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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

COALITION FOR ICANN TRANSPARENCY INC., a Delaware corportion, Plaintiff, v. VERISIGN, INC., a Delaware corporation; INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation, Defendants.	Case No. 5:05-CV-04826 (RMW) OPPOSITION BY DEFENDANT VERISIGN, INC. TO *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER FILED BY COALITION FOR ICANN TRANSPARENCY INC. Action Filed: November 28, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

I. PRELIMINARY STATEMENT

This action is the fifth attempt over the last two years by plaintiff and/or its member affiliates to prevent defendants VeriSign and/or the Internet Corporation for Assigned Names and Numbers ("ICANN") from implementing a domain name listing service that has the potential, as one court specifically found, "to benefit registries, registrars . . . and, *most importantly, the public.*" *Dotster, Inc. v. Internet Corporation for Assigned Names and Numbers*, 296 F. Supp. 2d 1159, 1166 (C.D. Cal. 2003, emphasis added).[1] All of these prior efforts have been unsuccessful and claims like those asserted here have been dismissed by other courts. Plaintiffs are merely using the proposed 2005 .com Agreement as a pretext to re-litigate the same issues and rehash previously rejected arguments. In fact, the proposed 2005 .com Agreement will have no effect on the proposed domain name listing service (the Central Listing Service ("CLS")).

In *Dotster*, for example, plaintiffs, a group of domain name registrars,[2] sought a preliminary injunction enjoining ICANN from approving any amendment or modification to the Registry Agreement between VeriSign and ICANN that would allow implementation of the Wait List Service ("WLS"), a prior iteration of CLS.[3] The *Dotster* court denied the preliminary injunction motion, finding that the traditional elements for preliminary relief, including irreparable injury and likelihood of success on the merits, could not be met. *Id.* at 1161, 1163-66. Moreover, the *Dotster* court found that the public interest would not support the entry of injunctive relief. *Id.* at 1166. The *Doster* action was subsequently dismissed *with prejudice*. As explained in Section II.B.3., *infra*, the dismissal with prejudice of the *Doster* action should be res judicata and bar the claims made in this action.

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[1] *See* Declaration of Laurence J. Hutt for a history of the litigation to block WLS and CLS.

[2] One of the identified members of CFIT, namely R. Lee Chambers Co. LLC ("Chambers"), is a member of an organization called the Domain Name Justice Coalition (the "DJC"), of which the *Dotster* plaintiffs also are members. The DJC publicly has proclaimed responsibility for the *Dotster* action.

[3] Plaintiff alleges that the CLS is a "modified and expanded version of the Wait List Service." (Complaint, ¶ 49). For a detailed explanation of WLS and CLS, see declaration of Raynor Dahlquist, submitted concurrently herewith.

Equally fatal to plaintiff's instant request for a temporary restraining order, there is no showing of an imminent threat -- other than that of plaintiff's making. Plaintiff has known of the proposed .com agreement since October 24, 2005. Nonetheless, while plaintiff secretly prepared its voluminous papers, it delayed notice to defendants or this Court of its claims and now seeks to burden the Court and defendants by claiming that relief must come in the next 24 hours. A temporary restraining order is inappropriate under such circumstances. Such relief requires that the plaintiff proceed diligently and not create the very urgency of which it complains.

Furthermore, plaintiffs' representations regarding urgency are untrue for another, fundamental reason. Although not disclosed in the moving papers, the execution of the new .com agreement requires approval of the U. S. Department of Commerce ("DOC"). As plaintiffs know, DOC has not approved the agreement, although the government has reviewed the terms, including those to which plaintiffs object. Thus, contrary to plaintiffs' representation, a new .com agreement cannot and will not be executed "as early as November 30."

Plaintiff's claims of urgency and imminent execution of the new .com agreement are merely pretexts to attempt once again to block WLS/CLS. As other courts have done, such relief should be denied on the grounds that there is no urgency, there is no irreparable injury, and there is no "antitrust injury" or likelihood of success on the merits.

First, the proposed .com agreement has no impact on CLS. Instead, the proposed agreement merely confirms ICANN's previous approval of WLS. That approval was 2 years ago. The new .com agreement would expand, not contract, the definition of "registry services" under the .com agreement and thus expand the scope of ICANN's oversight with respect to VeriSign's services. Any new services, such as substantive modifications to WLS, would have to be approved by ICANN following an assessment of the security, stability and competitive effects of the service. Thus, the proposed .com agreement does not approve CLS, and VeriSign's plans with respect to CLS could not support an injunction against execution of the proposed .com agreement.

Furthermore, plaintiffs cannot meet the requirement that they plead antitrust injury as a requirement to pleading an antitrust claim with respect to CLS. As discussed below, at most, CLS

might affect a competitor, but not competition in the market. Indeed, as recognized by the *Dotster* court, WLS/CLS will expand competition among registrars for domain name registrations.

Second, the proposed .com agreement does not include an "automatic price escalator," as plaintiffs consistently misrepresent. The agreement would merely release the price ceiling on registry services over a period of years, at a rate of approximately 7% per year. In fact, there is no price increase threatened at this time, other than a pass through of a small fee from ICANN. Clearly, if that fee is wrong, it is compensable as monetary relief at the end of this case and threatens no one. In addition, VeriSign and ICANN could agree to an increase in prices under the existing .com agreement as well as the proposed .com agreement. Plaintiff thus has failed to show a threat of a price increase, any urgency to its application, or any potential irreparable injury with respect to registration pricing.

While no restraining order is appropriate in this case, the claims in the complaint at most would support an order directed to specific acts (*i.e.*, CLS, price increase), not execution of the proposed .com agreement, as plaintiff suggests. Enjoining the execution of the proposed .com agreement would cause serious and irreparable injury to ICANN and VeriSign. The execution of the proposed agreement resolves several ongoing litigation cases between the parties as well as other material issues. In addition, entry of such an order potentially would be confusing to the public and injurious to the public image of parties who operate in the public eye.

II. ARGUMENT

A. The TRO Application Should Be Denied Because There Is No Immediate Threat of Irreparable Harm

As CFIT recognizes, it faces a heavy burden in seeking a temporary restraining order. It must demonstrate either "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [its] favor." *Gilder v. PGA Tour, Inc.* 936 F.2d 417, 422 (9th Cir. 1991). However, regardless of how the test is articulated, to succeed in an application for injunctive relief, a plaintiff "must demonstrate irreparable harm" (*American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985)) and that irreparable harm must be actual and imminent.

