

**DECLARATION OF
DOUG ARMENTROUT**

DECLARATION OF DOUGLAS B. ARMENTROUT

I, DOUGLAS B. ARMENTROUT, declare as follows:

1. I am the Chief Executive Officer of defendant NeuLevel, Inc. I have personal knowledge of the facts set forth below and if called and sworn as a witness, could and would testify competently thereto.

2. I submit this declaration in support of defendant NeuLevel's opposition to plaintiffs' request for preliminary injunctive relief.

3. NeuLevel's plan for initial "landrush" domain name registrations in the new top level domain name registry, .biz, balances many competing concerns, ranging from the protection of the legitimate rights of trademark owners around the world to the need to increase competition for domain name registration services. The launch of .biz has been the product of years of compromise and consensus building by the Internet Corporation for Assigned Names and Numbers ("ICANN") within the international community to increase the availability of Internet domain names while ensuring the Internet's stability and technical performance. Before discussing the NeuLevel program for launching its registry for .biz, I provide below some background on the development of the Internet domain name system to put the launch of our business in perspective.

The Development of the Internet and the Domain Name System

4. The Internet is a network of computer networks that operates worldwide. It is the product of research efforts by the Department of Defense and the National Science Foundation. The DOD launched ARPANET, the Internet's predecessor, in 1969. Ultimately, the NSFNET of the National Science Foundation superseded ARPANET in 1990. The United States has played a central role in the development and support of the Internet for the last thirty years.

5. The Internet consists of a hierarchical network of computers that are able to resolve alphanumeric data into groups of numbers. These groups of numbers, also known as IP addresses, are literally the "phone numbers" that enable the network to locate a particular site on the Internet. This process allows a user to type in an alphanumeric domain name, rather than

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1 blocks of numbers, and thus to reach a particular Internet site. A domain name usually consists
2 of two levels: a Second Level Domain and a Top Level Domain ("TLD"). The system by
3 which names are created and allocated to different users is known as the Domain Name System,
4 or "DNS".

5 6. Pursuant to contracts with ICANN, "registries" operate top level domains. The
6 role of a registry is to store the various domain names that are registered in a database and make
7 certain that its servers appropriately map the domain names to an Internet address. Registries,
8 in turn, enter into contracts with "registrars" which deal directly with the Internet public and
9 accept applications to register domain names. Registrars determine whether a domain name is
10 available from the registry by accessing the registry's shared registration system over the
11 Internet. This general structure has been in place in the operation of the .com, .net, and .org.
12 registries.

13 7. The DNS has been under the control of the United States government for many
14 years. Recognizing the unique nature of the Internet, and the United States' special relationship
15 thereto, in 1997, then President Clinton directed the Secretary of Commerce to "make the
16 governance of the domain name system private and competitive and to create a contractually
17 based self-regulatory regime that deals with potential conflicts between domain name usage and
18 trademark laws on a global basis." Presidential Directive: Electronic Commerce, July 1, 1997
19 (attached as Exhibit A). This privatization program was intended to determine whether a
20 private organization with an international constituency could manage the DNS and thereby
21 reflect the global interest in the further development, growth and management of the DNS.
22 These policies were reflected in the DOC's subsequent policy statement known as the "White
23 Paper." 63 Fed. Reg. 31,741 (June 10, 1998) (attached as Exhibit B).

24 8. The Internet Corporation for Assigned Names and Numbers ("ICANN") was
25 subsequently formed for that purpose. ICANN then entered into a Memorandum of
26 Understanding ("MOU") with the DOC that reflected the policies of the White Paper and the
27 presidential directives on privatizing the DNS. See Exhibit C.

28 9. In carrying out the directives in the MOU, and after extensive international

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1 debate and comment about the addition of new top level domains, ICANN determined it would
2 add new gTLDs to the Internet. This international discussion took place through several
3 working groups chartered by ICANN as well as through discussion by the Internet community
4 at meetings held around the world: Berlin, Germany, May 1999; Santiago, Chile, August 1999;
5 Cairo, Egypt, March 2000; Yokohama, Japan, July 2000. Each of these meetings was open to
6 the world Internet community and follow-up dialogue was conducted in public forums on the
7 Internet (archived at <http://www.icann.org>) after each of these meetings.

