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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.:

**MEMORANDUM IN SUPPORT
OF COALITION FOR ICANN
TRANSPARENCY'S
APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER**

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1 Plaintiff Coalition For ICANN Transparency Inc. (“CFIT”) respectfully submits this brief
2 in support of its application for a temporary restraining order (“TRO”) prohibiting defendants
3 Internet Corporation for Assigned Names and Numbers (“ICANN”) and VeriSign, Inc.
4 (“VeriSign”) from signing and implementing a proposed .com Registry Agreement (“2005 .com
5 agreement”) between ICANN and VeriSign.

6 I. SUMMARY OF ARGUMENT

7 ICANN operates under a charter granted by the U.S. Department of Commerce to
8 coordinate the Internet domain name system. It is charged with promoting competition, and it is
9 prohibited from “unjustifiably or arbitrarily” injuring “particular persons or entities or particular
10 categories of persons or entities.” Unfortunately, ICANN has strayed from its mission and, unless
11 enjoined, is threatening to do the very things its charter prohibits.

12 ICANN and VeriSign have announced the terms of a new .com registry agreement, the
13 2005 .com Agreement, which may take effect as soon as November 30, 2005. Plaintiff seeks a
14 TRO to preserve the status quo, and to prevent imminent harm in the form of the eradication of an
15 entire industry, until this Court has had an opportunity to review the effect the 2005 .com
16 Agreement will have on competition in various markets related to Internet domain name
17 registration.

18 The harm is imminent; defendants may sign the new 2005 .com Agreement as soon as
19 November 30, 2005. If they do, it will transform the Internet domain name registration industry.
20 One immediate and irrevocable effect will be to wipe out an entire industry made up of
21 companies who currently compete in providing services for obtaining expired domain names.¹
22 The proposed 2005 .com Agreement, once implemented, would permit VeriSign to leverage into
23 a complete monopoly for these services, which VeriSign has indeed announced that it intends to
24 do forthwith. The 2005 .com Agreement would also install VeriSign permanently in control of
25 the .com registry. Thus, the threatened agreement promises to extend VeriSign’s monopoly

26 ¹ Certain of CFIT’s members operate as “back order service providers” and, as such, have
27 a great deal to lose if the proposed Registry Agreement is approved and this industry is
28 eliminated.

1 control over the registry into the indefinite future, and to permit VeriSign to leverage off of that
2 monopoly to exclude all companies competing in adjacent and downstream markets for various
3 domain name services.

4 That the new agreement will eliminate competition is obvious from its face: the
5 agreement effectively *mandates* price increases. The cost of domain name registrations, currently
6 \$6/year, will go up in price in a month, and then increase again in July 2006 and annually
7 thereafter by up to seven percent. This is but one example of the imminent exercise of monopoly
8 power that must be enjoined in order to preserve the possibility of competition.

9 All the elements necessary for the issuance of a TRO are present.

10 **First**, CFIT is likely to succeed on the merits. Just as there can be only one county
11 recorder's office to maintain the land title registry, there can be just one registry for each Internet
12 domain. VeriSign has control of that registry for the duration of its current contract with ICANN.
13 The proposed 2005 .com Agreement will allow VeriSign to leverage its temporary contractual
14 control of the registry into a permanent monopoly over the registry itself as well as adjacent and
15 downstream markets for various other domain name services, such as the market for the
16 registration of expiring domain names. Proof of this monopoly power will in fact be trivial, since
17 VeriSign has already announced that the new arrangement will permit it to substantially increase
18 prices above current more competitive levels.

19 **Second**, CFIT, through its members, will be irreparably injured. The implementation of
20 the 2005 .com Agreement will structurally eliminate the ability of so-called "back order service
21 providers" to compete, and will replace their function with a monopoly controlled by VeriSign.
22 These service providers cannot simply shut down and then reopen for business as usual weeks,
23 months, or years from now—key employees will have moved on, business relationships will have
24 dissipated, and sources of financing will have been disrupted.

25 **Third**, a TRO will not injure ICANN or VeriSign. The existing registry agreement (the
26 "2001 .com Agreement") does not even expire until 2007. There is no reason why the current
27 arrangements cannot continue for a few additional weeks or months until this Court can entertain
28 a hearing on the preliminary injunction.

1 **Fourth**, the public interest favors a TRO. The market for back order services is
2 competitive, and the Sherman Act represents a fundamental public policy in favor of maintaining
3 competitive markets against private contrivances. Since the 2005 .com Agreement will
4 immediately vest VeriSign with monopoly power in several currently competitive markets, there
5 is a public interest in preserving the status quo until this court can more thoroughly consider the
6 anticompetitive effects that will follow from this new agreement.

7 This Court should issue a TRO freezing the status quo by temporarily prohibiting ICANN
8 and VeriSign from signing, consummating, and implementing the proposed 2005 .com
9 Agreement.

