addresses were provided by NAC.

93) During the five months prior to the filing of the Amended Complaint, UCI was slowly migrating its customers from the NAC IP addresses to new IP addresses.

94) The process to change each IP address requires significant time and effort. UCI was required not only to develop and test special software, but also completely redesign the network, to re-number the IP addresses.

95) In addition, UCI could only secure a limited number of IP address.

96) If UCI could not to use the addresses and to migrate its customers off the NAC IP addresses, UCI's customers' websites would go down and UCI would almost certainly lose the customers who currently utilize IP addresses provided by NAC.

97) The cost to NAC to permit UCI to continue to use the existing IP addresses totaled less than \$500.00 per month.

98) NAC also had an obligation to announce UCI's new IP addresses to the world.

99) If NAC refused to do so, UCI could change the addresses and could not move its own customers from the NAC system to UCI's new facilities.

100) NAC originally provided Internet connection to UCI via a bandwidth connection entitled "DCJN 15036."

101) The acronym devised by Mr. Rubenstein stands for "Dirt Cheap Jew



Network”, a derogative reference to Silverglate’s business.

102) Because, however, it was more difficult for NAC to maintain this line, the parties agreed in 2002 to switch to a speedier connection via a NAC 8001 line.

103) Upon information and belief, if NAC reverted from the NAC 8001 bandwidth to the DCJN 15036 bandwidth, the Internet access provided by UCI to its customers would have been significantly slower and cause those customers to cancel their UCI service to find speedier Internet access.

104) In early April 2004, in a discussion regarding UCI’s planned move, defendant Kenneth Ellman stated in words or substance, “We can make this easy for you or hard for you.”

105) In connection with this statement, Kenneth Ellman referred to the possibility of switching UCI back to the slower DCJN line.

106) Because that line is more difficult for NAC to maintain, NAC’s only purpose in doing so could be to hurt UCI’s business.

107) NAC also had an obligation to permit UCI to integrate its two separate network segments.

108) If UCI were not permitted to do so when it moves, the websites and dedicated servers for UCI’s customers would not work.

109) NAC had every incentive to interfere with and damage UCI’s business.

110) If NAC interrupted the services provided to UCI, and UCI's business fails as a result, NAC would be in an ideal position immediately to offer Internet access to UCI's customers.

111) Approximately 50% of UCI customers were, at the time of the filing of the Amended Complaint provided Internet access through NAC-supplied IP addresses.

112) Moreover, access to UCI's remaining customers would have been available through equipment that NAC could have placed liens on if there were a claimed default. NAC could then offer immediate Internet access through its "15 Minute Servers" (modeled on UCI's "Dedicated Now" product) and based on Confidential Information secured from UCI.

#### **4. LEGAL CONTENTIONS:**

- 1) The Agreements were contracts of adhesion.
- 2) NAC's markup electricity or power provided under the Agreements was unlawful under applicable tariffs and law.
- 3) The actions NAC threatened UCI with, including but not limited to an interruption of Internet access service and reverting to a slower Internet connection, would have caused UCI to suffer irreparable harm because it would have put UCI out of business.
- 4) Under the April 2003 Network Access Agreement between NAC and

UCI, NAC had no basis to change, withdraw, suspend, or terminate Internet access to UCI.

5) Plaintiffs had no adequate remedy at law when they brought this action and sought equitable relief from the Chancery Division.

6) In claiming that UCI is in default of the “creditworthiness” requirement in the Network Access Agreement, and in unilaterally attempting to modify the payment terms of such contract, NAC breached the April 2003 Network Access Agreement.

7) In soliciting plaintiffs’ customers and in using the confidential information relayed by plaintiffs regarding their business operations plan for its own purposes, NAC breached the April 2003 Network Access Agreement between the parties.

8) NAC’s breach included breach of the “Confidentiality” provisions set forth in Paragraph 15 of the Agreement.

9) Credit card companies and applicable law prohibit the passing-on of fees to the credit card customer.

10) The foregoing actions by NAC constitute a breach of its obligations under the April 2003 Agreement.

11) At the time of the filing of the Amended Complaint, the parties disputed, and they continue to dispute, their respective rights and obligations under the terms

of the Network Access Agreement dated April 29, 2003.

12) An actual case or controversy existed between plaintiffs and defendant regarding the intent and scope of the April 2003 Network Access Agreement.