8 10. After these meetings and committee meetings of various working groups set up
9 to consider the issues surrounding the launch of the new gTLDs, including the Intellectual
10 Property Constituency and the Governmental Advisory Committee (comprised of government
11 representatives of ICANN participant countries), ICANN solicited RFPs for the introduction of
12 gTLDs. The criteria for proposals and the selection process focused on the need to maintain the
13 Internet's stability, to enhance competition for registry services, to protect the rights of third
14 parties and to prove financial, technical and operational viability for the new registry, among
15 other things.

16 11. ICANN recognized the unique challenges to be faced by the launch of new name
17 spaces given the demand for Internet domain names and the significant increase in Internet
18 usage since the launch of .com, .org and .net. The ICANN RFP requested that the parties
19 interested in acting as the registries for the new name spaces specifically address how they
20 would handle the landrush period and select applications for domain names. NeuLevel's
21 proposal for handling these issues is described in more detail below.

22 **NeuLevel's Proposal to Provide Registry Services for .biz: Considerations in Launching
23 A New Name Space That were Reflected in the Proposal and Final Contract with ICANN**

24 12. NeuLevel's initial proposal for the .biz registry was posted on the Internet in
25 October 2000 for public comment along with the many other proposals to operate new gTLDs.
26 On November 16, 2000, ICANN selected seven new gTLD's, including .biz. The selection
27 process was public and open, consistent with ICANN's consensus-driven, bottom-up decision-
28

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1 making policy and with the policies set forth in the MOU and the White Paper. The successful
2 applicant for the .biz registry was NeuLevel, Inc., then known as JVTeam, L.L.C. Thereafter,
3 ICANN and NeuLevel undertook a process of discussion and negotiation aimed at arriving at a
4 satisfactory top-level domain name registry agreement.

5 13. Launching a new name space in 2001 presents a different set of circumstances
6 than when the first top level domains, .com, .net and .org were introduced many years ago.
7 Those name spaces developed over time when the demand for Internet domain names was
8 substantially less than it is now. At that time only a very small percentage of the United States
9 population was connected via the Internet and in the early days of .com's existence there were
10 only a few hundred active names. Now with mass acceptance of the Internet, there are over 36
11 million domain names in existence with 22 million of those being .com names.

12 14. Another reason launching a new name space in 2001 presents particular
13 problems is the increase in domain name speculators who use custom written scripts, or
14 computer programs, enabling them to send hundreds of requests for particular names in a single
15 minute. Running computer scripts is done to maximize the chances of obtaining a domain
16 name.

17 15. NeuLevel was aware that running these scripts had caused technical difficulties
18 in other registry shared systems. In particular, NeuLevel knew that Network Solutions, Inc.
19 ("NSI"), the registry for .com, .org and .net, had problems with its shared registration system
20 because a few registrars were making very large numbers of queries for names expected to
21 expire. These practices threatened the integrity and reliability of the NSI systems.

22 16. In designing its application system for .biz names, NeuLevel anticipated that the
23 instantaneous demand for .biz names at launch would be enormous. Even a conservative
24 estimate of applications for 10% of the registered .com names presents more initial demand
25 than any first come, first serve shared registration system could handle from a technology
26 standpoint. It would have been impossible to build a shared registration system to handle the
27 anticipated initial demand. And, even if such a system could be designed, it would be cost
28 prohibitive to do so, and such an over-engineered system would be obsolete and unnecessary

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1 the day the registry began operations.

2 17. The possibility of disruption of service due to the initial demand during the
3 initial landrush period also presented NeuLevel with a problem in meeting ICANN's
4 requirement to provide all registrars with equal access to the shared registration system. ICANN
5 requires that registries for all the gTLDs, both new and old, provide all ICANN-Accredited
6 registrars with equivalent access to the registries' shared registration system. This requirement
7 is part of the White Paper and MOU policies of increasing competition in registration services
8 and providing Internet users with more choices.