10 **II. STATEMENT OF FACTS**

11 **A. The Internet Domain Name System**

12 The Internet is a network of interconnected computers, each of which has a unique
13 numerical address used to communicate with other computers when connected to the Internet.
14 (Declaration of Dr. Michael A. Geist in Support of CFIT's *Ex Parte* Application for Temporary
15 Restraining Order ("Geist Decl.") ¶ 2.) These addresses are known as Internet Protocol ("IP")
16 addresses and each one consists of a string of four sets of numbers, separated by periods.
17 64.233.161.147 is an example of an IP address. (*Id.*) Because these numerical IP addresses are
18 difficult for Internet users to remember, so a user-friendly system was developed, overlaying the
19 actual IP address system with an alphanumeric domain name system. (*Id.* at ¶ 3.) Under this
20 system, a single alpha-numeric domain name is associated with a specific IP address. For
21 example, IP address 64.233.161.147 is more commonly known as www.google.com. (*Id.*)

22 These alphanumeric domain names are also separated by periods (or dots). Top-level
23 domains ("TLDs") are found to the right of the final period. They are either generic TLDs, such
24 as .com, .gov, .net, .mil, and .biz, or country code TLDs, such as .us, .uk, and .ca. Second-level
25 domains ("SLDs") are those domains immediately to the left of the top-level domains, such as
26 "uscourts" in "uscourts.gov." (*Id.* at ¶ 4.)

27 Because each domain name refers to a single IP address, each alpha-numeric domain
28 name must be unique, even if it differs from another domain name by only one character (*e.g.*,

1 cook.com is different from cooks.com). (*Id.* at ¶ 5.) A given domain name, therefore, can be
2 registered to only one entity. For the system to work, a framework is needed to track which
3 alpha-numeric domain name is associated with which IP address. (*Id.*) That function is
4 performed by a domain name registry, which is responsible for maintaining a definitive database
5 of domain names and associated IP addresses within a single TLD. (*Id.*)

6 **B. ICANN's Role**

7 The Internet grew out of a system that was set up and operated by the U.S. military. In the
8 early 1990s the U.S. military contracted with the National Science Foundation ("NSF") to take
9 over administrative functions for the civilian Internet (the .com, .net, .org, .edu, and .gov top level
10 domains), and NSF solicited bids. (*Id.* at ¶ 6.) Network Solutions was awarded the contract for
11 registration services, touting its previous experience provide similar services to the military
12 Internet (the .mil top level domain). (*Id.*) As a result of this successful bid, Network Solutions
13 became responsible for both registering domain names (registrar services) and maintaining the
14 registry linking domain names to specific IP addresses (registry services), in essence, controlling
15 the internet root server system. (*Id.*)

16 There was initially no charge to register a domain name through Network Solutions, but
17 NSF permitted Network Solutions to begin charging fees to register.com, .net, and .org domain
18 names in the mid-1990s. (*Id.* at ¶ 7.) The initial registration fee was \$100 for two years. (*Id.*)

19 From its inception until 1997, the Internet was subject to governance by the United States
20 military, and then by the National Science Foundation, which awarded a contract to network
21 Solutions to maintain the registries and provide registrations services. (*Id.* at ¶ 8.) In 1997 the
22 Department of Commerce ("DOC") succeeded to the role of the NSF, and a Presidential directive
23 authorized the Secretary of Commerce to "support efforts to make the governance of the domain
24 name system private and competitive and to create a contractually based self-regulatory regime
25 that deals with potential conflicts between domain name usage and trademark laws on a global
26 basis." (*Id.*) The DOC proposed and eventually created a private not-for-profit corporation that
27 would be responsible for overseeing the policy and operation of the domain name and IP address
28 system: ICANN. (*Id.*)

1 ICANN has at all times operated under a Memorandum of Understanding (the “MOU”),
2 as amended from time to time, with the DOC. (*Id.* at ¶ 9.) ICANN administers policy for the
3 domain name and IP address system subject to the principles set forth in the MOU: stability;
4 competition; private, bottom-up coordination; and representation. (*Id.*) The MOU prohibits
5 ICANN from “unjustifiably or arbitrarily” injuring “particular persons or entities or particular
6 categories of persons or entities” and requires ICANN to act “in a non-arbitrary and reasonable
7 manner with respect to . . . any . . . activity related to the DNS project.” (*Id.* at ¶ 9 & Ex. B,
8 § V.D.2.)

9 **C. ICANN’s Existing Contracts with VeriSign**

10 VeriSign has been awarded by ICANN the exclusive contractual right to maintain the
11 registries for the two most important domain names, .com and .net. The 2001 .com Agreement is
12 set to expire on November 10, 2007, but provides that VeriSign may submit a written proposal to
13 extend the agreement between November 10, 2005, and May 10, 2006.² (Declaration of Keith
14 Butler in Support of CFIT’s *Ex Parte* Application for Temporary Restraining Order (“Butler
15 Decl.”) Ex. 1, § 4.) Under the current agreement, VeriSign can charge a maximum of \$6/year for
16 registration, renewal or transfer of a .com domain name. (Butler Decl., Ex. 1, Appendix G.) In
17 addition, ICANN is allowed to charge a “registry-level transaction fee” of 25¢. (Declaration of
18 Anthony Farrow in Support of CFIT’s *Ex Parte* Application for Temporary Restraining Order
19 (“Farrow Decl.”) ¶ 3.)

20 **D. The Players in the Market—Registrars and Registrants**

21 The individual or organization that registers a specific domain name, the “registrant,” does
22 not have direct access to the registry’s database. Instead, prospective registrants must register a
23 domain name through one of the hundreds of ICANN-authorized “registrars,” who handle the

24 _____
25 ² The 2001 .net registry agreement (the “2001 .net Agreement”) expired on June 30, 2005.
26 That Agreement established a procedure by which ICANN was to select as a successor operator
27 of the .net registry “the eligible party that it reasonably determines is best qualified to perform the
28 registry function . . . taking into account all factors relevant to the stability of the Internet,
promotion of competition, and maximization of consumer choice” (Butler Decl. Ex. 2,
§ 5.2.4.)