See Caribbean Marine Services Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988). These standards cannot be met in this case.

1. There is no emergency requiring a TRO, and plaintiff's delay in bringing its claims belies its assertion of imminent harm

CFIT asserts that its application for emergency relief is justified because it is in danger of suffering "imminent" harm, because "defendants may sign the new 2005 .com Agreement as soon as November 30, 2005." (Mem. in Supp. at 1:18 (emphasis added).) However, as the information provided to plaintiff and the public makes clear, the proposed agreement will not become final that quickly, because the agreement must go through additional approval steps before becoming final -- including approval by the U.S. Department of Commerce. Accordingly, even if all of plaintiff's other arguments were correct (which they are not), plaintiff's application for a TRO fails at the most basic level because plaintiff has not demonstrated a need for emergency relief.

Furthermore, even if the proposed 2005 .com Agreement were to be signed on the schedule CFIT alleges, it is CFIT's own delay that has caused the "emergency" of which it complains, and it should not benefit from that delay through a TRO. Plaintiff and its members have long known of the facts underlying their application for a TRO. They simply chose not to act until now.

Need for Department of Commerce Approval. The 2005 .com Agreement, which ICANN and VeriSign have negotiated and drafted, is currently posted on the ICANN website to solicit comment from members of the public. (Morris Decl. Exh. A (on October 24, 2005, the parties announced "that they had reached a proposed settlement agreement" and that agreement has "been posted for public comment"); Exh. B.) That period of public comment has been extended "to allow for comments at the ICANN meeting in Vancouver, Canada," which is scheduled to take place November 30 through December 4, 2005. (*Id.* at Exh. A.)

As the ICANN website further makes clear, after this period of public comment is closed and after the ICANN board decides to approve the agreement, the agreement still must be submitted to the United States Department of Commerce for final approval. (*Id.* (ICANN Response to Question 3.1).) Although the United States government has conducted a preliminary review of the agreement, including the pricing terms of which plaintiff complains, the agreement cannot take

effect until it is re-submitted to the government for approval. (*Id.*) Accordingly, plaintiff's argument that a TRO is necessary due to the imminence of the signing of the proposed .com agreement is factually incorrect.

CFIT Has Known About The Proposed .Com Agreement Since October 24. Plaintiff's own delay has created the "emergency" of which it complains. It cannot now rely on this delay as a justification for the emergency order it seeks. *See Nassau Boulevard Shell Service Station, Inc. v. Shell Oil Co.*, 869 F.2d 23, 24 (2d Cir. 1989) (party should not be allowed to rely on alleged irreparable injury which is "the result of the moving party's delay in seeking relief").

CFIT asserts that entry of the 2005 .com Agreement will cause irreparable injury because entry of that agreement will trigger implementation of the "CLS" program, which CFIT alleges will hurt its members' businesses (*see, infra.*). As discussed below, entry of the 2005 .com Agreement will not trigger implementation of the CLS program. However, even if the entry of the 2005 .com Agreement were some type of trigger (which it is not), the proposed 2005 .com Agreement has been public knowledge since October 24, 2005, when it was announced and posted on the ICANN website. Rather than bringing an action at that time and allowing defendants appropriate time to respond, CFIT prepared its papers in secret and delayed for over a month before filing a complaint and seeking this temporary restraining order without advance notice to defendants. If CFIT had instead filed in a timely manner, the parties and this Court could have dealt with the issues on a noticed motion basis, and this expedited proceeding would have been unnecessary. Instead, CFIT and its members filed the action and application at what it asserts is the last minute, requiring defendants to respond to its voluminous materials within 24 hours. This improper tactic should not be rewarded.

Plaintiff Has Known About ICANN's Approval of WLS For Almost 2 Years And Approval of CLS Is Not Imminent. The predicate upon which CFIT bases its claim of imminent and irreparable harm is that ICANN, through the 2005 .com Agreement, "is now permitting [] the Wait List Service ("WLS")," which has been "modified and renamed [] as the Central Listing Service ("CLS")." (Mem. in Supp. at 8:11-13; *see also id.* at n.3 (execution of the 2005 .com Agreement "will permit VeriSign to offer the WLS service (the precursor to the CLS service)").

According to CFIT, execution of the 2005 .com Agreement will trigger approval of the WLS/CLS programs, which will in turn allow VeriSign (in combination with its position as the Registry for .com) to drive plaintiff's "members" out of business. (*See id.*)

As described below, plaintiff cannot demonstrate that the WLS or CLS programs will cause it or its members any irreparable harm, nor that the implementation of such programs constitutes a violation of the antitrust laws. However, even if there were any merit to plaintiff's claim of irreparable injury and antitrust claim, the WLS/CLS programs cannot provide the basis for an emergency TRO for two additional important reasons: (1) the alleged "imminent" entry of the 2005 .com Agreement is not the triggering event for approval of WLS -- that program was vetted and approved through public announcement 2 years ago, and the 2005 .com Agreement merely references that approval; and (2) CLS -- which is different than WLS -- has not been approved by ICANN (nor is approval imminent) and entry of the 2005 .com Agreement would not constitute approval of CLS. Thus, even if the 2005 .com Agreement is executed, CLS must be separately approved by ICANN, and such approval is not imminent, because VeriSign has not even submitted it for formal consideration by ICANN.