9 18. The differences between processing capabilities of the various registrars, and the
10 resulting difficulty of providing equal access to the NeuLevel Shared registration system is best
11 explained in historical context. When ICANN was formed, there was only a single registrar,
12 NSI, now a Verisign company. Since that time, ICANN has been working to increase
13 competition at this retail level and there are now over 180 accredited registrars, with
14 approximately half of those actively operating to register domain names. These registrars vary
15 widely in their capitalization, technological expertise and hardware and software
16 infrastructures. The computer processing power of the various registrars differs because of the
17 amount of money and technological expertise they have dedicated to their own systems.
18 Registrars differ in ability to communicate with NeuLevel's servers because of differences in
19 the number of pipes and bandwidth they have purchased to make such connections.

20 19. To create equal access for all registrars during the landrush period, NeuLevel
21 had to account for these various differences between the registrars, including their different
22 Internet access capabilities, software and hardware infrastructures, computer processing power
23 and ability to communicate with NeuLevel's servers. This is because the larger and more
24 powerful registrars have the infrastructure and the bandwidth to access NeuLevel's shared
25 registration system more frequently and with more reliability than many other registrars. This
26 means they can initiate more registration sessions with the shared registration system than the
27 smaller registrars, which would enable them to obtain more names faster than other less funded
28 and less technologically advanced registrars and to block access by the other registrars who, in

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1 essence, would be more likely to get a "busy" signal and be unable to contact the NeuLevel
2 server. The obligation of equal access is meant to level the playing field in terms of these
3 technical differences and give all Internet users, no matter which registrar they use, equal access
4 and opportunity with the DNS. In fact, fair and equal access for all accredited registrars is such
5 an important value to ICANN and the global internet community that ICANN has set out severe
6 monetary penalties to any gTLD registry if the registry fails to provide such fair and equal
7 access.

8 20. To prevent larger registrars from having an unfair advantage and to stay in
9 compliance with its equal access charter, NeuLevel had to devise a system that allowed each
10 registrar to submit applications during the landrush period without impediments due to lack of
11 bandwidth, software or hardware. NeuLevel proposed a randomization process during the
12 landrush period (which is described in more detail at paragraphs 30 through 39 below) to
13 accommodate ICANN's requirement that all registrars be treated equally. Allowing all
14 registrars to submit applications in batches during the initial landrush period and selecting
15 applications randomly regardless of the registrar eliminates the concerns over differences in
16 bandwidth, hardware and software configurations of the various registrars. I have reviewed the
17 only other final registry agreements for the new gTLD's (for .info and .name). Both of these
18 registry agreements also employ randomization processes to assign new domain names. I
19 believe these processes are necessary to achieve equal access. These agreements can be seen at
20 <http://www.icann.org>.

21 21. It has been suggested that NeuLevel could have adopted a rule that limited each
22 applicant to one entry. In light of past experience, this rule would have been impossible to
23 enforce and would have provided violators of such a rule with an unfair advantage. Given the
24 number of registrars and the number of potential applicants for .biz names, there is no way to
25 limit the number of entries for names in the landrush period and be assured that individuals or
26 entities are not attempting to circumvent the system by submitting more than one entry for their
27 business address. Applicants could submit multiple applications by using different versions of
28 their name or other identifying information (i.e. John Smith versus J. Smith versus J. E. Smith),

1 or by using numerous employee e-mail addresses. Computer programs exist that generate
2 fictitious employee names and/or email addresses in strings so that a single applicant can
3 submit as many applications as possible. In short, there are many demonstrated methods to
4 evade such a single application rule. Finally, even if such a limit had been placed on the
5 program, there would have had to have been a selection process since there could still be more
6 than one applicant for a particular name even if there could have been only one entry per entity.

7 22. Also, NeuLevel had to prevent the problem presented by the running of
8 computer scripts described above, whereby entities would design computer programs to enable
9 them to apply repeatedly and instantaneously for the same domain names throughout the
10 registration period. This would provide an unfair advantage to registrars with the technical
11 capacity and the capital to run such programs and could bring the shared registration system
12 "down", meaning that the flood of applications such programs could create would be more than
13 the NeuLevel servers could handle, resulting in the disruption of the service. These overloads
14 of the technical systems have the effect of "denial of service" attacks and can be substantial
15 business disruptions that bring the business to a halt until remedied. These interruptions are
16 similar to the attacks that computer networks face from viruses spread through email and with
17 the same ability to disable service. For expiring names on its existing registries (a small
18 fraction of the names available during the landrush), NSI has experienced such service
19 interruptions due to computer scripts being run by registrars seeking to be the first to discover a
20 name for which the registration is about to expire.