1 technical details of registering domain names in the registry. Qualified registrars are granted a
2 limited number of connections to VeriSign's registry computers. (Declaration of Taryn Naidu in
3 Support of CFIT's *Ex Parte* Application for Temporary Restraining Order ("Naidu Decl.") ¶ 4.)

4 **E. How Expiring Domain Names Get Reallocated**

5 Domain names are released to the public through an automated system that functions
6 something like a lottery. Typically, a registrant seeking a domain name that is about to be
7 released to the public places an order with a registrar, who uses its connections to VeriSign's
8 registry computer to attempt to acquire the name as it is released. If another registrar also
9 attempts to acquire the name on behalf of another registrant, it is a matter of chance which
10 registrar will succeed in acquiring the name through its registry connections. (*Id.* at ¶¶ 3, 5.)

11 **F. The Role of "Back Order Service Providers"**

12 To increase the chances of "winning" the name registration lottery, registrars have
13 "partnerships" with so-called "back order service providers," who have forged partnerships with
14 multiple registrars in order to pool them together on behalf of prospective registrants hoping to
15 register a domain name as it is released. The back order service is a robust and competitive
16 business, with millions of dollars in revenue and hundreds of registrars competing in the market.
17 (*Id.* ¶ 6.) Back order service providers perform a valuable service by helping clients (registrants)
18 obtain desirable expiring domain names.

19 **G. The 2005 .com Agreement**

20 Although the current 2001 .com Agreement will not expire until November 10, 2007,
21 VeriSign and ICANN announced on October 24, 2005 that they had agreed to terms for a new
22 .com registry agreement to take effect immediately upon its execution. (Geist Decl. ¶ 16.)
23 VeriSign and ICANN set a period of approximately two weeks for public review and comment,
24 prior to approval by ICANN's Board of Directors. (*Id.* at ¶ 17.) ICANN has received an
25 outpouring of public resistance to the agreement, and has even extended the public comment
26 period until its next meeting, set to start in two days in Vancouver, British Columbia, where it has
27 scheduled a meeting of its Board of Directors. (*Id.*) If the ICANN Board of Directors approves
28

1 the agreement at this meeting, a VeriSign monopoly will promptly be substituted in place of the
2 current competitive conditions.

3 **1. The Perpetual Renewal Term**

4 The current agreement contemplates the possibility of ICANN putting the .com registry
5 contract out for competitive bid every four years, so that those seeking to manage the registry can
6 compete on, among other things, the price for registrations. (Butler Decl. Ex. 1, § 25.B.) The
7 prospect of such competition currently constrains VeriSign even while it controls the registry,
8 since gouging by VeriSign might lead ICANN to exercise its right to reopen the registry to
9 competing bids at the end of the current contract. The 2005 .com Agreement eliminates –
10 permanently – this competitive constraint on the pricing for registrations. The 2005 .com
11 Agreement precludes ICANN from seeking potentially competing bids *unless* VeriSign has been
12 found (by an arbitrator or court, in a final ruling) to be “in fundamental and material breach” *and*
13 VeriSign has failed to cure such breach within ten days of the decision. (Butler Decl. Ex. 3,
14 § 4.2.)

15 The perpetuation of VeriSign’s position converts its temporary control of the registry into
16 a permanent monopoly, conveying immediate and permanent power over the prices for .com
17 registrations. Unless ICANN and VeriSign are enjoined from entering into the 2005 .com
18 Agreement, this will take place almost immediately.

19 **2. The Automatic Price Escalator Term**

20 The 2005 .com Agreement institutionalizes monopoly pricing. It provides that until
21 December 31, 2006, the price for domain name registrations, renewals and transfers shall be
22 capped at \$6/year. (Butler Decl. Ex. 3, § 7.3(d).) Starting on January 1, 2007, however,
23 VeriSign’s registry fee (which is the fee that VeriSign earns on each domain name registration,
24 renewal or transfer), is set to increase annually by seven percent. (*Id.*) Alongside VeriSign’s
25 increased fee, consumers will face an increase in the “registry-level transaction fee,” which is the
26 fee that ICANN earns on each domain name registration, renewal or transfer. That fee will
27 increase from 25¢ to 52¢ (37¢ plus 15¢) on January 1, 2006, and will increase again in July 2006
28 and July 2007. (Butler Decl. Ex. 3, § 7.2(d) & (e).)

1 **3. VeriSign's Monopoly Leverage into Adjacent Markets**

2 The proposed 2005 .com Agreement allows VeriSign to expand its operations into
3 additional markets that are downstream and adjacent to the domain name registration market.
4 ICANN previously opposed many of these services (Geist Decl. ¶¶ 13, 16, Ex. E.), but has now
5 given in to VeriSign's pressure. The immediate problem this presents is that VeriSign absolutely
6 controls the registry database, an essential input for anyone competing in these other markets.
7 Because VeriSign obtains access to this input for free while it imposes the ever-increasing prices
8 on its putative rivals discussed above, competition will quickly drown under the 2005 .com
9 Agreement.

