Jeffrey A. LeVee (SBN 125863)
Jason C. Murray (SBN 169806)
Courtney Schaberg (SBN 193728)
Eric P. Enson (SBN 204447)
Sean W. Jaquez (SBN 223132)
JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, CA 90071
Telephone: 213-489-3939
Facsimile: 213-243-2539
jlevee@jonesday.com

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COALITION FOR ICANN TRANSPARENCY INC.,

Plaintiff,

v.

VERISIGN, INC; and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendants.

Case No. 05-4826 (RMW)

ICANN'S OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER

[Declarations Of Sean W. Jaquez And Daniel E. Halloran In Support Of Opposition And Evidentiary Objections To Declarations Offered In Support Of Plaintiff's Application Filed And Served Concurrently Herewith]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The timing of the filing of this lawsuit should tell the Court all it needs to know about plaintiff's real motivation, which is to *avoid* competition by seeking to enjoin it.

Although plaintiff does not reveal the names of the "members" of its "coalition," the coalition appears to include a number of competitors of defendant VeriSign, Inc. ("VeriSign"). Those competitors are nervous about the introduction of any new competition, and they have litigated before in an effort to avoid competition. Those prior efforts failed, and they should fail again in this Court.

Indeed, some of these same issues were litigated in the "*Dotster* litigation" filed in the Central District of California in 2003 in which a final judgment was entered against the plaintiffs after they failed to obtain either a temporary restraining order or a preliminary injunction. In that lawsuit (like this lawsuit, filed on the eve of week-long activities culminating in a meeting of the Internet Corporation for Assigned Names and Numbers ("ICANN") Board of Directors), plaintiffs argued that ICANN's decision to allow VeriSign to operate a "waitlisting service" -- the same type of service that plaintiffs are worried about in this case -- violated agreements that ICANN had with the plaintiffs. District Judge John F. Walter disagreed, rejected plaintiffs' TRO and preliminary injunction applications and entered a final judgment against the plaintiffs. (Declaration of Sean W. Jaquez ("Jaquez Decl."), Exs. B-D.)

The timing of this lawsuit is identical to the timing of the *Dotster* lawsuit. Thirty-five days have passed since the announcement by defendants VeriSign and ICANN that the parties had reached a tentative agreement to settle litigation between them and to extend the contract for VeriSign to operate the ".com" top level domain ("TLD") of the Internet. But rather than file this lawsuit a week or two ago to give the defendants and the Court the opportunity to consider these matters in a timely manner, plaintiff filed this lawsuit literally as ICANN had commenced one of its busiest weeks of the year. The agenda for the week, which has been posted on ICANN's website (Declaration of Daniel E. Halloran ("Halloran Declaration"), ¶ 21, Ex. B), reflects a week that is packed with activity -- not a week during which ICANN officials should be responding to *ex parte* applications.

Judge Walter found that the *Dotster* plaintiffs had failed to meet *any* of the necessary elements for a temporary restraining order (or, ultimately, a preliminary injunction). (Jaquez Decl., Exs. B and C.) The instant lawsuit suffers from the same infirmities. Perhaps the most glaring weakness is that, while plaintiff attempts to meet its burden to show a likelihood of success on the merits of its antitrust claims, it provides the Court with *none* of the elements necessary to evaluate the antitrust claims. Thus, for example, plaintiff does not give the Court any basis to determine that plaintiff has associational standing, does not give the Court any evidence to indicate that plaintiff might suffer an antitrust injury, and does not provide the Court with any evidence to determine if VeriSign might be unlawfully monopolizing a relevant antitrust market. Instead, plaintiff simply states that VeriSign is going to be the registry for the ".net" and ".com" TLDs of the Internet -- which VeriSign has in fact been for the past ten years -- and argues without *any evidence* that serving as the registry for those markets confers monopoly power. By logical extension, any company that has a contract with ICANN to operate the registry for a TLD has a "monopoly," but the courts have rejected that argument because domain names issued within a single TLD do not constitute a separate relevant product market for antitrust purposes.

As to ICANN's "role" in VeriSign's alleged antitrust violations, plaintiff does not even attempt to explain how ICANN might somehow be involved in antitrust violations with respect to any of the registries that have signed agreements with ICANN. The very notion that ICANN is settling with VeriSign after years of intense litigation by "conspiring" to give VeriSign an unlawful monopoly is absurd. ICANN's bylaws do not permit ICANN to conduct any commercial business whatsoever and thus ICANN cannot serve as an Internet registry or a registrar.