21 23. For all of these reasons, NeuLevel could not adopt a first-come, first-serve
22 approach to the landrush period. NeuLevel instead decided to have a short initial landrush
23 period whereby applications would be accepted and selection of the names for which there were
24 multiple applications would be conducted on a random basis. This approach made speed and
25 technological differences between the registrars irrelevant and met the equal access obligations
26 of the ICANN contract.

27 24. It also proved an impossible task to attempt to police the numerous ways that
28 entities could submit multiple entries. NeuLevel's \$2.00 processing fee per application charged

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1 to the registrar has the added benefit of serving as a deterrent to multiple entries, including the
2 problem of the running of scripts described above. While this fee was intended to achieve a
3 partial cost recovery for the extraordinary costs applicable solely to the landrush program
4 (described more fully below), as a financial deterrent to multiple entries it brings some balance
5 to the application process and avoids the unfair advantage to be gained by computer script
6 running.

7 25. Finally, it has been suggested that NeuLevel should have pursued an auction
8 model as an alternative to the model discussed above. However, NeuLevel believed that an
9 auction model would be inherently unfair to the Internet community and that ICANN would not
10 have accepted a proposal incorporating an auction model in response to its RFP. The debate
11 regarding the launch of new name spaces over the years prior to the RFP had made it clear that
12 the Internet community was opposed to an auction model. Moreover, the auction model did not
13 serve ICANN's purpose of the launch of a new name space as it would have made access to the
14 new names limited only to those who could afford to purchase them at the highest prices.
15 NeuLevel also realized the need to have a competitively priced alternative to domain names
16 offered by other registries and rejected the auction model for this reason as well.

17 The NeuLevel ICANN Registry Agreement

18 26. NeuLevel and ICANN developed and signed a registry agreement on May 11,
19 2001 aimed at addressing various concerns, including concerns about implementing a domain
20 name registration process that could have multiple Internet users clogging and potentially
21 overwhelming the registry. This registry agreement was discussed at various ICANN meetings
22 around the world and was also posted repeatedly on the Internet for international public
23 discussion and comment beginning in March of 2001.

24 27. As discussed above, NeuLevel's contract requires that all registrars be able to
25 access NeuLevel's Shared registration system using the same means available and on the same
26 terms and conditions.

27 28. The registry agreement contains certain other terms. The .biz registry is a
28 restricted registry, which means that, unlike registries such as .net which are available to all

1 registrants, this registry is limited to use by businesses. Appendix L to the registry agreement
2 provides that registrations for the .biz TLD "must be used or intended to be used primarily for
3 bona fide business or commercial purposes . . ." Such purposes are further defined in that
4 Appendix. Included in such further definition is the statement that registration of a .biz domain
5 name exclusively for personal, non-commercial uses is not a bona fide business or commercial
6 purpose for registration.

7 29. Appendix L contains a further limitation: "Registering a domain name solely for
8 the purposes of (1) selling, trading, or leasing the domain name for compensation, or (2) the
9 unsolicited offering to sell, trade or lease the domain name for compensation shall not
10 constitute a "bona fide business of commercial use" of that domain name. If a domain name is
11 used in violation of this provision, then such use constitutes grounds for cancellation of the
12 registration. This means that a person who would register a .biz domain name for purposes of
13 speculation or resale would violate the limitations of the registry and such registration is subject
14 to cancellation by NeuLevel.

15 **How the .biz Application Process Works: From Launch to Live Operation**

16 30. The registry agreement contemplates a landrush application process consisting
17 of two main components: (1) the IP Claims service; and (2) the domain name application
18 process. Each of these components is described below.

19 31. First, the IP Claims process enables the owner of a trademark, whether common
20 law or registered in any country, to file notice of its IP rights with NeuLevel along with a fee of
21 \$90.00 per IP claim, so that if one or more applicants seek to register a domain name that
22 corresponds with that mark, all such applicants will be notified of the IP Claim and given a
23 chance to withdraw the application without having to contest who has the right to use the
24 domain name. All IP claims must have been filed through a registrar.