10 **H. The Imminent and Irreparable Harm to Back Order Service Providers**

11 One of the services ICANN initially resisted but is now permitting is the Wait List Service
12 ("WLS"). After ICANN's initial objections, VeriSign delayed the launch of WLS. It has since
13 modified and renamed the service as the Central Listing Service ("CLS"), and has announced its
14 intention to launch CLS in early December 2005.³ (Naidu Decl. ¶ 20.) The CLS will affect the
15 manner in which expired .com and .net domain names are released to the public. (*Id.* at ¶ 12.)
16 Under the current regime, there is a daily release of deleted domain names and a free market
17 system of allocation of those names. (*Id.*) That will be eliminated. Instead, VeriSign will offer
18 its own CLS, whereby it will notify all registrars who have signed the CLS agreement of the
19 domain names to be deleted, and will hold a five-day auction for all of the domain names. (*Id.* at
20 ¶ 13.) VeriSign will have monopoly control over the market for released domain names and,
21 because the lottery system will be eliminated, CLS will eliminate the back order service
22 providers, who will be structurally excluded from the marketplace altogether. (*Id.* at ¶ 20;
23 Declaration of Richard L. Chambers in Support of CFIT's *Ex Parte* Application for Temporary
24 Restraining Order ("Chambers Decl.") ¶ 11.) As a result, VeriSign will have successfully

25 _____
26 ³ Because both the 2005 .net Registry Agreement and the 2005 .com Registry Agreement
27 permit VeriSign to offer the WLS service (the precursor to the CLS service) (Butler Decl. Ex. 3,
28 Appendix 9 & Ex. 4, Appendix 9), VeriSign is likely to launch the CLS service for the .com and
29 .net domain names simultaneously.

1 leveraged its monopoly over the registry to create a monopoly that will displace the currently
2 competitive market used to obtain expired domain names.

3 The harm to competition is again apparent on the face of the CLS as VeriSign itself has
4 presented it: registrants will pay more, and ICANN and VeriSign will share in the monopoly
5 profits. Under CLS, VeriSign will receive 10% of any successful bid for an expired domain name
6 (Naidu Decl. ¶ 14); ICANN's "registry-level transaction fee" will also increase. (Butler Decl.
7 Ex. 3, § 7.2(d) & (e).) There will be no competitive marketplace to limit VeriSign (or ICANN) to
8 this first round of price increases.

9 **III. THE LEGAL STANDARD FOR ISSUING INJUNCTIVE RELIEF**

10 **A. Injunctive Relief, In General**

11 A plaintiff seeking injunction must demonstrate "either: (1) a likelihood of success on the
12 merits and the possibility of irreparable injury; or (2) that serious questions going to the merits
13 were raised and the balance of hardships tips sharply in [their] favor." *Sw. Voter Registration*
14 *Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc); *see also Clear Channel*
15 *Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). Additionally, if the
16 public interest is involved, courts examine whether the public interest favors issuance of the
17 injunction. *Sw. Voter*, 344 F.3d at 917; *see also Fund for Animals v. Lujan*, 962 F.2d 1391, 1400
18 (9th Cir. 1992).

19 **B. Injunctive Relief For Antitrust Violations**

20 CFIT alleges violations of Section 2 of the Sherman Act (15 U.S.C. § 2), which can be
21 enjoined under Section 16 of the Clayton Act. 15 U.S.C. § 26. Section 16 requires proof only of
22 "threatened loss or damage by violation of the antitrust laws." 15 U.S.C. § 26; *see also Reilly v.*
23 *Hearst Corp.*, 107 F. Supp. 2d 1192, 1195 (N.D. Cal. 2000). Accordingly, Section 16 affords
24 injunctive relief where a violation has not yet occurred but is threatened. *Zenith Radio Corp. v.*
25 *Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969)); *Indus. Commc'n Sys., Inc. v. Pac. Tel. &*
26 *Tel. Co.*, 505 F.2d 152, 155 (9th Cir. 1974) (quoting *Zenith Radio*). Thus, to establish a claim for
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1 injunctive relief, CFIT must demonstrate a “significant threat of injury.” *Zenith Radio*, 359 U.S.
2 at 130.⁴

3 The same conditions and principles that guide courts in granting or withholding injunctive
4 relief generally apply equally to Section 16. Thus, the “relief against threatened conduct that will
5 cause loss or damage” is to be granted “by courts of equity, under the rules governing such
6 proceedings.” 15 U.S.C. § 26; *see also Zenith Radio*, 359 U.S. at 130 (Section 16 “invokes
7 traditional principles of equity.”); *Los Angeles Mem’l Coliseum Comm’n v. NFL*, 634 F.2d 1197,
8 1200 (9th Cir. 1980).

9 **IV. ARGUMENT**

10 All of the elements necessary for the issuance of a TRO are established.

11 **A. Probability Of Success On The Merits**

12 CFIT has established its probable success on the merits. For purposes of this application,
13 CFIT’s two essential antitrust charges are (1) that VeriSign, in collusion with ICANN, is
14 extending its temporary control over the .com registry into a permanent monopoly over the
15 registry; and (2) that VeriSign, in collusion with ICANN, is leveraging its control over the .com
16 registry into additional monopolies in separate relevant markets for (among others) registration
17 services for expired names. As to this first claimed monopoly there can be little doubt: the 2005
18 .com Agreement precludes ICANN from seeking potentially competing bids *unless* VeriSign has
19 been found (by an arbitrator or court, in a final ruling) to be “in fundamental and material breach”
20 *and* VeriSign has failed to cure such breach within ten days of the decision. Moreover, the
21 agreement raises prices starting January 1, 2006, and, more tellingly, guarantees VeriSign annual
22 price escalations. All periodic competition for operation of the registry on the basis of lower
23 prices offered to the public or otherwise is exterminated by the unambiguous provisions of the
24 2005 .com Agreement. The evidence also shows that the second charge of leveraged monopolies
25 will also prevail, because the very structure of the market—with VeriSign given permanent

26 ⁴ CFIT has standing to bring a claim for injunctive relief by virtue of the standing of its
27 members. *See, e.g., Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977); *United*
28 *Auto. Workers v. Brock*, 477 U.S. 91 (1986); *see also* 2 Areeda & Hovenkamp, *Antitrust Law*,
¶ 354b (2000).