13) UCI and NAC were and are competitors.

14) It is the custom in the Internet hosting industry to permit a sufficient period of time to allow renumbering after a customer has elected to transfer service.

15) Custom and usage in an industry may supplement an agreement.

16) Plaintiffs reasonably relied on the aforesaid custom and usage in their conduct and their interpretation of the relevant agreements among the parties.

17) Plaintiffs were at the time of the filing of the Amended Complaint, and are at present, entitled to a declaration that the penalty for early termination under the foregoing Agreement is equal to 75% of its minimum bandwidth requirements for 16 days, and that no other sums are due under the April 2003 Agreement.

18) By increasing its rates above reasonable market rates and unilaterally changing the terms of the April 2003 Network Access Agreement, defendant NAC deprived plaintiffs of the benefit of that Agreement.

19) The Agreement permitted UCI to terminate NAC on 45 days notice.

20) UCI had, at the time of the filing of the Amended Complaint, advised UCI that it intended to terminate the Agreement as of July 1, 2004.

21) In order for UCI to receive the benefits of the April 2003 Agreement, including the termination provision, UCI was entitled to seek the Court's in aid in securing an order that UCI continue to provide Internet access via NAC 8001 bandwidth, continue to provide IP addresses until such time as UCI can migrate all its customers to new IP addresses, announce UCI's new IP address following its move, and permit and assist UCI in integrating its two separate "Pegasus" uplinks currently used by UCI.

22) The refusal by defendant to continue to provide IP addresses to UCI, to refuse to announce new IP addresses following UCI's move, to assist UCI in integrating its two "Pegasus" uplinks or to continue to supply Internet access via NAC 8001 bandwidth destroyed or injured the right of UCI to receive the benefits of the April 2003 Network Access Agreement.

23) NAC knew that reverting to DCJN 10536 bandwidth, which provided a significantly slower Internet connection, would severely damage UCI's business and cause UCI customers to sever their business relationship with UCI.

24) There was no business justification for NAC to revert to the DCJN 10536 bandwidth.

25) The April 2003 Agreement was a one year agreement with a termination date of April 17, 2004. The Agreement was subject to automatic three month renewals.

26) In permitting the Agreement to automatically renew from April 17 to

July 17, 2004, plaintiffs relied upon NAC's promise to supply NAC 8001 bandwidth, rather than a slower bandwidth.

27) NAC's actions were taken with the specific intent to interfere with UCI's contracts with third parties, including UCI customers, and UCI's prospective economic advantage.

28) NAC's actions were taken in bad faith and with malice.

29) UCI was damaged as a result of NAC'S actions.

30) UCI was in danger of being further damaged as a result of NAC'S actions if not enjoined by the Chancery Division.

31) The foregoing actions by NAC and Kenneth Ellman amounted to economic duress.

32) As a result of the foregoing, the April 2003 Network Access Agreement should be reformed by the Court Reforming the April 2003 Agreement, and specifically enforcing that Agreement to provide that all Internet connection shall be via NAC 8001 bandwidth.

## **5. DAMAGE AND INJURY CLAIMS:**

- i) See Section (6) "Amendments." Plaintiffs have stipulated not to proceed with their claims for affirmative damages recovery from defendants, except to the extent applicable for purposes of recoupment against the counterclaims.

ii) Plaintiffs respectfully submit that neither NAC nor Ellman have produced in discovery any evidence that can, at trial, provide a basis for the assertion of damages under their various tort theories of recovery found in the original Counterclaims.

**6. AMENDMENTS:**

iii) Amendment of plaintiffs' pleading per their proposed order regarding abandonment of their claims for affirmative relief herein, attached hereto as Exhibit A.

iv) Amendment of plaintiffs' designation of Trial Counsel per (14) below.

**7. ISSUES AND EVIDENCE PROBLEMS:**

**i) Fraudulent Ellman Assignment**

The question of the legitimacy of the supposed "purchase" of certain rights or "agreements" by Kenneth Ellman is a matter that must be resolved prior to any trial proceedings, because it bears on whether or not "Defendant and Real Party in Interest and Indispensable Party" Kenneth Ellman has any right to proceed with his claims in this matter.

This topic has never been substantively addressed by the Court, much to the frustration of plaintiffs.