25 32. As provided for in its contract with ICANN, NeuLevel began accepting
26 Intellectual Property Claims ("IP Claims") from the owners of intellectual property ("IP") on
27 May 21, 2001. NeuLevel accepted IP claims until August 8, 2001.

28 33. The sole purpose of the IP Claims process is to provide a procedure to notify

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1 applicants for a name that another entity has asserted IP rights in that name. This allows the
2 applicant to determine ahead of time whether it can defeat a challenge by the IP claimant. If
3 not, the would-be applicant can abandon its attempt to register the name voluntarily. Any
4 actual dispute regarding whether an entity has IP rights to a particular domain name, however,
5 will be determined outside of the .biz registration process, either through litigation or alternative
6 dispute resolution procedures that have been established for these types of disputes. NeuLevel
7 has not made and will not make any determination regarding the scope or validity of any IP
8 claim.

9 34. The second component of the landrush phase is the domain name application
10 process. Pursuant to the domain name application process, a business submits its .biz domain
11 name application(s) to the registrar of its choice. Pursuant to the registry-registrar agreement,
12 the applications are forwarded to NeuLevel by the registrars electronically and each application
13 must be accompanied by a \$2.00 application processing fee. Under the registrar agreements,
14 the registrars are free to charge applicants a processing fee solely in their discretion. The
15 registrars retain all application fees collected from applicants in excess of \$2.00 per application.

16 35. The registrars in turn submit these domain name applications to NeuLevel, the
17 registry for .biz. At this point, the IP Claims service and the domain name application process
18 intersect. During this time, applicants will receive IP Claim notices if they have applied for a
19 domain name that exactly matches a name for which an IP claim has been filed. The applicant
20 will be notified by e-mail. The e-mail will contain the name of the registrar that submitted the
21 application, the name and contact information of the IP Claimant—as well as information
22 regarding the IP Claim, i.e. the possible ownership of intellectual property rights relating to the
23 name sought. There will also be a link to a secure website where the applicant must go to
24 confirm their desire to either proceed with or cancel the application. If the applicant chooses to
25 abandon its application or fails to elect either course of action, that application is deleted.

26 36. The technical design of the system to match the applications with the IP claims,
27 provide access to a separate secure website, including user name and password protection, for
28 each application and then manage the applications and move forward with the randomization

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1 process is highly sophisticated and involved significant investments of time and money.
2 Moreover, once the landrush period ends, this system will not be a part of NeuLevel's on-going
3 operations as the .biz registry.

4 37. On September 17, 2001, the landrush application period ends. All names
5 submitted to Registrars during the domain name application process will then be processed by
6 NeuLevel unless the applicant has elected not to proceed. September 25, 2001 is the final date
7 to indicate whether an applicant intends to proceed with a domain name application for a
8 domain name request that is an exact match to an IP Claim. Application fees will not be
9 refunded. Selection will proceed through a completely neutral and randomized process placing
10 all applications in the same queue —ignoring the order in which the submissions were received
11 and avoiding preference toward any registrar. If the domain name sought by the applicant is
12 available when that application is processed (i.e., it has not already been assigned), then the
13 registrar through which the applicant submitted its application will be notified that the
14 application was successful and the applicant will be assigned the right to register the name. If
15 the domain name sought in the application is not available, the registrar through whom the
16 application was filed will be notified that the application was not successful and the applicant
17 will not be given the right to register the name. In this way, each application will be considered
18 in random order and if the desired name is still available when a particular application is
19 processed, the applicant will be given the right to register and use the name. There is no
20 guarantee that an applicant's domain name request will be successful where there is more than
21 one application for that name.

22 38. The applicant whose name is available may then choose to complete the
23 registration process by remitting an additional fee through the registrar. To register a .biz
24 domain name, the applicant must pay a registration fee. Again this fee is paid through the
25 registrar and in no circumstances is it paid directly to NeuLevel. Although NeuLevel charges a
26 fee not to exceed \$5.30 (depending on volume) per name to register a .biz domain name for one
27 year, registrars are free to charge applicants more and to retain any excess revenue received.
28 Applicants will register the .biz domain name for two years and will also have a right to renew

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1 the registration at the end of the initial term. It is important to note that the registration period
 2 for domain names assigned during the landrush application process will not occur until after
 3 September 26. Accordingly, NeuLevel has not issued a single .biz domain name registration.
 4 The registry is scheduled to be fully operational on October 1, 2001.