In the early part of 2004 following negotiations regarding the program's merits and effect on the domain name system, ICANN approved implementation of the WLS program via a letter dated January 26, 2004, which letter was publicly posted at the ICANN website. (Morris Decl. Exh. C.) In that January 26 letter, ICANN informed VeriSign and the public that ICANN was prepared to "report a successful conclusion regarding the status of our negotiations" of the WLS program. (*Id.*) Accordingly, it is not the proposed 2005 .com Agreement that establishes the WLS program, which plaintiff asserts requires a TRO. Instead, the 2005 .com Agreement merely confirms what was approved nearly two years ago. (*See* Butler Decl. Exh. 3, Appendix 9 (confirming that the WLS program has been approved "prior to the effective date" of the agreement "in accordance with the letter . . . dated January 26, 2004") (emphasis added).) Nothing prevented plaintiff or its members from bringing a claim back in January 2004 if they believed that the WLS system would cause it irreparable harm. Indeed, as described in Section II.B.3., *infra*, plaintiff's members did just that --

those members sought a preliminary injunction to prohibit the implementation of WLS. That motion, however, was denied by the court and the case was dismissed with prejudice. (*Id.*)

The CLS program (which plaintiff alleges is a "renamed" WLS program) also cannot support a TRO. As an initial matter, plaintiff's own declarations reveal that its members have been aware of VeriSign's proposed CLS program for almost a year. (*See* Naidu Decl. ¶ 11 ("I am familiar with the CLS service" "[a]s a result of numerous conversations I have had with individuals at VeriSign, including . . . [through] my attendance at discussions about the CLS service at the ICANN conferences held earlier this year in Argentina and in December 2004"). If the CLS program -- as an alleged "modified" WLS program -- posed a threat to plaintiff's members, plaintiff or its members could have asserted a claim with respect to CLS and brought a noticed motion for a preliminary injunction months ago. If there is any threat that ICANN will approve CLS, that threat always has existed. ICANN always could have approved it (once submitted for approval), as ICANN approved WLS, regardless of the status of the proposed 2005 .com Agreement. Nothing in the proposed .com Agreement increases the purported threat to plaintiff or is subject to an injunction.

Moreover, approval of the CLS program is not imminent and does not warrant the emergency relief sought. As the documents plaintiff itself has submitted demonstrate (including the proposed .com agreement), approval of the proposed 2005 .com Agreement does not trigger approval or implementation of the CLS program. (*See, e.g.*, Butler Decl. Exh. 3, Appendix 9 (2005 .com Agreement listing of approved Registry programs, which list does not include CLS).) Thus, even if approval of the 2005 .com Agreement were so imminent as to justify a TRO (which it is not), that approval would not also warrant a TRO regarding CLS. Indeed, as the proposed 2005 .com Agreement reflects, approval under the 2005 .com Agreement of a program such as CLS only will be accomplished through a detailed process that will take time and require comments from the public. (*See* Butler Decl. Exh. 3 (2005 .com Agreement, Section 3.1 (d)(iv) describing "process for consideration of proposed" services that includes various consecutive periods of 15, 45, and 30 days before implementation of a service after submitted for approval).) The documents filed by plaintiff on this application also reflect that VeriSign recognizes that CLS must be approved by ICANN (*see*

Naidu Decl. Exh. B, at 3rd page (CLS only goes forward "Pending ICANN Approval")), and VeriSign has not even submitted the CLS program for consideration to ICANN, so the approval process has not even begun and final approval is not imminent. (*See* Dahlquist Decl. ¶¶ 28-29.)

While plaintiff makes other general and unsupported claims that the proposed 2005 .com Agreement allows VeriSign to "leverage" other markets or services, that argument is not true. The proposed agreement in fact broadens the definition of "registry services" -- *i.e.*, those services for which ICANN has some oversight authority. Moreover, under the proposed agreement, all such services must go through an approval process, pursuant to which the service will be reviewed based on its implications for security, stability and competitive conditions. Thus, the proposed agreement in fact adds limitations on VeriSign's ability to introduce new services.

There is No "Automatic Price Escalator Term," as CFIT Represents, and ICANN and VeriSign Could Have Agreed to an Increase in Price Under the Existing .com Agreement. The proposed 2005 .com Agreement provides for a gradual loosening of price limitations under the registry agreement, but maintains a price cap. Further, any increases are not "automatic," as plaintiff erroneously states, but rather are permissive and subject to market tolerance. Further, VeriSign and ICANN could have agreed to price changes at any time under the existing .com agreement that was entered and approved by the Department of Commerce in May 2001. (*See* Butler Decl. Exh. 1, Section 22B and Appendix G.) Thus, there is nothing in the proposed agreement that represents a conspiracy to increase prices. If grounds existed for restraining purported price increases (which they do not), such grounds always have existed and, in any event, cannot support a TRO.

There is No Material Change in the Renewal Term. Plaintiff complains that the proposed 2005 .com agreement presumes renewal unless VeriSign has committed a material breach of the .com agreement.[4] However, the competitive implications of such a provision -- if any -- do not change from the existing .com agreement entered and approved by the Department of

[4] The reason for such a provision in the old and new agreements is the ongoing investment the registry makes in building the technology infrastructure. (*See* Morris Decl. Exh. A at Questions Q4.1 and 4.2.)

Commerce to the proposed .com agreement. Both agreements contemplate a presumptive renewal. (*See* Morris Decl. Exh. A (Questions 4.1 and 4.2).) The existing agreement specifically requires that "Registry Operator shall be awarded a four-year renewal term unless ICANN demonstrates that: (a) Registry Operator is in material breach of this Registry Agreement . . . ." (*See* Butler Decl. Exh. 1, Section 25B (emphasis added).) Thus, this provision of the proposed 2005 .com Agreement does not support CFIT's arguments of urgency nor irreparable injury.

2. Plaintiff has not demonstrated -- and cannot demonstrate – that it will suffer irreparable injury if the 2005 .com Agreement is signed or CLS is implemented

In order to obtain a temporary restraining order, CFIT must demonstrate that it has suffered, or imminently will suffer, irreparable injury absent injunctive relief. *Gilder*, 936 F.2d at 422. "Irreparable injury is an injury that is not remote or speculative, but actual and imminent and for which monetary damages cannot adequately compensate." *Dotster, Inc.*, 296 F. Supp. 2d at 1162. "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Id.* at 1162-63 (quoting *Caribbean Marine Services Company, Inc. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988)). Here, CFIT asserts that its members will suffer irreparable injury if the new .com Registry Agreement becomes effective and CLS is implemented because they will be "driven out of business" by CLS. CFIT fails to provide any evidentiary support for its wild claims of injury. Indeed, the CLS program would provide all registrars with a fair platform for the auction of expiring domain names. (*See* Dahlquist Decl. ¶¶ 19-25.) Moreover, the only injuries identified by CFIT are economic and do not support a finding of irreparable harm, because damages afford an appropriate remedy to such injury.