Contrary to the repeated assertions on the record by Kenneth Ellman that this issue was in any way resolved by the Court, the exact opposite is true. As set forth above, the Court's Order dated July 9, 2004 provided that although UCI was, at that time, ordered

to render a check payable to “Kenneth Ellman” to satisfy amounts based on outstanding invoices from NAC to UCI, UCI’s tendering such payment “is not a waiver of the plaintiffs’ position that there has not been a valid sale or assignment to Mr. Ellman of the April 2003 Agreement and Security Agreement between NAC and UCI.”

Fundamentally, New Jersey law requires that an assignment be clear and unequivocal to be effective as to the obligor. A valid assignment must contain clear evidence of an intent to transfer rights, must describe the subject matter of the assignment sufficiently to make it capable of being readily identified and must be noticed to the obligor. A contractual right also can only be assigned where it will not materially impair the obligor’s chance of obtaining return performance, which is questionable here.

In all events, a court of equity such as this one must examine the total circumstances of a purported assignment such as that claimed here for indications that is a sham. By all indications that is the case here, i.e., the evidence will show that this was a fraudulent non-transaction for which no value ever changed hands, perpetrated in order to permit an unlicensed principal of defendant NAC to conduct its legal defense and prosecute its counterclaims free of charge. Plaintiffs urge the Court to insist that it be given the opportunity for plenary consideration of the evidence and the applicable law here.

Indeed, even giving Ellman and NAC the broadest possible benefit of the doubt – far beyond what the proofs merit – judicial decisions have rejected the utilization of such transactions, even when they are bona fide, when their transparent purpose is to circumvent the strict rule against representation of a corporation by a non-lawyer shareholder, officer or director, in line with the established public policy rationales on



which it is based.

Here plaintiffs will demonstrate that the alleged “purchase” of the chose in action here was made on the eve of the filing of the Amended Complaint, when negotiations among the parties broke down; that neither the original nor a complete, unedited copy of the alleged assignment has ever been produced, though repeatedly demanded; that no proof of actual payment of the supposed price of this “purchase” has ever been produced, though repeatedly demanded; that no bona fide business rationale for this “purchase” has ever been so much as suggested by defendants; that Kenneth Ellman is a serial amateur litigator with a history of holding himself out as an attorney, a “peace officer,” and a “detective,” and who has a demonstrated history of misrepresenting facts in open Court and under oath in submissions to the Court.

## **ii) Sanctions**

- (1) In the event that plaintiffs demonstrate the foregoing, the Court will have to consider the imposition of sanctions on Kenneth Ellman, and others involved in this deception, by virtue of their repeated misrepresentations to the Court regarding the fraudulent “purchase” by him of the chose in action here, as set forth above.

In consideration of appropriate sanctions, the extraordinary record of wasted resources as a result of this deception, including nearly half a dozen applications by plaintiffs’ counsel arising from defendants’ serial non-compliance with the Rules of Court, never sanctioned, will also need to be addressed.

- (2) Special attention will, additionally, be required to address the violation of applicable legal ethical canons regarding the foregoing by NAC's general counsel, Feng Li, Esq., as well as its outside counsel of record, Ann Kiernan, Esq., who remains counsel of record for NAC in this matter and who actively participated in the early proceedings herein.
- (3) Plaintiffs' Ninth Separate Defense asserts a violation of N.J.S.A. 2A:15-69.1 and reserves their rights to move for sanctions in accordance with R. 1:4-8.

**iii) Failures to state claims**

- (4) Defendants will be unable to prove the elements of the First Count of their counterclaims, styled as "Abuse of Process and Malicious Abuse of Process," given the ample grounds for the relief sought and granted in the Chancery Division, as set out above.
- (5) Defendants' Second Count, "Legal Process Maliciously Abused," is duplicative of the First Count, as a result of defendants' copying of overlapping model causes of action out of a form book, and is similarly deficient as set out in (1) a above.