Indeed, the notion that ICANN can violate the antitrust laws in the manner alleged in the complaint is itself suspect. In 2004, when VeriSign was upset that ICANN was blocking some of the very same services that the plaintiff "coalition" now fears, VeriSign filed an antitrust suit against ICANN. District Judge Howard A. Matz of the Central District of California dismissed

the complaint with prejudice at the Rule 12(b)(6) stage because VeriSign could not state a claim under the Sherman Act. (Jaquez Decl., Ex. A.)

Not only has plaintiff failed to show a likelihood of success on the merits, plaintiff likewise has failed to demonstrate a likelihood of irreparable injury. The law is clear that a plaintiff must submit evidence of harm to *competition,* not merely to one or two individual competitors. And even if those individual competitors will suffer loss of business, such losses are remediable in damages and provide no basis for injunctive relief.

At the end of the day, the Court should reject the TRO application of this undefined "coalition." The coalition has no legal basis for any court-mandated relief. Instead, the members of the coalition should participate vigorously in the ICANN process, as in fact they are doing this week in Vancouver. They can urge the ICANN Board to reject the new .com agreement with VeriSign; they can use the means available under the ICANN bylaws to challenge the Board's decision (if the Board approves the agreement); and they can urge the Department of Commerce to reject the new .com agreement. These are the appropriate resources available to the coalition, not an action in this Court.

FACTUAL BACKGROUND

A. History and Function of ICANN.

ICANN is a not-for-profit public benefit corporation that was organized under California law in 1998. Pursuant to a series of agreements with the United States Department of Commerce ("DOC"), ICANN is responsible for administering certain aspects of the Internet's domain name system. (Halloran Decl., ¶ 2.) Among its various activities, ICANN accredits companies known as "registrars" that make Internet "domain names," such as "cnn.com" or "pbs.org," available to consumers. (*Id.*) Each registrar enters into a Registrar Accreditation Agreement with ICANN that permits it to sell the right to use domain names in a particular top-level domain (such as ".com," ".net," ".biz" and so forth). (*Id.*) Registrars, in turn, contract with consumers and businesses that wish to register Internet domain names. (*Id.*) Typically, those contracts last one or two years, and at the end of that term, the consumer is given the option to renew the contract so as to retain that particular domain name. (*Id.*)

Separately, ICANN also contracts with Internet "registries." Each "top level domain name" -- such as .com, .net, .biz, .org and so forth, along with hundreds of country-code top-level domains -- is operated by a single registry that functions similar to a phone book, making sure that each name registered in that domain is unique. Registries offer a variety of services that, for example, permit consumers to check to see if a particular domain name has already been registered and when the name is set to expire. (*Id.*, ¶ 3.)

B. VeriSign's Wait Listing Service.

Beginning in late 2001, VeriSign proposed to offer a "Wait Listing Service," which would operate by permitting ICANN-accredited registrars, acting on behalf of customers, to place reservations for currently registered domain names in the .com and .net top-level domains. (*Id.*, ¶ 4.) Only one reservation would be accepted for each registered domain name. Each reservation would be for a one-year period. Registrations for names would be accepted on a first-come/first-served basis, with the opportunity for renewal. (*Id.*) VeriSign would charge the registrar a fee. (*Id.*) The registrar's fee to the customer would be established by the registrar, not by VeriSign. In the event that a registered domain name was not renewed and was thus to be deleted from the registry, VeriSign's WLS would have checked to determine whether a reservation for the name is in effect, and if so would automatically register the name to the customer. If there was no reservation, VeriSign's WLS would simply delete the name from the registry, so that the name is returned to the pool of names equally available for registration through all registrars, also on a first-come/first-served basis. (*Id.*) VeriSign proposed to implement the WLS for a twelve-month trial; it needed ICANN's approval to proceed. At the end of the trial, ICANN and VeriSign were to evaluate whether the WLS should be continued. (*Id.*)

On August 23, 2002, the ICANN Board determined that the WLS "promotes consumer choice" and that the "option of subscribing to a guaranteed 'wait list' service is a beneficial option for consumers." For these reasons, the Board approved a resolution authorizing (with certain conditions, imposed largely to address the stated concerns of registrars) ICANN's President and General Counsel to negotiate appropriate revisions to VeriSign's registry agreements to allow for the offering of the WLS. (*See id.* at ¶ 6.)

