

1 JESSE W. MARKHAM, JR. (CA SBN 87788)
WILLIAM L. STERN (CA SBN 96105)
2 JENNIFER LEE TAYLOR (CA SBN 161368)
KEITH L. BUTLER (CA SBN 215670)
3 MORRISON & FOERSTER LLP
425 Market Street
4 San Francisco, California 94105-2482
Telephone: 415.268.7000
5 Facsimile: 415.268.7522
JMarkham@mofo.com

6 Attorneys for Plaintiff
7 COALITION FOR ICANN TRANSPARENCY INC.

8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION
12

13 COALITION FOR ICANN TRANSPARENCY
INC., a Delaware Corporation,

14 Plaintiff,

15 v.

16 VERISIGN, INC., a Delaware Corporation;
INTERNET CORPORATION FOR
17 ASSIGNED NAMES AND NUMBERS, a
California Corporation,

18 Defendants.
19

No.: 5:05-CV-04826 (RMW)

**REPLY BRIEF IN SUPPORT OF
CFIT'S APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER**

20
21 **INTRODUCTION**

22 In opposing CFIT's application for a TRO, Defendants ICANN and VeriSign take
23 contradictory positions which severely undercut their opposition to the request. ICANN argues
24 that it is not planning to approve the new registry agreement at this week's meeting in Vancouver
25 so harm to CFIT is not imminent, but then turns around and argues that if it is enjoined from
26 being able to approve the new registry agreement, it will be harmed. If it was not planning to
27 approve the agreement, how can it be harmed if the Court says it must delay approving the
28

1 agreement until the Court hears a motion for preliminary injunction? If it is planning to approve
2 the agreement in short order, how can harm not be imminent? VeriSign's arguments on this point
3 are no more persuasive. It goes to great lengths in its brief to challenge CFIT's claims that its
4 members will be harmed if there is no TRO, but does not even allege that a TRO will harm
5 VeriSign. If VeriSign will not be harmed by a TRO, then surely a TRO is appropriate in light of
6 the irreparable harm that has been properly alleged by CFIT on behalf of its members.

7 CFIT submits that it has met the requirements for a TRO:

- 8 • a likelihood of success on the merits
- 9 • irreparable harm to CFIT's members is imminent
- 10 • the balance of hardships favors CFIT and its members

11 Recognizing the weakness in their arguments that harm is not imminent or irreparable and
12 that CFIT's members will not suffer hardship, Defendants try to distract the Court from the real
13 issues by suggesting that CFIT does not have standing,¹ that these issues have been addressed by
14 other courts,² and that CFIT is relying on inadmissible evidence.³ These issues are sideshows
15 and do not merit the Court's attention.

16 ¹ ICANN's conclusory assertion that CFIT lacks standing is simply mistaken. First, CFIT's members would
17 have standing. Pool.com, among others, is a CFIT member, and as a back order service provider, Pool.com would
18 suffer antitrust injury by being forced out of business by defendants' attempt and conspiracy to monopolize.
19 Second, this litigation is germane to CFIT's purpose; its very existence was "provoked by the proposed .com
20 agreement." Third, individual participation of CFIT's members is not required because of the relief CFIT seeks. See
Appraisers Coalition v. Appraisal Inst., 845 F. Supp. 592, 601 (N.D. Ill. 1994) (holding that where an antitrust claim
attacks a practice that is equally detrimental to members of an association, individualized proof of injury is not
necessary) (citation omitted).

21 ² VeriSign argues that CFIT's claims are barred as res judicata despite the fact that there is no identity of
22 claims or parties between this case and the *Dotster* litigation. (VeriSign Brief at 22-24.) There is no identity of
23 claims because the *Dotster* case did not concern antitrust claims, and, as VeriSign concedes (*Id.* at 6:11-13), CLS is a
different service from WLS. Moreover, CFIT challenges much more than CLS in its complaint. Finally, there is no
identity of parties because as of the filing of this suit none of the named plaintiffs in the *Dotster* case (*Dotster, Inc.*,
Go Daddy Software, Inc. and *eNom, Inc.*) were members of CFIT.