1 will also prevail, because the very structure of the market—with VeriSign given permanent
2 control and free access to the registry database—will not tolerate competition from those who
3 currently compete in the market and those who will pay ever-higher fees for registrations.

4 These facts establish CFIT’s likelihood of success on the merits as to its claims for
5 attempted monopolization and conspiracy to monopolize, both of which violate Section 2 of the
6 Sherman Act.

7 **1. CFIT Can Establish Its Attempted Monopolization Claim**

8 “If there is a dangerous probability that a monopoly will be created by leveraging conduct,
9 then the conduct will be reached under the doctrine of attempted monopoly.” *Alaska Airlines,*
10 *Inc. v. United Airlines, Inc.*, 948 F.2d 536, 549 (9th Cir. 1991); *see also Cost Mgmt. Servs. v.*
11 *Wash. Natural Gas Co.*, 99 F.3d 937, 951 (9th Cir. 1996) (“[T]o the extent that ‘monopoly
12 leveraging’ is defined as an attempt to use monopoly power in one market to monopolize another
13 market, this theory remains a viable theory under Section 2.”).

14 The elements of a claim of attempted monopolization are: “(1) the defendant has engaged
15 in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a
16 dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*,
17 506 U.S. 447 (1993); *see also Alaska Airlines*, 948 F.2d at 542. Plaintiff must also demonstrate
18 antitrust injury. *See, e.g., SmileCare Dental Group v. Delta Dental Plan of Calif., Inc.*, 88 F.3d
19 780, 783 (9th Cir. 1996).

20 CFIT has established each of these required elements.

21 **a. VeriSign’s Predatory or Anticompetitive Conduct**

22 Courts have defined “predatory” and “anticompetitive” conduct in various ways. For
23 example, “[i]f a firm has been ‘attempting to exclude rivals on some basis other than efficiency,’
24 it is fair to characterize its behavior as predatory.” *Aspen Skiing Co. v. Aspen Highlands Skiing*
25 *Corp.*, 472 U.S. 585, 605 (1985). Alternatively, anticompetitive behavior includes “behavior that
26 not only (1) tends to impair the opportunities of rivals, but also (2) either does not further
27 competition on the merits or does so in an unnecessarily restrictive way.” *Id.* at 605 n.3 (quoting
28 3 Areeda & Turner, *Antitrust Law*, ¶ 626b at 78 (1978).

1 In this case, the Court does not have to chart the outer boundaries of predatory and
2 anticompetitive conduct. VeriSign's conduct constitutes predatory and anticompetitive conduct
3 under any of these definitions. VeriSign's proposed implementation of CLS threatens to replace a
4 robustly competitive market with a VeriSign monopoly. That monopoly portends the immediate
5 end of operations for CFIT members and, with no competition to exert downward pressure on
6 prices, supracompetitive prices for consumers in the very near future.

7 Under the current system for registering expiring domain names, domain names released
8 to the public reach individual registrants through a competitive marketplace of registrars and back
9 order service providers; back order service providers compete with each other to offer the greatest
10 likelihood of success in the lottery-like process through which domain names are released at the
11 lowest cost to registrants. (Naidu Decl. ¶ 5.) Because of competition in the back order service
12 market, any attempt by a back order service provider to increase prices carries the risk that a
13 competitor will take business by offering lower prices or better services at the same price.

14 Under the proposed CLS, VeriSign's release of domain names through an auction
15 excludes any role for back order service providers, who would be replaced by a single supplier,
16 VeriSign.

17 **b. VeriSign's Specific Intent to Monopolize**

18 Specific intent to monopolize may be inferred from VeriSign's anticompetitive, unfair,
19 and predatory conduct. "Anticompetitive conduct alone can satisfy the specific intent
20 requirement if the conduct 'form[s] the basis for a substantial claim of restraint of trade' or is
21 'clearly threatening to competition or clearly exclusionary.'" *Confederated Tribes of Siletz*
22 *Indians Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1042 (9th Cir. 2005) (citing *Twin City*
23 *Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1309 (9th Cir. 1982)).
24 Similarly, "unfair" and "predatory" actions "may be sufficient to prove the necessary intent to
25 monopolize" in an attempt case. *Spectrum Sports*, 506 U.S. at 459.