**iv) Affirmative defenses**

- (1) Plaintiffs intend to introduce evidence, on cross-examination and otherwise, of evidence of defendants' bad acts in support of their Affirmative Defenses.

v) **Evidence**

(2) Defendants' extensive non-disclosure and failure to make discovery in this matter is set out, *inter alia*, in plaintiffs' motions made on December, 2005 and renewed in September 2006 for sanction, based on defendants' refusal to make discovery. These motions were based on defendants' failure to produce documents pursuant not only to duly served discovery notices, including a Notice to Produce Documents served on defendants dated October 13, 2004 but explicit court orders. The Court reserved opinion and ultimately dismissed the counterclaims and defenses pursuant to the transcript entered into the record by Judge McKenzie and read in court by Judge Langlois. No written order was issued and ultimately Judge Langlois vacated her previous ruling based on Judge McKenzie's findings, refused to sanction defendants and, without explanation, ordered an end to further discovery despite defendants' non-compliance with Judge McKenzie's order. Plaintiffs therefore will move or object, as appropriate, for an order prohibiting defendants from supporting or opposing the related claims or defenses, or prohibiting the introduction of such matters in evidence, pursuant to R. 4:23-2(b)(2).

(3) The amounts alleged by defendants to be due for services rendered are claimed to be based on various invoices. Neither the original invoices nor true copies of of invoices containing all the new charges, nor other supporting documentation as to the legitimacy of the charges shown on the ersatz invoices ("duplicate invoices") created by defendants after issue was joined in this Court, have ever been produced, despite repeated demands for the same. Late production of the

same, if they exist, should be prohibited pursuant to R. 4:23-2(b)(2).

These “duplicate invoices,” actually rendered, as indicated on their face, by Kenneth Ellman to UCI and purporting to be charges for charges by UCI incurred prior to Ellman’s fraudulent “purchase” of the Network Agreements and the Security Agreement and Personal Guaranty are inadmissible under the standards set out in, and the cases interpreting, Evid. R. 1002, 1003, 1004 and 1006, *inter alia*.

These invoices are also irrelevant and inadmissible under the cases applying Evid. R. 402 based on a lack of foundation, to wit, the legal incoherence of the claim that by virtue of his “purchase” of the Network Agreements and the Security Agreement and Personal Guaranty, Ellman not only was assigned the right to stand in the shoes of NAC for purposes of prosecution of an action for collection on amounts due thereunder, but had the right to render new invoices, including by the addition of new charges, for services actually rendered, or alleged to have been rendered, by NAC.

The invoices also appear to be inadmissible under Evid. R. 602.

- (4) Both defendants claim damages arising from various tort claims in their Counterclaims as amended. No evidence of any such damages has been produced.
- (5) Plaintiffs expect, upon cross-examination of Kenneth Ellman, to impeach his credibility with reference to collateral matters pursuant to Evid. R. 607.

(6) Plaintiffs expect, upon cross-examination of Kenneth Ellman, to impeach his credibility on the basis of his conviction of a crime pursuant to Evid. R. 609, considering that such conviction or convictions directly relate to Ellman's credibility and his candor toward judicial tribunals.

**8. LEGAL ISSUES ABANDONED:**

- i) See Section (6) "Amendments." Plaintiffs have abandoned all their theories of affirmative damages recovery, though not the facts pled in their Amended Complaint nor the legal theories set forth therein to the extent applicable for purposes of recoupment against the counterclaims.
- ii) Plaintiffs abandon their prayer for injunctive relief (Second Count of the Amended Complaint), the relief specified in their claim for and specific enforcement (Fifth Count), and the prayer for an order compelling NAC to provide UCI with NAC 8001 bandwidth until July 17, 2004 which are no longer germane.

**9. EXHIBITS:**

Exhibits shall be marked P-1 for plaintiff, D-1 for defendant, J-1 for joint exhibits. Lists to be exchanged by no later than 9:00 a.m. on the date of trial is scheduled to commence. Trial time is not to be wasted by interruptions to mark exhibits. When appropriate, copies of exhibits should be made and provided to the Court and to the Court and to the adversary to facilitate the trial.

**10. EXPERT WITNESSES:**

No expert witnesses, nor topics for expert witness testimony, have been disclosed by either party.

**11. BRIEFS:**

Parties shall submit trial briefs 10 days prior to trial. Trial briefs, to the extent that they append exhibits, shall be appropriately indexed and tabbed.

**12. ORDER OF OPENING AND CLOSING:**

Plaintiffs seek a reversal of the normal order in light of the abandonment of their claims for affirmative relief herein and the *de facto* status of the counterclaims as a complaint.

**13. ANY OTHER MATTERS AGREED UPON:**

Defendants have, in conversation off the record and in colloquy on the record at the most recent hearing, agreed to the foregoing proposed switching of the order of opening, closing and presentation of evidence.