On facts nearly identical to those presented here, the *Dotster* court found that plaintiffs in that case had failed to demonstrate irreparable injury.[5] In *Dotster*, a group of Internet domain name registrars brought an action alleging that ICANN would be in breach of the registrar accreditation agreements between ICANN and registrars if it approved an amendment to the .com Registry Agreement allowing VeriSign to offer WLS, which would compete with the domain name back-

[5] Indeed, the plaintiffs in *Dotster* are the same plaintiffs here for purposes of *res judicata*. *See* Section II.B.3.

ordering services offered by registrars and other companies. As stated *supra*, CFIT asserts that WLS was a prior iteration of CLS. Like the plaintiff in the instant action, the *Dotster* plaintiffs sought an injunction barring ICANN from taking any further steps to negotiate or execute a modification to the Registry Agreement which would allow implementation of WLS.

The *Dotster* court found that plaintiffs' alleged damages were speculative and could be compensated by monetary damages. Like plaintiff here, the *Dotster* plaintiffs asserted that they would lose revenue and suffer increased expenses if WLS was implemented. *Id.* at 1163. Because a monetary award could compensate the *Dotster* plaintiffs for these alleged losses, they did not constitute irreparable injury. *Id.* (citing *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.")).

In this case, the harm complained of CFIT clearly is compensable by monetary damages, and there is no need for injunctive relief. The fundamental complaint that CFIT raises in its TRO is that certain of its members -- namely, Pool.com and R. Lee Chambers Co., LLC -- will lose revenue from back ordering services if CLS is implemented. If CFIT succeeds on its antitrust claims, then monetary damages will satisfy that fundamental complaint.[6]

Moreover, CFIT's alleged harm is speculative. CFIT asserts that some of its members derive up to 95% of their revenue from back order services and that, if VeriSign launches CLS, "it will cause the immediate loss of that entire revenue stream." (Mem. in Supp. at 16.) CFIT's own declarations belie its assertions of harm. The Naidu Declaration submitted by CFIT asserts that, under the proposed CLS service, registrars who choose to participate in CLS will be entitled to participate in an auction for domain names to be deleted. If there are no bids on a particular domain

[6] CFIT makes *no argument and submits no evidence* that execution of the new Registry Agreement, in and of itself, including implementation of any price increases, will result in irreparable injury to CFIT or its members. Because CFIT has failed to establish irreparable injury from entry into the new .com agreement, its request for a "TRO freezing the status quo by temporarily prohibiting ICANN and VeriSign from signing, consummating, and implementing the proposed 2005 .com Agreement" must be denied. (*See* Mem. in Supp. at 3.)

name, it will be deleted by the registry and may be registered by any registrar -- including a domain name back order service like those offered by Pool.com and Chambers. If there is a successful bid for the domain name, the successful registrar obtains the right to register the domain name to a registrant from whom it has received a request to register the domain name. (Naidu Decl., ¶ 13.) *These allegations make clear that CFIT's members will continue to be able to offer domain name back order services notwithstanding launch of CLS.* CFIT's members may either participate in a CLS auction, and then sell the domain name registration to a customer who has back ordered the domain name or, if there is no CLS auction for that domain name, register the domain name in the same manner that they currently do. Thus, CFIT's claims of near total loss of revenue are entirely speculative and insufficient to establish irreparable harm. *See Dotster*, 296 F. Supp. 2d at 163 ("Plaintiffs claim a significant part of their business results from cross-sales of products to customers and if Plaintiffs cannot attract new customers through the secondary domain name market, those cross-selling opportunities will disappear. [] However, Plaintiffs ignore the fact that all registrars will be able to offer WLS to existing and potential customers. If Plaintiffs decide to offer WLS and continue to offer their wait-listing services for domain names not affected by WLS, Plaintiffs will be able to exploit these cross-selling opportunities").

Finally, CFIT offers no specific or admissible evidence of the purported threatened irreparable injury to its members. To establish irreparable injury, a plaintiff must provide "credible and admissible evidence that such damage threatens Plaintiffs' businesses with termination." *Id.* at 1164; *American Passage Media Corporation v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) ("Without a sufficient showing that these contracts threatened [plaintiff's] existence, any loss of revenue due to an antitrust violation is compensable in damages."). Self-serving and conclusory declarations of damage by a plaintiff's executives cannot support a finding of irreparable injury for injunctive relief. *Dotster*, 296 F. Supp. 2d at 1164 (rejecting conclusory declarations by plaintiffs' executives that their goodwill and reputation would suffer from implementation of WLS); *American Passage Media Corp.*, 750 F.2d at 1473 (declarations of plaintiff's executives on effects of defendant's exclusive contracts were insufficient because they were "conclusory and without sufficient support in facts."); *Goldie's Bookstore, Inc. v. Sup. Ct.*, 739 F.2d 466, 472 (9th Cir. 1984)

(reversing issuance of preliminary injunction where district court had determined that plaintiff "would lose goodwill and 'untold' customers" because the finding was not based on any factual allegations and was speculative).

Like the plaintiffs in *Dotster*, CFIT offers only conclusory assertions of harm to support its claim of irreparable injury. For example, Taryn Naidu, the president of Pool.com, asserts that Pool.com would lose nearly its entire revenue stream, would not be able to meet its expenses, and would be required to layoff its "trained and skilled" employees, and terminate "beneficial" contracts with reigstrars. (Naidu Decl. ¶ 20.) Mr. Naidu does not identify the amount of revenue currently generated by Pool.com's back order services, explain why that revenue stream would disappear if CLS is implemented (even though all registrars would be entitled to participate in a CLS auction, not all "expiring" domain names would be auctioned through CLS, and domain names would continue to be deleted on a regular basis as they are today), identify the contracts it will be forced to terminate or why CLS would result in such termination, or identify the employees it purportedly will need to terminate. (*See* Naidu Decl., ¶¶ 20-21.) The Chambers Declaration is similarly devoid of fact.[7] (*See* Chambers Decl., ¶¶ 11-12.) Because CFIT has failed to submit any credible evidence to support its claim of irreparable injury, the TRO must be denied.

As explained in Section II.A.1 , *supra*, the alleged threat to change prices likewise fails to support plaintiff's claim of irreparable injury. The only definitive price change for which there is any support, namely VeriSign's right to pass on an increase in ICANN's fees, represents a small percentage of the price of registering a domain name. Such an increase, if actionable, would be compensable in monetary damages and certainly does not threaten the revenue stream or existence of any of plaintiff's purported members.