5 39. On or about October 1, 2001, the .biz domain name registry will go live,
 6 meaning that names can be applied for and registered on a first-come-first-serve basis. Domain
 7 name applications submitted after the registry goes live must still be submitted via the
 8 registrars. NeuLevel will not impose an application or processing fee after the registry goes live
 9 because it will then proceed on a first-come, first-serve basis and no IP claims processing will
 10 occur. The same domain name registration fees will apply.

11 **The Registry-Registrar Agreements**

12 40. Shortly after NeuLevel's Registry Agreement with ICANN was finalized,
 13 memorializing the process described above, NeuLevel entered into registry-registrar agreements
 14 with registrars located in the U.S., Canada, India, Korea, Japan, China, Norway, Spain, Kuwait,
 15 Israel and elsewhere. The form for these agreements was negotiated exclusively between
 16 ICANN and the registry operators, not the registrars. Moreover, none of the registry operators
 17 (including NeuLevel) are allowed under their respective registry agreements with ICANN to
 18 change any terms or conditions in the form registry-registrar agreements. All applications for
 19 .biz domain names (before or after the go live date of October 1) are required by the registry
 20 agreements to be submitted to NeuLevel through those Registrars. No applications may be
 21 submitted directly to NeuLevel by applicants. A business that wants to obtain a .biz domain
 22 name may apply through any of the Registrars and there is no requirement that an applicant use
 23 a registrar from its home country.

24 41. NeuLevel's only relationship with the registrars is by individual contracts.¹ The
 25 form of those contracts is set forth in Appendix F to the registry agreement, which can be found
 26 at www.icann.org (attached as Exhibit D). The same form of agreements has been used in the
 27

28 ¹ One registrar, Melbourne IT d/b/a Internet Names Worldwide, is a minority shareholder in NeuLevel, Inc., but must be treated like every other registrar.

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1 launch of other new gTLDs, including .info and .name and were similar in form. The registrars
2 did not participate in the negotiation of those form contracts.

3 Harm to NeuLevel of a Delay in Launch

4 42. Any delay in the launch of .biz now after years of negotiations with ICANN and
5 the international community to come up with a means to expand the domain name system
6 would be devastating to our business. In addition to the impact such a delay would have in
7 consumer confidence in the launch of .biz, as well as any other new TLD, the delay would have
8 significant revenue and marketing impacts that are addressed in the Declaration of Tim Switzer.
9 NeuLevel's entire business has been built upon a launch in October of 2001.

10 43. The October 1st date was selected for several reasons. First, domain name
11 marketing, like other marketing, is seasonal. Target marketing toward the Fall time period
12 avoids the summer vacation months and the December and January months when buyers may
13 be distracted due to the worldwide celebration of Christmas and other religious and secular
14 holidays. Launching October 1 provided NeuLevel with sufficient time over the past nine
15 months to build the technology to handle the landrush process as well as take advantage of the
16 seasonal marketing issues thereby improving our chances of marketing success. Second, with
17 multiple TLDs either going live over the next few months or being more aggressively marketed
18 (e.g., country code TLDs), being first to market carries with it significant marketing advantages.
19 Those gTLDs, like .biz, that go live early in the process have a better chance at market
20 acceptance and thus have a better chance to recoup part of their infrastructure and development
21 investments.

22 44. Finally, to improve our chance of market success, NeuLevel has engaged in an
23 extensive series of marketing and sales activities that total multiple millions of dollars. These
24 marketing initiatives have all been focused on a launch date of October 1st. Any delay will
25 create significant losses for us, our registrars and resellers as well as for the end registrants who
26 may be planning on using their registered names in their own promotions and marketing
27 activities. In addition, we and our registrars and their resellers have spent many millions of
28 dollars more over the past nine months to inform the marketplace of the October 1st launch.

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1 Any delay will cause us to loose momentum that we can never recoup.

2 45. I declare under penalty of perjury under the laws of the State of California that
3 the foregoing is true and correct.

4 Executed this 14 day of September, 2001, at Sterling, Virginia.

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6 Douglas B. Armentrout, CEO Neustar
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