There have been several lawsuits arising out of VeriSign's proposed implementation of a Wait Listing Service. The following is a brief summary of certain of those lawsuits.

Dotster Lawsuit.

On September 9, 2002, after the Board had approved the WLS, counsel for Dotster, Inc. ("Dotster") submitted a letter to ICANN and then filed a formal request for reconsideration of the Board's decision regarding the WLS. On May 20, 2003, ICANN's Reconsideration Committee determined that Dotster's request lacked merit. (*Id.*, ¶ 8.)

On July 16, 2003, Dotster and several other registrars initiated litigation and filed a request for a temporary restraining order, which the District Court denied via its order of July 21, 2003. (Jaquez Decl., Ex. C.) Plaintiffs subsequently filed a motion for preliminary injunction, which the Court denied via its order of November 10, 2003. (*Id.* at Ex. B.)

Pool.com Litigation.

In 2003, Pool.com, which is a subsidiary of Momentous.ca Corp., sued ICANN in Canada in connection with the WLS. ICANN moved to dismiss the case for lack of jurisdiction over it, and, in the alternative, for a transfer of the case to Los Angeles. (*Id.* at Ex. G.) In July 2004, the parties agreed to adjourn the matter. Recently, Pool.com has sought an end to the adjournment. (*Id.* at ¶ 10; Halloran Decl., ¶10.)

Registersite Litigation.

On August 4, 2004, Registersite.com and several other registrars filed a complaint seeking specific performance and declaratory and injunctive relief in connection with VeriSign's introduction of the WLS. On October 4, 2004, ICANN filed a demurrer, and on January 10, 2005, the plaintiff stipulated to a dismissal of ICANN without prejudice. (Jaquez Decl., Exs. H-J; Halloran Decl., ¶ 11.)

VeriSign v. ICANN Litigation.

On February 26, 2004, VeriSign filed a complaint against ICANN seeking specific performance, damages, and declaratory and injunctive relief in connection with four proposed services ("SiteFinder," WLS, "ConsoliDate," and "Internationalized Domain Names") that VeriSign sought to introduce. In April 2004, ICANN filed a motion to dismiss six of Plaintiff's

seven claims, pursuant to Federal Rule of Civil Procedure 12(b)(6). On May 18, 2004, Judge Howard Matz granted ICANN's motion and dismissed plaintiff's federal antitrust claim without prejudice. Plaintiff filed a first amended complaint on June 14, 2004. ICANN responded with a second motion to dismiss pursuant to Rule 12(b)(6). On August 26, 2004, Judge Matz dismissed VeriSign's first amended complaint with prejudice and declined to exercise supplemental jurisdiction over the remaining state court claims. (Jaquez Decl., Ex. A.) Final judgment was entered on September 22, 2004. On September 24, 2004, VeriSign filed a notice of appeal. That appeal is currently pending at the Ninth Circuit. (Halloran Decl., ¶ 12.)

On August 27, 2004, VeriSign filed a new complaint in state court. ICANN answered the complaint and cross-complained for declaratory relief seeking a declaration of VeriSign's obligations under the 2001 .com Registry Agreement and a determination that VeriSign breached its obligations under that agreement. That litigation remains pending and would be settled by the ICANN-VeriSign agreement. (Halloran Decl., ¶ 13.)

On November 10, 2004, ICANN filed a request for arbitration with the International Chamber of Commerce, International Court of Arbitration ("ICC"). ICANN is seeking declaratory relief interpreting a number of contractual rights, duties, and obligations of both parties under the 2001 .net Registry Agreement. Additionally, ICANN seeks a declaration that VeriSign violated that agreement by engaging in a series of unauthorized conduct as Registry Operator of the .net registry. (*Id.*, ¶ 14.)

C. Proposed Settlement Agreement.

On October 24, 2005, ICANN announced that it had reached a proposed agreement to end all pending litigation over its long-standing disputes with VeriSign. The proposed agreement documents were posted for public comment, and are subject to final approval by the ICANN Board as well as the United States Department of Commerce. Those agreements include the settlement agreement and the proposed 2005 .com Registry Agreement and its Appendices. (*Id.*, ¶ 15.)