[7] Indeed, the allegations of irreparable injury in the Naidu and Chambers Declarations are nearly identical, sometimes employing the exact language. *Compare* Naidu Decl., ¶ 21 ("If the shut down lasted more than a month, I am doubtful we would be able to wait out the period and restart the business") with Chambers Decl., ¶ 12 ("If the shut down lasted more than a month, I am doubtful we would be able to wait out the period and restart the business").

B. The TRO Should Be Denied Because There Is No Likelihood of Success on the Merits

1. CFIT Lacks Standing to Assert its Antitrust Claims

In order to state a claim for relief under the antitrust laws, an antitrust plaintiff is required to show more than mere "injury-in-fact or a threatened injury-in-fact" to pursue claims under the antitrust laws. *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 (1983). In addition, an antitrust plaintiff is required to show "antitrust injury," which is injury "'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986), *quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). As the Ninth Circuit put it, "[t]he antitrust laws do not provide a remedy for every party injured by unlawful economic conduct." *American Ad Management, Inc. v. General Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999). Thus, there is no claim under the antitrust laws unless the plaintiff can show that its injury results from harm to competition that is forbidden by the antitrust laws. *See, e.g., Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1036 (9th Cir. 2001) (decrease in one competitor's market share "affects competitors, not competition").

a. CFIT Has Not Established That It Has Standing To Sue

As a threshold matter, CFIT has not established that it has standing to sue. An association has standing to sue on behalf of its members only where (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. *See Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977). CFIT alleges that it is a not-for-profit membership corporation organized under Delaware law (Complaint ¶ 7), but is deliberately coy about identifying its members. The complaint states that its members "include certain Internet domain name registrars, registrants, back order service providers, and other Internet stakeholders." *Id.* In fact, according to CFIT's website, the only known members (referred to as "Class 1 Supporters" in CFIT's by-laws) are Trammell & Co., Pool.com, Inc., the

World Association of Domain Name Developers and Momentous.ca Corporation.[8] None of these entities has standing to sue in its own right.

The Complaint fails to allege facts establishing that any member of CFIT has standing to sue under the antitrust laws. Trammell & Co. is a Washington, DC-based lobbying firm and there are no allegations which support its standing to sue.[9] The World Association of Domain Name Developers claims to be an organization of domain name registrants, but there is no allegation of competitive harm to such registrants. Momentous.ca is the parent of Pool.com and not a market participant in any of the alleged relevant markets. Finally, the Complaint fails to allege facts supporting Pool.com's antitrust standing as a competitor or consumer in any cognizable relevant market.

The deficiency in CFIT's member claims is fatal to CFIT's claims. Notwithstanding the failure to allege facts establishing the antitrust standing of Pool.com or Chambers, even if that standing could be pled, it is that member, not the trade association, that is the appropriate plaintiff. *See Hunt* 432 U.S. at 343, 345 (finding that organization should represent members' "collective views and protect their collective interests.").

b. The Complaint Fails to Allege Harm to Competition

CFIT's complaint makes many references to "competition," but one fact is inescapable -- there can be only one registry for any "top-level domain," or TLD, such as .com or .net. The domain name registry maintains a central, authoritative directory of all domain names that are registered in that TLD. (Complaint, ¶19; Geist Decl.,¶5.) As CFIT concedes, "[j]ust as there can be only one county recorder's office to maintain the land title registry, there can be just one registry for each Internet domain." (Mem. in Supp. at 2.) This admission highlights the fatal flaw in CFIT's

[8] Consent of Directors in Lieu of Organizational Meeting of Coalition for ICANN Transparency Inc., available at http://www.cfit.info/downloads/CFIT%20Organizational%20Consent.pdf. C CFIT was also only established on November 16, 2005. http://www.cfit.info/downloads/ CFIT%20Certificate%20of%20Incorporation%20(November%2023,%202005).pdf

[9] http://trammellandcompany.com/list.htm.

antitrust complaint -- there can be only one registry for the .com or .net TLD, and therefore the agreement between VeriSign and ICANN that would extend the term for which VeriSign acts as that sole registry does not reduce or eliminate any competition that would otherwise have occurred.

Where there is no real possibility of competition, courts have rejected antitrust claims based on alleged harm to competition. For example, in *Brunswick v. Riegel*, 752 F.2d 261 (7th Cir. 1985) (Posner, J), the court rejected an antitrust claim based on an allegation that the defendant had taken a valid patent by fraud. Since the exclusionary power inherent in the patent was not altered by the complained-of conduct, the antitrust laws are indifferent as to who exercises that exclusionary power. *Accord Miller Insituform, Inc., v. Insituform of North America, Inc.*, 830 F.2d 606, 609 (6th Cir. 1987) ("There is no adverse effect on competition since, as a patent monopolist, INA, from the start, had exclusive right to manufacture, use, and sell his invention."); *Coniglio v. Highwood Services, Inc.* 495 F. 2d 1286 (2d Cir. 1975); cert. denied, 419 U. S. 1022 (1974), (rejecting tying claim because Buffalo Bills necessarily had sole control over "presentation of regular season professional football games [and] presentation of exhibition professional football games.") *Id.* at 1291.

In *City of Pittsburgh v. West Penn Power Co.,* 147 F.3d 256 (3d Cir. 1998), the court found that the plaintiff lacked standing to challenge a merger of two electric utilities. It was undisputed that the utilities operated in mutually exclusive territories and could not compete without state regulatory approval. The court held that there was no antitrust injury because "the actions of the utilities merely maintained the status quo." *Id.* at 266. "Without demonstrating that there was competition, a plaintiff cannot show that the defendants' actions have had or will have anticompetitive effects." *Id.* at 267, *citing Continental Cablevision of Ohio, Inc. v. Am. Elec. Power Co.*, 715 F.2d 1115, 1119-20 (6th Cir. 1983).

