

# **Exhibit B**



1776 K STREET NW  
WASHINGTON, DC 20006  
PHONE 202.719.7000  
FAX 202.719.7049

7925 JONES BRANCH DRIVE  
MCLEAN, VA 22102  
PHONE 703.905.2800  
FAX 703.905.2820

www.wileyrein.com

April 30, 2013

David E. Weslow  
202.719.7525  
dweslow@wileyrein.com

**VIA E-MAIL AND FACSIMILE**

Mr. Olin M. Lewin  
Prevolos Lewin & Hezlep, ALC  
550 West C Street, Suite 1600  
San Diego, CA92101

Re: Ascent Real Estate, Inc.'s Claims Regarding [ascentrealestate.com](http://ascentrealestate.com)

Dear Mr. Lewin:

We are counsel to Electronic Creations Corporation (“ECC”) and write in response to your correspondence to ZipRealty, Inc. and National Corporate Research, Ltd. on behalf of Ascent Real Estate, Inc. (“Ascent”).

We would like to make clear that ECC respects the intellectual property rights of others, just as it expects others to respect its rights. Consequently, ECC would not purposefully act in a manner that it believed violated Ascent’s rights. ECC has taken the allegations expressed in your correspondence very seriously and we have endeavored to investigate the merits of Ascent’s allegations. After reviewing Ascent’s position as set forth in your correspondence, ECC strongly disagrees that its registration and use of the [ascentrealestate.com](http://ascentrealestate.com) domain name violates Ascent’s trademark rights. As discussed in detail below, a basic review of the relevant facts and law should have made it abundantly clear to Ascent that there has been no infringement of Ascent’s purported rights.

ECC registered the [ascentrealestate.com](http://ascentrealestate.com) domain name on April 3, 2000. Your correspondence references Ascent’s United States Trademark Registration Nos. 3,195,161 and 4,230,114 for the marks A ASCENT REAL ESTATE (and Design) and ASCENT REAL ESTATE, but you failed to note that these registrations were issued on January 2, 2007 and October 23, 2012, respectively. Thus, even the oldest of Ascent’s registrations (which is directed to the “A” design mark that differs from the [ascentrealestate.com](http://ascentrealestate.com) domain name) was issued almost seven years after ECC registered the [ascentrealestate.com](http://ascentrealestate.com) domain name.

Ascent surely is aware that it could not establish the requisite elements of trademark infringement against ECC. It is a core tenet of both federal and California state trademark law that an entity claiming trademark infringement and related claims must establish priority of use. *See, e.g., Blanchard Importing & Distributing Co. v. Charles Gilman & Son, Inc.*, 353 F.2d 400, 401, 147 U.S.P.Q. 263 (1st Cir. 1965)



Mr. Olin M. Lewin  
April 30, 2013  
Page 2

(“As between conflicting claimants, it is well settled that the right to use the same mark is based on priority of appropriation.”); *Empresa Cubana del Tabaco v. Culbro Corp.*, 399 F.3d 462, 468, 73 U.S.P.Q.2d 1936 (2d Cir. 2005), cert. denied, 126 S. Ct. 2887 (U.S. 2006) (“[T]he standard test for ownership of a mark is priority of use, ...”); *One Industries, LLC v. Jim O’Neal Distributing, Inc.*, 578 F.3d 1154, 1158, 92 U.S.P.Q.2d 1065 (9th Cir. 2009), cert. denied, 130 S. Ct. 1739 (2010) (“It is a cardinal principle of federal trademark law that the party who uses the mark first gets priority.”); *Winfield v. Charles*, 77 Cal. App. 2d 64, 71, 175 P.2d 69 (1946) (“[I]n the interest of fair dealing courts of equity will protect the person first in the field doing business under a given name to the extent necessary to prevent deceit and fraud upon his business and upon the public.”). Given that Ascent did not exist, much less possess any trademark rights, at the time of ECC’s registration of the [ascentrealestate.com](http://ascentrealestate.com) domain name, any infringement claim by Ascent certainly would fail.

Nor would Ascent fare any better in a claim under the Uniform Domain Name Dispute Resolution Policy (UDRP) or the U.S. Anticyberquatting Consumer Protection Act (ACPA). Ascent cannot establish the requisite elements of the UDRP when its trademark rights did not exist at the time of ECC’s registration of the [ascentrealestate.com](http://ascentrealestate.com) domain name. See *AINS, INC. v. Name Administration Inc. (BVI)*, FA 1413667 (Nat. Arb. Forum December 1, 2011) (addressing the inapplicability of the UDRP to a domain name registration that predated the asserted trademark rights). Similarly, the U.S. Court of Appeals for the Ninth Circuit has held that “bad faith intent to profit” under the ACPA is assessed at the time of registration of the domain name. See *GoPets Ltd. v. Hise*, 657 F.3d 1024, 1032 (9th Cir. 2011) (“Because Edward Hise registered [gopets.com](http://gopets.com) in 1999, long before GoPets Ltd. registered its service mark, Digital Overture’s re-registration and continued ownership of [gopets.com](http://gopets.com) does not violate § 1125(d)(1).”).

It is clear that ECC neither registered nor used the [ascentrealestate.com](http://ascentrealestate.com) domain name with bad faith intent to profit from any alleged trademark rights of Ascent (which did not exist at the time of ECC’s registration). In light of the foregoing, it appears that Ascent’s claims as set forth in your correspondence constitute attempted reverse domain name hijacking. The ACPA authorizes recovery of damages and attorney’s fees by the domain name registrant in cases of reverse domain name hijacking. See, e.g., *GoForIt Ent. LLC v. Digimedia.com*, 750 F. Supp. 2d 712, 735 (N.D. Tex. 2010). Furthermore, Ascent’s direct correspondence to ECC’s business partner ZipRealty suggests that Ascent’s true purpose in



Mr. Olin M. Lewin  
April 30, 2013  
Page 3

asserting its facially invalid claim was to interfere with ECC's relationship with ZipRealty. In light of ZipRealty's response to Ascent's correspondence, ECC has indeed now suffered injury as a result of Ascent's invalid claim.

**Accordingly, ECC hereby demands that, within ten (10) business days of receiving this letter, Ascent retract its claim through a letter to both ZipRealty, Inc. and Commission Junction.** In the absence of your confirmation that Ascent is retracting the claims set forth in your correspondence, we will have no choice but to advise ECC to consider pursuit of: (1) the cancellation of Ascent's trademark registrations on grounds of priority; (2) a claim of tortious interference; and (3) declaration of the lawfulness of ECC's actions under the Lanham Act and the ACPA.

Please note that this letter does not prejudice ECC's rights, remedies, claims, and defenses related to this matter, which are hereby expressly reserved.

Govern yourselves accordingly.

Sincerely,

*/s/ David E. Weslow*

David E. Weslow

cc: Electronic Creations Corporation  
ZipRealty, Inc.  
Commission Junction