26 VeriSign's proposed implementation of CLS, insofar as it will eliminate the competitive
27 market for back order services and replace it with a VeriSign monopoly, is "unfair," "predatory,"
28 "clearly threatening to competition," and "clearly exclusionary." To the extent that

1 anticompetitive conduct satisfies the intent requirement, CFIT will have little trouble satisfying
2 the intent requirement.⁵

3 **c. VeriSign Has a Dangerous Probability of Achieving Monopoly**
4 **Power**

5 In order to determine whether there is a dangerous probability of monopolization, courts
6 will consider (1) the relevant market and (2) an examination of market power. *Spectrum Sports,*
7 506 U.S. at 457. CFIT has identified two meaningful relevant markets that VeriSign will
8 dominate completely unless enjoined: the market for registrations of the indispensable .com
9 domain names, and the market for services used to secure expired domain names. VeriSign has a
10 100% probability of achieving monopoly power in both markets. Furthermore, the perpetual
11 renewal provision of the 2005 .com Agreement will secure those monopolies behind impenetrable
12 entry barriers.

13 **2. Conspiracy to Monopolize**

14 CFIT has also shown its likelihood of prevailing on its conspiracy to monopolize claim.

15 The elements of the offense are (1) the existence of a combination or conspiracy, (2) an
16 overt act in furtherance of the conspiracy, and (3) specific intent to monopolize a relevant market.
17 *See, e.g., United States v. Yellow Cab Co.,* 332 U.S. 218, 225 (1947); *see also Freeman v.*
18 *San Diego Ass'n of Realtors,* 322 F.3d 1133, 1154 (9th Cir. 2003); *Hunt-Wesson Foods, Inc. v.*
19 *Ragu Foods, Inc.,* 627 F.2d 919, 926 (9th Cir. 1980) (Plaintiff must show "specific intent to
20 monopolize and anticompetitive acts designed to effect that intent [N]o particular level of

21 ⁵ VeriSign's intent to monopolize markets related to the registration of domain names is
22 evident from its conduct over several years. With respect to the Expiring Names Registration
23 Services Market, VeriSign has for years tried to introduce ways to freeze out the competitive back
24 order market in order to grab those revenues for itself and reap the long-term benefits of a
25 monopoly over the sale of expiring domain names to registrars and, through them, to registrants.
26 For example, before introducing CLS, VeriSign attempted over ICANN's objections to impose a
27 similar system, the WLS, on the Internet community. (Geist Decl., ¶¶ 13, 16, Ex. E.) VeriSign
28 eventually suspended its implementation of that proposal due to resistance from ICANN, but has
now resuscitated what is essentially the same idea, with the support of ICANN, in the form of
CLS. This sustained effort to implement a system that is so obviously monopolistic can only
result from VeriSign's determination – its intent – to monopolize the Expiring Names
Registration Services Market.

1 market power or ‘dangerous probability of success’ has to be alleged or proved . . . where the
2 specific intent to monopolize is otherwise apparent from the character of the actions taken”).

3 Each of these elements is established.

4 **a. The Existence of a VeriSign-ICANN Conspiracy**

5 The gravamen of a combination or conspiracy to monopolize is an agreement to commit
6 the objectionable conduct. *See, e.g., Yellow Cab*, 332 U.S. at 226. Here, no resort to indirect or
7 circumstantial evidence of an agreement is necessary. The new 2005 .com Agreement is itself an
8 unlawful agreement. Evidence of that agreement subsists in VeriSign’s and ICANN’s public
9 announcements, posted on their web sites, that they have reached an agreement. (*See Press*
10 *Release, ICANN and VeriSign Announce End to Long-Standing Dispute* (October 24, 2005),
11 *available at <http://www.icann.org/announcements/announcement-24oct05.htm>*.)⁶

12 VeriSign, relying on this agreement with ICANN, has stated its intention to launch CLS
13 imminently. (Naidu Decl. ¶ 20.) The implementation of CLS, as noted above, will result in the

14
15 ⁶ Although the agreement appears to have been reached as part of a settlement of
16 litigation between the parties, it is not protected by the petitioning immunity first announced in
17 *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United*
18 *Mine Workers v. Pennington*, 381 U.S. 657 (1965). First, the agreement is not court-sanctioned
19 or otherwise the result of judicial decree; therefore, like any other private agreement, if it violates
20 the antitrust laws it is illegal. *See MedImmune, Inc. v. Genentech, Inc.*, No. CV 03-2567 MRP,
21 2003 Dist. LEXIS 23443, at *20 (N.D. Cal. 2003) (“[G]enuine petitioning is necessary for *Noerr-*
22 *Pennington* immunity to apply.... [S]ettlements that merely require compulsory filings,
23 ministerial agency actions, or inconsequential court orders such as Rule 41(a) dismissals do not
24 raise a *Noerr-Pennington* defense.”); *see also Andrx Pharm., Inc. v. Biovail Corp.*, 256 F.3d 799,
25 818 (D.C. Cir. 2001) (private settlement agreement resolving patent litigation by substituting a
26 market allocation agreement does not enjoy *Noerr-Pennington* immunity); *In re Cardizem CD*
27 *Antitrust Litig.*, 105 F.Supp.2d 618, 633-35 (E.D. Mich. 2000) (agreement settling patent
28 infringement dispute which was the result of purely private conduct was subject to liability under
the antitrust laws.) Second, the agreement is not immune to the extent that it is unrelated to or
exceeds the scope of the litigation. *See eBay, Inc. v. Bidder’s Edge, Inc.*, No. C-99-21200 RMW,
2000 U.S. Dist. LEXIS 13326, at *5 (N.D. Cal. July 25, 2000) (declining to dismiss antitrust
claims under the *Noerr-Pennington* doctrine because some of the allegedly anti-competitive
conduct was unrelated to any petitioning activity.); Carl Shapiro, *Antitrust Limits to Patent*
Settlements, RAND JOURNAL OF ECONOMICS, (forthcoming) (an agreement settling litigation
should be a candidate for immunity from antitrust scrutiny only to the extent that it reflects a
possible outcome of the litigation). The litigation between the defendants essentially concerned
the permissible scope of VeriSign’s “Registry Services” under the 2001 .com Registry
Agreement. The 2005 .com Registry Agreement goes far beyond anything that was at issue in
litigation, including such unrelated provisions as the perpetual renewals and price escalators at
issue here.