Here, CFIT alleges that Verisign, in concert with ICANN, is "extending its temporary control over the .com registry into a permanent monopoly over the registry." (Mem. in Supp. at 10.) But there is no antitrust significance to who provides the exclusive registry services -- the fact remains that there is only one such provider today and there will be only one in the future. The.com Agreement therefore causes no reduction in *competition,* and there is thus no allegation of antitrust injury that has or can be made with regard to that agreement. *E.g., Florida Seed Co. v. Monsanto Co.*, 105 F.3d 1372

(11th Cir. 1997) (distributor terminated after allegedly illegal merger did not suffer antitrust injury).[10]

Plaintiff also cannot properly allege harm to competition in the market for domain name registration services where competition is vigorous. Plaintiff concedes that there are hundreds of ICANN-authorized registrars (Mem. in Supp. at 5), and fails to allege that the level of competition or the number of registrars competing in this market will be reduced as a result of the 2005 .com Registry Agreement. Absent an allegation of a harm to the competitive process between those hundreds of registrars, CFIT's purported allegations that the 2005 .com Registry Agreement will harm the market for domain name registration services fails.

2. Neither the Proposed .com Agreement Nor CLS Will Harm Competition

CFIT also has no likelihood of success on the merits of its antitrust claims because they stem either from no change in competition -- that is, VeriSign will as a technical necessity continue as what is necessarily the sole Registry Operator maintaining the authoritiative database of second-level domain names registered in the .com top-level domain -- or new and expanded competition through the introduction of CLS. Moreover, CFIT has failed to allege a proper relevant market, which is essential to its antitrust claims.

CFIT seeks a TRO based on claims of threatened violations of Section 2 of the Sherman Act, alleging attempted monopolization and conspiracy to monopolize. As CFIT notes, attempted monopolization has three elements. The plaintiff must show that "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447 (1993). CFIT has not established a likelihood of success on any of these elements, which is also fatal to CFIT's conspiracy to monopolize claim.

a. CFIT Has Not Properly Alleged a Relevant Market

CFIT has failed to define sufficiently the relevant markets that VeriSign is allegedly

[10] CFIT alleges that VeriSign, again in concert with ICANN, is "leveraging its control over the .com registry into additional monopolies in separate relevant markets...." (Mem. at 10.) Stripped of its rhetoric, this claim is based solely on the *increased* competition that would result from VeriSign's entry into a new market. It is fundamental that antitrust injury cannot result from increased competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489. To the extent that CFIT's claims stem from new competition that is anticipated from VeriSign, they cannot form the basis of antitrust injury.

attempting to monopolize. It is well-settled that "demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market." *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993). Without a proper market definition "there is no way to measure [a defendant's] ability to lessen or destroy competition." *Walker Process v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). Furthermore, "the alleged product market must (1) include all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand; and (2) be plausible." *Pinnacle Sys., Inc. v. XOS Techs., Inc.*, Case No. C-02-03804, 2003 WL 2137845, at *7 (N.D. Cal. Aug. 6, 2002); *Smith v. Network Solutions,* 135 F.Supp.2d 1159, 1168 (N.D. Ala. 2001) ("[F]or purposes of an antitrust claim under Section 2, it is well established that the relevant market includes those commodities or services that are reasonably interchangeable by consumers for the same purposes.").

CFIT alleges two relevant markets in support of its TRO application: the market for .com domain name registrations, and the market for "services used by end users in the purchase and sale of expiring domain names." Complaint, ¶¶1, 2. CFIT offers no evidence to support CFIT's necessary assumption that .com domain names belong in their own relevant market, distinct from hundreds of other top-level domains. To the contrary, CFIT attached Exhibit A to Taryn Naidu's Declaration, which indicates that .com only accounted for 46% of all domain names while country code domain names (ccTLDs) accounted for 35%. *Id.* at 3. Other TLDs, such as .org, .biz, .info and .name, collectively accounted for 11% of all domain names. *Id.*[11] These data refute the notion that other TLDs are not reasonable substitutes for .com and for each other. Accordingly, CFIT's proposed market definitions that are limited to the .com TLD are too narrow and insufficient as a matter of law.[12]

Moreover, CFIT's reference to a market based on services for "expiring domain names" is not only vague but is virtually identical to the "expired domain names" definition rejected as a matter of law by the court in *Smith v. Network Solutions*, 135 F. Supp. 2d 1159 (N.D. Ala. 2001).

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[11] There are over 240 ccTLDs and multiple generic TLDs in addition to the .com TLD. Naidu Decl., Ex. A.

[12] Indeed, CFIT's own web site, cfit.info, does not utilize a .com domain name.

There, the court dismissed plaintiff's monopolization claim in the relevant market for "expired domain names" after finding that relevant market could not be "expired domain names" and instead "the relevant product market is domain names generally." *Id.* at 1170. The court reasoned that:

> [T]here is no inherent difference in character, for purposes of interchangeability and cross-elasticity of demand, between domain names that are "expired" and held by NSI and those that are not. It is true in a literal sense that each domain name is unique. And one given individual domain name may be far more valuable on the open market than others. But products need not be entirely fungible to be considered part of the same relevant market.

Id. at 1169. The court held that there is only a relevant market for domain names generally "[b]ecause the number of domain names, unlike traditional commodities, is essentially unlimited, there will always be reasonable substitute names available." *Id.* at 1170; *see also Weber v. National Football League*, 112 F. Supp. 2d 667, 674 (N.D. Ohio 2000) ("the market is defined in terms of domain names in general.").

CFIT's other alleged market, for "services used to secure exprired domain names," is also insufficient, as it fails to allege what services VeriSign is allegedly attempting to monopolize or what else might substitute for those services. CFIT does not contend, nor could it, that VeriSign is attempting to monopolize the market for expiring domain names in *all* TLDs. Yet if the market is limited to expiring domain names in .com, it would fail to include all reasonably interchangeable substitutes. As a result, CFIT's proposed relevant markets, which lack any factual underpinning, cannot sustain plaintiff's attempted monopolization or conspiracy claim.

b. CFIT Has Not Alleged Predatory Conduct

Section 2 of the Sherman Act prohibits only predatory or unreasonably exclusionary conduct, which is typically defined as conduct that makes sense only because of its tendency to exclude competition. *See, e.g., Advanced Health-Care Servs. v. Radford County Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990); *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986) ("[P]redation involves aggression against business rivals through the use of business practices *that would not be considered profit maximizing* except for the expectation that 1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or 2) rivals will be chastened

sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits.") (emphasis added). As noted above, the extension of the .com registry agreement has *no* impact on competition because it simply extends the term for which VeriSign will serve, as a technical necessity, as the sole Registry Operator maintaining the authoritiative database of second-level domain names registered in the .com TLD. This cannot form the basis of an antitrust claim.[13]