24 ³ District courts have discretion to consider otherwise inadmissible evidence in ruling on an application for a
25 temporary restraining order or preliminary injunction. See *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394
26 (9th Cir.1984) ("The Harveys argue that Flynt's evidence is hearsay. The urgency of obtaining a preliminary
27 injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be
28 competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves
the purpose of preventing irreparable harm before trial"); *Mattel, Inc. v. MCA Records, Inc.*, 1998 WL 422641 at* 1
(C.D. Cal. Feb.18, 1998) (denying both parties' motions to strike declarations because "strict evidentiary rules" do
not apply to preliminary injunction hearings) (citations omitted).

1
2 **ARGUMENT**

3 **I. CFIT HAS ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS**

4 As laid out very clearly in its opening papers, CFIT has established that it is likely to
5 succeed on two different antitrust claims: attempted monopolization and conspiracy to
6 monopolize.

7 Through Defendants' agreement to expand the definition of registry services to permit
8 VeriSign to implement CLS and replace a robustly competitive market with a VeriSign
9 monopoly, Defendants have engaged in predatory or anticompetitive conduct with a specific
10 intent to monopolize and a dangerous probability of achieving monopoly power. This conduct
11 establishes an attempted monopolization claim. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S.
12 447 (1993).

13 As a result of Defendants' agreement on the terms of the new .com Registry Agreement,
14 Defendants' conduct also meets the elements of a conspiracy to monopolize claim, namely: (1)
15 the existence of a combination or conspiracy, (2) an overt act in furtherance of the conspiracy,
16 and (3) specific intent to monopolize a relevant market. *See, e.g., United States v. Yellow Cab*
17 *Co.*, 332 U.S. 218, 225 (1947). This proposed agreement reflects a conspiracy and is itself an
18 overt act in furtherance of the conspiracy, demonstrating Defendants' specific intent to
19 monopolize a relevant market.

20 Thus, CFIT has established a likelihood of success on the merits.

21 **II. IRREPARABLE HARM TO CFIT'S MEMBERS IS IMMINENT**

22 One member of CFIT is Pool.com, a back order services provider. As described in detail
23 in the Declaration of Taryn Naidu, president of Pool.com, submitted in support of this
24 application, Pool.com would lose close to 95% of its revenue if VeriSign offered the proposed
25 CLS service, resulting in layoffs, possible bankruptcy, and the potential closing of a business.⁴

26
27 ⁴ VeriSign and ICANN argue that existing services could continue to be offered if CLS is implemented,
28 such as back order services. (VeriSign Brief at 11:5-10, 12:10-12, 19:10-11; ICANN Brief at 23:22-23.) What they
do not say is that because of VeriSign's unique ability as the operator of the .com registry, it can offer to transfer
(Footnote continues on next page.)

1 (Naidu Decl. ¶ 20). This is real harm⁵ that will be suffered by a real company, and it cannot be
2 compensated by damages, as claimed by VeriSign.

3 When CFIT filed its application for a TRO it feared that the ICANN Board would approve
4 the new .com Registry Agreement at its Board meeting this week in Vancouver, the last
5 remaining step before ICANN and VeriSign signed and implemented the agreement. VeriSign
6 had also announced that it intended to offer the new CLS service in early December. The ICANN
7 Board meeting scheduled in Vancouver was a natural place for the Board to consider the
8 agreement, and the detailed Board agenda was never announced.⁶

9 ICANN first announced today that the Board was not going to vote on the new .com
10 Registry Agreement at its meeting in Vancouver.⁷ (Declaration of Jesse W. Markham, Jr.
11 ("Markham Decl.") at ¶ 2.) Immediately after hearing about this announcement, CFIT contacted
12 ICANN to explore a possible stipulation to maintain the status quo until the Court is able to
13 decide CFIT's upcoming motion for a preliminary injunction. (*Id.*, ¶ 3.) ICANN refused this
14 request, and also stated that ICANN plans to hold its Board meeting at the end of the public
15 discussions this week in Vancouver and will decide at that Board meeting how and when the
16 matter will be put to a vote. (*Id.*, ¶ 4.) Continuing its gamesmanship, ICANN stated that it could

17 _____
18 (Footnote continued from previous page.)

19 ownership of a domain name before a domain name is deleted and released to the public. No one but VeriSign can
20 do this for .com and .net domain names. Thus, if any registrant attempts to register an expiring domain name through
21 the CLS service, there is no possibility that the domain name will be available through any other service. If another
22 registrant wants that domain name, it must participate in the CLS auction and pay VeriSign 10% of the auction price.
23 Thus, only the domain names that no registrant wants will be available to be registered through existing services, and
24 the back order services industry will be eliminated.