**14. TRIAL COUNSEL:**

Plaintiff: Ronald D. Coleman

**15. ESTIMATED LENGTH OF TRIAL:**

Five to seven days.

**16. WEEKLY CALL OR TRIAL DATE:**

**17. ATTORNEYS FOR PARTIES CONFERRED ON:**

Defendants were most recently ordered by the Court to confer on the form of order with respect to the proposed abandonment by plaintiffs of their claims for affirmative relief, but refused to do so and submitted their proposed form of order directly to the Court.

**MATTERS THEN AGREED UPON:**

None.

**14. IT IS HEREBY CERTIFIED THAT ALL PRETRIAL DISCOVERY HAS BEEN COMPLETED EXCEPT:**

Plaintiffs cannot so certify except as follows: Defendants' extensive failure to make discovery in this matter is set out, *inter alia*, in plaintiffs' motions to dismiss based on discovery abuses made on December, 2005 and renewed in September 2006. These motions were based on defendants' failure to produce documents pursuant not only to duly served discovery notices but explicit court orders. The Court reserved opinion and ultimately dismissed the counterclaims and defenses pursuant to the transcript entered into the record by Judge McKenzie and read in court by Judge Langlois. No written order was issued and ultimately Judge Langlois vacated her previous ruling based on

Judge McKenzie's findings, refused to sanction defendants and, without explanation, ordered an end to further discovery despite defendants' non-compliance with Judge McKenzie's order. Plaintiffs therefore will move or object, as appropriate, for an order prohibiting defendants from supporting or opposing the related claims or defenses, or prohibiting the introduction of such matters in evidence, pursuant to R. 4:23-2(b)(2).

**15. PARTIES WHO HAVE NOT BEEN SERVED:**

None.

**16. PARTIES WHO HAVE DEFAULTED:**

None.

**17. OTHER MATTERS:**

The Court's July 16, 2004 written opinion includes the following legal rulings, which are law of the case. Internal citations and quotes are omitted:

- (1) New Jersey courts have long recognized the necessity for interlocutory injunctive relief in order to prevent irreparable injury that immediately threatens a party.
- (2) The object of a preliminary injunction is to prevent some threatening irreparable mischief which should be averted until opportunity is offered for a full and deliberate investigation of the case.
- (3) The purpose of temporary restraining orders is "to enable the court to fully deliberate and investigate a case in order that the injunction maintains the status quo so that the parties are in substantially the same place when the final decree is entered as they were when the litigation began.



- (4) In the determination of granting injunctive relief, three main elements predominate. First, a preliminary injunction should not [be issued] except when necessary to prevent irreparable harm. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. Second, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. In attempting to demonstrate such a reasonable probability, temporary relief should be withheld when the legal right underlying plaintiffs claim is unsettled., Further, such a reasonable probability cannot be demonstrated where all material facts are controverted. The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief.
- (5) The covenant of good faith and fair dealing is implied in every contract in New Jersey, and is among the few terms that courts have been called upon to supply.
- (6) Under this principle, neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.
- (7) Here, UCI has advanced an improper motive. It has repeatedly alleged that NAC sought to drive UCI out of business and divert the lost customers to NAC and its competing product.
- (8) As noted above, UCI has set out with specificity allegations that NAC abused its discretion under the express terms of the contract thereby breaching the implied covenant of good faith and fair dealing.
- (9) Thus, the Court finds that UCI has made a preliminary showing of a reasonable probability of ultimate success on the merits.
- (10) With regard to whether the legal right underlying UCI's claim is unsettled, the Court is satisfied that UCI has sustained its burden and points to [the] public announcement made by ARIN on July 1, 2004 regarding the matter at bar.
- (11) Given the above announcement by ARIN, the Court finds NAC's arguments regarding whether the Plaintiffs' right to restraints pending their

renumbering efforts are "unsettled" or would create chaos in the Internet community to have little weight.

- (12) As noted above, UCI has demonstrated that irreparable harm will occur or is likely to occur if service is terminated by NAC before the numbering process is complete.
- (13) Interruption of service would harm thousands of UCI customers as well as UCI's business.
- (14) Such a foreseeable outcome is certainly within the paradigm of irreparable harm, as stated previously, acts destroying a complainant's business, custom and profits do an irreparable injury and authorize the issue of a preliminary injunction.

Dated: June 24, 2009



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