CFIT's allegations with respect to CLS are equally unavailing. CFIT claims that the introduction of CLS will displace so-called back order service providers. But that does not represent injury to competition and is not anticompetitive conduct. As the declaration of Raynor Dahlquist makes clear, CLS will add a new source by which "expired" domain names can be made available to registrants while preserving numerous existing sources of competition. (*E.g.*, Dahlquist Decl. ¶ 23.) Registrars will continue to be able, as they are today, to place the domain names of their registrants that have "expired" into an auction of their choosing rather than having them be deleted. Indeed, one of CFIT's members, Pool.com, currently runs such auctions for various registrars. Second, those domain names that are not registered through CLS will continue to be deleted on a regular basis and will continue to be accessible by registrars and any of their associated "backorder" service providers just as they are today. The only change is that an additional option will be available to consumers (through registrars and their associated backorder services providers) intermediate step will be added, whereby participating registrars, including any who may be members of CFIT, will have access to "expiring" domain names made available for auction during the pending delete period. (Dahlquist Decl., ¶¶ 21-23.) The addition of a new service and additional access to domain names cannot be a predatory or exclusionary act.

[13] CFIT attempts to muddle this issue by claiming that VeriSign will not be forced to price its services competitively. (Mem. in Supp. at 7.) As discussed above, this argument assumes without any basis that .com domain names do not compete with other TLDs. Even if we assume they do not, the 2005 .com Agreement has no different effect on the incentives of VeriSign to set prices than the existing agreement. It is implausible to expect that a registry would alter its pricing structure because ICANN could reopen the registry to competing bids. A registry would likely have more resources available to win those competitive bids by virtue of its incumbency as a natural monopolist.

c. CFIT Has Not Shown Specific Intent to Monopolize

CFIT makes no effort to show that VeriSign has a specific intent to monopolize, an essential element of a claim of attempted monopolization. Rather, CFIT simply asserts that VeriSign's conduct is "predatory" or "unfair" and a specific intent to monopolize should therefore be presumed. As noted above, the only conduct alleged by CFIT is the extension of VeriSign's tenure as the sole Registry Operator for the .com registry, and the introduction of a new CLS service that will expand the ways in which expiring domain names are made available to the public. Neither of these qualifies as the type of predatory conduct that would justify an inference that VeriSign specifically intends to monopolize a relevant market.

CFIT cites *Confederated Tribes of Siletz Indians or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1042 (9th Cir. 2005), but that case involved proof that the defendant overpaid for sawlogs while its profits declined, conduct that could be seen as irrational but for its tendency to exclude competitors. No such conduct is alleged here. CLS clearly contemplates coexisting and competing with other means by which expiring domain names will be made available to registrants, and plainly makes business sense for VeriSign whether it excludes competitors or not.

d. CFIT Has Not Shown A Dangerous Probability of Success

Even if it had properly defined relevant markets, CFIT has not demonstrated a dangerous probability that VeriSign would succeed in its alleged attempt to monopolize those markets. Instead, CFIT simply makes the conclusory and unsupported assertion that "VeriSign has a 100% probability of achieving monopoly power in both markets." CFIT Mem. at 13. Inasmuch as VeriSign is and will remain the sole provider of .com registry services, this contention is only relevant to the alleged "expiring domain name services" market.

VeriSign has yet to enter the alleged relevant markets, much less obtain a large market share or threaten to monopolize that alleged market. Thus, CFIT faces an imposing burden to show that there is a dangerous probability that VeriSign will gain monopoly power in that market. *See, e.g.*, *General Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335, 1351 (S.D. Fla. 2002) (dismissing attempted monopolization claim) ("[I]f a plaintiff is to sustain an attempted monopolization claim with an allegation of less than 50% market share, he must also allege other

reasons that make a monopoly 'dangerously probable.'"). The Ninth Circuit requires evidence that entry barriers are high and that competitors would not be able to expand their output to respond to supracompetitive pricing. *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1438 (9th Cir. 1995). No such showing has been made.

CFIT's own description of how VeriSign's proposed CLS will actually work demonstrates the lack of any dangerous probability of monopolization. For example, Mr. Naidu states in his declaration that domain names that do not receive any bids through CLS during the five day auction will be "released" by VeriSign and can be registered by anyone. (Naidu Decl. ¶ 13.) However, CFIT fails to explain why the allegedly foreclosed "expired" domain name service providers, such as Mr. Naidu's employer Pool.com, could not compete (through associated registrars) to register those "expired" domain names that are released.[14] In addition, Mr. Naidu's declaration indicates that CLS depends upon domain name registrars signing CLS service agreements and participating in the auction. (*Id.*) In other words, the effect of CLS on the supply of "expired" domain names is entirely dependent on how successful VeriSign is in attracting registrars to participate, which in turn means that VeriSign will have to compete with alternative outlets to attract such participation. Thus, there is no evidence to support the allegation that CLS will result in monopoly control of this alleged market, or that there is a dangerous probability of such an outcome.

As Ms. Dahlquist's declaration demonstrates, CLS will preserve numerous existing sources of competition. That is, registrars will continue to be able, as they are today, to place the domain names of their registrants that have expired into an auction of their choosing rather than having them be deleted. Existing entry barriers into either purported relevant market or the ability of competitors to expand output in response to supracompetitive prices will therefore not be affected by CLS. Accordingly, CFIT has not shown a substantial likelihood that it could prove the required dangerous probability of success element of its attempted monopolization claim.

[14] Mr. Naidu claims that the CLS service will eliminate the pending delete period. (Naidu Decl. ¶13.) This is false. Domain names will continue to be deleted, or "released," such that they are available for creation and registration by any ICANN-accredited registrar, on its own or in association with a backorder service provider such as Pool.com. (Dahlquist Decl., ¶¶ 19-25.)

3. CFIT's Claims Are Barred By Res Judicata

CFIT's claims are barred based on res judicata. The same claims asserted here were made and dismissed with prejudice in earlier litigation brought by similarly-situated parties -- registrars of expired domains who fall under the broadly-defined membership of CFIT. In the earlier litigation, these registrars unsuccessfully attempted to prevent ICANN from permitting VeriSign to offer WLS, the alleged prior iteration of CLS.[15] *See Dotster*, 296 F. Supp. 2d at 1159.