1 immediate creation of an auction market for expiring domain names, one that VeriSign will
2 automatically monopolize. Therefore, CFIT can plainly establish the existence of an agreement
3 between VeriSign and ICANN to monopolize the newly-created auction market for expiring
4 domain names.

5 **b. VeriSign and ICANN's Overt Acts in Furtherance of the**
6 **Conspiracy**

7 The performance of some overt act in furtherance of a conspiracy is a necessary element
8 in establishing a conspiracy to monopolize. *See, e.g., Am. Tobacco Co. v. United States*, 328 U.S.
9 781, 801 (1946). There is, however, no requirement that the acts taken in furtherance of the
10 conspiracy be acts that are themselves illegal; any act taken in furtherance of the conspiracy will
11 suffice. *See, e.g., id.* at 809. Indeed, “[t]he requisite act, in a conspiracy claim, may be the
12 agreement itself.” *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1174 (9th Cir.
13 1988). That is the case here.

14 **c. VeriSign's and ICANN's Specific Intent to Monopolize a**
15 **Relevant Market**

16 A specific intent to monopolize a relevant market is an essential element of a conspiracy
17 to monopolize. *See Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1491
18 (9th Cir. 1991) (elements focus on a “specific intent to monopolize and anticompetitive acts
19 designed to effect that intent”). To establish specific intent, a plaintiff need only show that
20 defendants were aware that their conduct would result in the monopolization of a relevant market.
21 *Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986).

22 We have already discussed VeriSign's intent. As for ICANN, because the result of the
23 implementation of CLS so obviously results in a monopoly over the Expired Names Registration
24 Services Market, ICANN cannot credibly deny that it was aware that its acquiescence in
25 VeriSign's efforts to win approval of, and to implement, CLS would have that result.

26 **B. Irreparable Harm**

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

1 *Am. Cyanamid Co. v. U.S. Surgical Corp.*, 833 F. Supp. 92, 132 (D. Conn. 1992). In this case, if
2 VeriSign and ICANN are permitted to consummate their agreement and implement CLS, at least
3 some of CFIT's members will face precisely this immediate and irreparable harm.

4 Some CFIT members derive up to 95% of their revenue from back order services. (Naidu
5 Decl. ¶ 20; Chambers Decl. ¶ 11.) If VeriSign launches CLS, it will cause the immediate loss of
6 that entire revenue stream. (Naidu Decl. ¶ 20; Chambers Decl. ¶ 11.) This will result in the
7 immediate layoff of trained and skilled employees, the termination of beneficial contract
8 relationships between CFIT members and numerous registrars, and possible bankruptcy as a
9 result of set financial obligations, such as mortgages and costs associated with their servers.
10 (Naidu Decl. ¶ 20; Chambers Decl. ¶ 11.) Even a temporary offering of CLS will irreparably
11 harm CFIT members because they will not be able simply to restart their back order services.
12 (Naidu Decl. ¶ 21; Chambers Decl. ¶ 12.) After the extensive layoffs resulting from the launch of
13 CLS, back order service providers will be shell companies; before they could begin offering back
14 order services again, they would need to renegotiate contracts with registrars and hire employees
15 and persuade skeptical sources of financing. (Naidu Decl. ¶ 21; Chambers Decl. ¶ 12.) They
16 might be able to rehire some of their former employees, but some of the most valuable employees
17 would likely have found alternative employment and would no longer be available. (Naidu Decl.
18 ¶ 21; Chambers Decl. ¶ 12.)

19 **C. Balance of Hardships**

20 Under the alternative test, preliminary injunctive relief is appropriate where the plaintiff
21 has raised serious questions going to the merits and the balance of hardships tips sharply in its
22 favor. *Sw. Voter*, 344 F.3d at 917. VeriSign and ICANN's blatant attempt to establish a perpetual
23 monopoly in the .com registry, with mandated price increases, and their agreement to permit
24 VeriSign to leverage off of that monopoly to exclude all companies competing in adjacent and
25 downstream markets for various domain name services surely raises serious questions going to
26 the merits of this case. The only question remaining is whether the balance of hardships tips in
27 CFIT's favor, and CFIT submits that it does. On the one hand, CFIT's members include
28 businesses that will be quickly driven out of business if the 2005 .com Agreement is

1 implemented. Conversely, VeriSign would at most be harmed to the extent of a brief delay in the
2 deployment of certain new services, such as CLS. It is difficult to see how ICANN would
3 experience any harm at all, and indeed it may very well benefit from additional time to
4 contemplate the marketplace uproar over the proposed new agreement.

5 **1. Plaintiff's Hardship**

6 CFIT is a membership organization that includes both registrars and back order service
7 providers, among other Internet stakeholders. Some of these registrars derive most of their
8 revenue from the back order service market, rather than from typical registrar services. If
9 VeriSign implements CLS, these back order service providers and registrars will suffer such an
10 immediate and substantial loss of revenue that they will be driven out of business, laying off
11 trained and skilled employees and terminating beneficial contract relationships in the process. As
12 discussed above, this bankruptcy is possible for some of these companies. (Naidu Decl. ¶ 20;
13 Chambers Decl. ¶ 11.)