25 ⁵ *Am. Passage Media Corp. v. Cass Comm'n, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) (threat of being
26 driven out of business is sufficient to establish irreparable harm) (citing *Los Angeles Mem'l Coliseum Comm'n v.*
27 *NFL*, 634 F.2d 1197, 1203 (9th Cir. 1980)).

28 ⁶ ICANN argues that the agenda for the December 4, 2005 Board meeting does not include a vote on the
2005 .com Agreement. The document it cites, however, does not support this argument because it includes vague
categories that could allow a vote on the agreement, including "other business" and "Board committee business."
(Halloran Decl., Ex. C.)

⁷ It is ICANN's lack of transparency that caused the timing of the lawsuit and the TRO application. Had
ICANN made this announcement on November 10th when it extended the public comment period, there would have
been no need for CFIT's TRO application.

1 decide to convene a special Board meeting to consider the issue with as little as one week's
2 notice. (*Id.* ¶¶ 4-5.)

3 Thus, while ICANN is telling the Court in its papers that the execution of the .com
4 Registry Agreement is not going to happen this week (and therefore harm is not imminent),
5 ICANN has the *right* to schedule the meeting for next week and ICANN is refusing CFIT's
6 request to a proposed freeze of the status quo. ICANN's continuing equivocation on this issue is
7 indicative of the manner in which ICANN operates and is precisely why a TRO is necessary. If
8 the Court does not enjoin ICANN, ICANN might simply change its mind again and add the issue
9 to the Board's agenda.

10 **III. THE BALANCE OF HARDSHIPS FAVORS CFIT**

11 Certain of CFIT's members will lose their revenue stream and be forced out of business if
12 a TRO is not granted. There can be no greater harm for a company. In contrast, neither VeriSign
13 nor ICANN are able to point to any harm it will suffer by the entry of a temporary restraining
14 order maintaining the status quo.

15 While VeriSign claims in the introduction to its argument that it would be harmed if it is
16 enjoined from signing the proposed .com Registry Agreement because that agreement will resolve
17 ongoing litigation between VeriSign and ICANN (Verisign Brief at 3), this claim addresses the
18 issuance of a permanent injunction, not a brief delay caused by a TRO. In fact, VeriSign does not
19 allege any harm at all from the brief delay that will be caused by issuance of a TRO.

20 ICANN's claim that it will be harmed if it is enjoined from entering into the agreement
21 with VeriSign must be disregarded entirely in light of its claim that approval of that agreement is
22 not imminent. ICANN's statements that the TRO is "contrary to [its] public interest mission"
23 because ICANN "seeks to develop consensus wherever possible" (ICANN Brief at 21) also
24 misses the point. It is precisely because ICANN has abdicated its public interest mission that
25 CFIT has been forced to seek temporary injunctive relief from this Court. If anything, ICANN's
26 public interest mission will be furthered, not harmed, if this Court considers CFIT's antitrust
27 claims *before* ICANN precipitously signs an inherently defective agreement. The delay would
28 afford ICANN time for a more deliberative process than has taken place on this contentious issue.

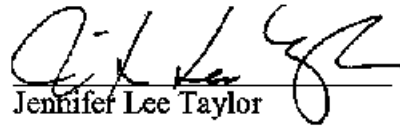
1 **IV. CONCLUSION**

2 For the foregoing reasons, CFIT respectfully requests issuance of a temporary restraining
3 order to maintain the status quo and to prohibit VeriSign and ICANN from consummating their
4 proposed 2005 .com Agreement and implementing CLS until such time as the Court rules on
5 CFIT's forthcoming motion for a preliminary injunction.

6 In the alternative, in the event the Court does not enter a TRO, CFIT requests, at a
7 minimum, that the Court require ICANN to give CFIT two weeks notice before convening a
8 Board meeting to vote on the new .com Registry agreement.

9 Dated: November 29, 2005

10 Respectfully submitted,

11 
12 Jennifer Lee Taylor

13 Attorneys for Plaintiff
14 COALITION FOR ICANN
15 TRANSPARENCY INC.

16
17
18
19
20
21
22
23
24
25
26
27
28