In *Dotster*, the court concluded that the plaintiff registrars could not show irreparable injury, likelihood of success on the merits, or a public interest that would support injunctive relief, where the registrars claimed that VeriSign's proposed WLS would prevent approximately fifty registrars from competing to register recently deleted domain names for their customers. *Id.* at 1161, 1163-66. The court found not only that the traditional factors for preliminary injunctive relief were absent, but that implementation of VeriSign's WLS could cause "the options available to consumers of Internet domain names [to] greatly increase." *Id.* at 1166. This was so because WLS would give *all* of the approximately 170 registrars the ability to offer the service to their customers, rather than just the approximately 50 registrars that then offered some form of their own wait list services. *Id.* Thus, the court found VeriSign's WLS had "the potential to benefit registries, registrars who do not currently offer wait-listing services, and, most importantly, the public." *Id.* The same conclusions should apply to bar CFIT's claim for injunctive relief here.

Res judicata bars further litigation "whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003). All of these elements are met here. *First*, an identity of claims exists when two suits arise from "the same transactional nucleus of facts." *Id.* at 1077-78 (citations and quotations omitted). Both the *Dotster* litigation and CFIT's claims arise from alleged competitive harm to registrars and "back-order service providers" with respect to recently deleted and "expired" domains names purportedly resulting from VeriSign's proposed domain name listing service. It does not matter that there may

[15] Plaintiff alleges the CLS is a "modified and expanded version of the Wait List Service." (Complaint, ¶ 49.)

be some differences in the legal theories in the two actions -- "an imaginative attorney" may not avoid preclusion by "attaching a different legal label" to an issue already litigated. *Id.*

Second, the *Dotster* litigation resulted in a final judgment on the merits. After the temporary restraining order and preliminary injunction were denied (*see* Hutt Dec., Ex. C; *Dotster*, 296 F. Supp. 2d 1159), the action was dismissed with prejudice. (*Id.*, Ex. D.) A dismissal with prejudice has res judicata effect. *In re Marino*, 181 F.3d 1142, 1144 (9th Cir. 1999).

Third, CFIT is in privity with the plaintiff registrars in the *Dotster* litigation. Even if all parties are not identical, "privity may exist if 'there is "substantial identity" between parties, that is, when there is sufficient commonality of interest." *Tahoe-Sierra*, 322 F.3d at 1081. *See, e.g.*, *Pedrina v. Chun*, 97 F.3d 1296, 1302 (9th Cir. 1996) (tenants who were similarly situated as those in earlier proceedings challenging evictions, some of whom were the same, were in privity); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719-20 (5th Cir. 1975) (state boards and county were in privity where both had similar interest in avoiding transfer of land to plaintiff). The relationship between an association and its members is also sufficiently close to find privity. *Tahoe* 322 F.3d at 1082 (finding privity between association filing prior suit and members filing second suit).

The alleged interest of CFIT is identical to that of the plaintiff registrars in *Dotster*. The *Dotster* plaintiffs alleged there were approximately 45 highly competitive registrars attempting to obtain recently deleted domain names for customers; that VeriSign's WLS would give it a "monopoly" in offering registration of recently deleted and "expired" domain names; that WLS was opposed "by virtually all Registrars, and by a substantial number of other Internet stakeholders" because it would eliminate competition for recently deleted and "expired" domain names; and that if WLS was not enjoined, plaintiffs would no longer be able to operate their competing systems. (*See* Hutt Dec., Ex. A, ¶¶ 24, 27, 33, 35, 44.)

Similarly here CFIT alleges its membership "include[s] certain Internet domain name registrars, registrants, back order service providers, and other Internet stakeholders;" that there is a robust and competitive back order business for registering recently deleted and "expired" domain names involving hundreds of registrars; that VeriSign's CLS will cause an auction of expired domain names that would be available to all registrars, rather than deletion of the "expired" domain

name for registration on a first come first served basis in which certain registrars "pool" their connections to the registry; and that registrars would no longer be able to operate or use "pooling services" to register recently deleted and "expired" expired domain names. (Complaint, ¶¶ 7, 25, 49-50, 64, 68.) It is clear that in both cases, similarly-situated plaintiffs, assisted by able counsel, had a closely aligned interest to preserve registrars' unfettered access to recently deleted and "expired" domains. CFIT should be barred from re-litigating issues that have already been decided against its members.[16]

The significant overlap between the principals of CFIT and parties actively involved in or controlling the *Dotster* litigation further supports a finding of privity. *See Tahoe* at 1081-83 (privity where non-parties controlled prior suit or interests in prior suit were adequately represented). Two of the four principal supporters of CFIT -- Pool.com and Momentous.ca[17] -- were part of the coalition controlling the *Dotster* litigation. Although *Dotster* involved three named plaintiffs, many other registrars joined with Dotster as part of the "Domain Justice Coalition" that backed the lawsuit, including Pool.com. (Morris Decl, Exs. F & G.) Pool.com is an affiliate of Momentous.ca (*id.*, Ex. H), and one of CFIT's declarant's here, Pool.com President Taryn Naidu, worked for Momentous.ca. (Naidu Dec., ¶ 2.) Pool.com's Chairman, Robert Hall, is the CEO of Momentous.ca. (Morris Dec., Ex. I.) It is apparent that CFIT's backers are using the association form to relitigate issues they previously litigated and lost. The res judicata privity rules are intended to prevent this.

III. CONCLUSION

For all the foregoing reasons, CFIT's request for a temporary restraining order should be denied.

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[16] There has been other unsuccessful litigation by similarly situated plaintiffs challenging VeriSign's WLS. In *Registersite.com, et al. v. Internet Corporation for Assigned Names and Numbers, et al.*, Case No. CV 04-1368 ABC (C.D. Cal.) and Case No. SC082479 (Cal. Superior Ct.), plaintiff registrars challenged the WLS on multiple grounds, including as a tying arrangement under the Sherman Act and unfair competition under state law. (*See* Hutt Dec., Exs. G, H, I & J.) Those actions were dismissed by the courts with leave to amend, but were not pursued further. R. Lee Chambers, one of CFIT's declarants (and presumably one of its members) in this case, was a plaintiff in the *Registersite* litigation.

[17] Both are "Class 1" Supporters of CFIT, each having contributed $50,000 and obtaining voting rights on all matters. (Morris Dec., Ex. E.)

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