14 **2. Modest or No Hardship for Defendants**

15 ICANN will not be harmed by a brief delay in signing and implementing the 2005 .com
16 Agreement, other than to the extent that it would otherwise potentially collect its new share of
17 registration fees starting on January 1, 2006. It will also clearly benefit because its request for
18 public comment on the proposed new agreement has caused a firestorm in the community of
19 Internet stakeholders, and ICANN by its charter answers to all of these stakeholders and not
20 merely to VeriSign. The delay would thus afford ICANN time for a more deliberative process
21 than has taken place on this contentious issue.

22 Any harm to VeriSign will also be modest to non-existent. The 2001 .com Agreement
23 will still be in place and VeriSign will still control the .com registry system and collect its registry
24 fees. Because VeriSign's registry fees are not to increase until January 1, 2007 under the new
25 agreement (Butler Decl. Ex. 3, § 7.3(d)), a TRO will not have any effect on VeriSign's share of
26 the registry fees. As for the proposed new registry services that VeriSign hopes to launch under
27 the new agreement, a brief delay in the launch of these services until there can be a hearing on the
28 merits will not harm VeriSign. VeriSign has already delayed its launch of two of these services

1 for over two years⁷ and can surely wait a little while longer to allow the Court to consider the
2 effect that these services will have on the competitive marketplace. It surely will not cause
3 significant harm to VeriSign in light of VeriSign's decision not to launch these services for the
4 past several years.

5 **3. Salient Effect of Preserving the Status quo**

6 The purpose of any preliminary injunctive relief is "to preserve the status quo *ante litem*."
7 *Regents of the Univ. of Cal. v. ABC*, 747 F.2d 511, 514 (9th Cir. 1984) (citing *Tanner Motor*
8 *Livery, Ltd. v. Avis, Inc.* 316 F.2d 804, 809 (9th Cir. 1963)). CFIT is not seeking to remove
9 VeriSign as the .com registry, or any other extraordinary relief, in this TRO application. Rather,
10 CFIT is merely asking that the Court require VeriSign and ICANN to continue to operate under
11 the existing 2001 .com Agreement until the Court is able to consider CFIT's upcoming motion for
12 preliminary injunction. A ruling in CFIT's favor on this TRO application will permit the markets
13 for domain name registrations to continue to operate as successfully as they have for years. Thus,
14 the preservation of the status quo is simple and will promote important public interests, while
15 permitting the Court to deliberate before VeriSign and ICANN irreversibly alter the current
16 competitive conditions in the relevant markets.

17 **D. The Public Interest Favors the Grant of Temporary Relief**

18 In considering whether to grant temporary relief, a court must also assess the interests of
19 the public. *See, e.g., Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir.2002)
20 ("Public interest inquiry primarily addresses impact on non-parties rather than parties."). Here,
21 the general public would be injured by consummation of the agreement and VeriSign's
22 implementation of CLS. In this case, the public outcry by various Internet Stakeholders against
23
24

25 ⁷ VeriSign first launched the SiteFinder service in September 2003, but stopped offering
26 that service after ICANN objected. VeriSign first proposed WLS in December 2001, but has not
27 yet launched it in the face of ICANN's objections. VeriSign has consistently maintained that it
28 has the right to offer both of these services under the 2001 .com Registry Agreement, but has not
offered either.

1 the 2005 .com Agreement has been so strong that it cannot be ignored.⁸ Yet ICANN appears to
2 be prepared to do just that, and to have its Board rubber stamp the 2005 .com Agreement at its
3 meeting this week in Vancouver.

4 If it does so, VeriSign appears prepared to launch to its CLS service shortly thereafter. As
5 noted already, the implementation of CLS will eliminate what is currently a competitive system
6 among back order service providers and replace it with a VeriSign monopoly. That will have
7 adverse price effects on consumers, eliminating all choice and imposing higher prices. The
8 antitrust laws were enacted to protect the public's interest in preventing the elimination or
9 restraint on free and open competition by private contrivances.

10 Failure to enter the TRO would lead to potential instability on the Internet. Stability in the
11 Internet is a matter of great public concern, as embodied in the explicit terms of the ICANN
12 MOU with the United States Department of Commerce. Internet stability, among other things,
13 facilitates its use by maintaining a familiar experience for the community of users. If VeriSign
14 were permitted now to introduce its proposed new services, and were later required to withdraw
15 them, it would be impossible to reconfigure the Internet and related markets without disruption
16 and without at least twice altering the nature of the Internet for users.

25 ⁸ Literally hundreds of comments criticizing the settlement have been posted on ICANN's
26 website (<http://forum.icann.org/lists/settlement-comments/>) by a wide variety of concerned
27 Internet stakeholders.

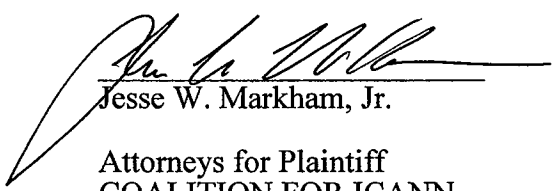
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V. CONCLUSION

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

Dated: November 28, 2005

Respectfully submitted,



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