ICANN has independent business justifications for entering into the 2005 .com Registry Agreement. For example, the proposed agreement settles many long-standing points of tension

between VeriSign and ICANN which have adversely affected the broader Internet community. It eliminates all pending litigation between the two parties, and—importantly for the community—more ICANN staff and resources can be devoted to ICANN's core functions, rather than to litigation with VeriSign over the terms of the .com registry agreement. In the future, in the event of a disagreement relating to the .com Registry Agreement, both sides will be able to make use of cost-efficient and binding arbitration under the International Chamber of Commerce. (*Id.*, ¶ 16.)

D. The Vancouver Meetings.

As posted on ICANN's web site, the public comment period on the proposed settlement was extended, and ICANN has invited all constituencies and advisory committees "to meet with the Board during ICANN's Vancouver meeting to discuss the settlement, and the Board also will listen to comments regarding the settlement offered during the Vancouver Public Forum." (*Id.*, ¶ 18.) Individuals can take part in these meetings by attending in person, by taking part in the webcast and remote participation opportunities, and/or by joining one of the various ICANN-related mailing lists. The agenda for this week's ICANN meeting in Vancouver has also been posted on ICANN's web site. That agenda reflects the fact that on November 29, 2005, there will be a public forum to discuss the proposed settlement with VeriSign, which includes the proposed 2005 .com Registry Agreement. Additional public forum sessions will be held on December 2 and December 3, 2005. (*Id.*, ¶ 20.)

The agenda does not, however, state that the ICANN Board will take action on the settlement or the .com Registry Agreement this week. To the contrary, the agenda merely states that at the end of the week, on Sunday, December 4, 2005, the ICANN Board will hold a meeting. But the agenda for that Board meeting does *not* include a vote on the settlement or proposed 2005 .com Registry Agreement. There are no other ICANN Board meetings scheduled this year. (*Id.*, ¶ 22.)

Should the settlement and proposed 2005 .com Registry Agreement eventually be approved by the ICANN Board, the amendments to the .com Registry agreement then would have to be approved by the United States Department of Commerce. If the Department of Commerce were to approve the proposed 2005 .com Registry Agreement -- and there is no way to predict

how long that could take -- VeriSign would then have to undertake the significant task of successfully implementing the complained of services. (*Id.*, ¶ 24.)

If plaintiff is dissatisfied with the proposed settlement agreement or the proposed 2005 .com Registry Agreement, there are several avenues that plaintiff can pursue -- some of which it is pursuing -- to have its views heard. For example, plaintiff can participate vigorously in the ICANN process (as in fact it is doing this week in Vancouver) and can urge the ICANN Board to reject the proposed 2005 .com Registry Agreement. If it is unsuccessful in that effort, it can then use the reconsideration process available under the ICANN bylaws to challenge the Board's decision. Plaintiff also has begun to lobby the Department of Commerce. (*Id.*, ¶ 26.)

LEGAL STANDARD

It is a "fundamental principle that an injunction is an equitable remedy that does not issue as of course." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). The basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959).

Injunctive relief will not issue unless the plaintiff has established: (1) a likelihood of success on the merits and the possibility of immediate irreparable injury, or (2) the existence of serious questions going to the merits and that the balance of hardships tips heavily in its favor. *Metro Publishing, Ltd. v. San Jose Mercury News*, 987 F.2d 637, 639 (9th Cir. 1993); *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (*en banc*) (citations omitted). "This analysis creates a continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Southwest Voter Registration Education Project*, 344 F.3d at 918; *Oakland Tribune, Inc. v. Chronicle Publ'g Co., Inc.*, 762 F.2d 1374, 1376 (9th Cir. 1985) (noting that the two prongs "represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases."). Under any articulation of the test, to justify the grant of injunctive relief a plaintiff must show a "significant threat of irreparable injury, irrespective of the magnitude of the injury." *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1397 n. 1 (9th Cir.1997).

ARGUMENT

Plaintiff has failed to meet its burden to prove that a temporary restraining order is warranted. First, plaintiff has not demonstrated an immediate threat of irreparable harm. Indeed, plaintiff's thirty-five day delay in filing this action confirms the lack of imminent threat. Likewise, plaintiff's alleged injuries negate any potential for irreparable harm because they are fully calculable and compensable by money damages.

Second, plaintiff has failed to demonstrate a probability of success on the merits because plaintiff lacks standing to bring this action on behalf of its members; plaintiff has failed to allege the elements of a conspiracy to monopolize; plaintiff has failed to allege a cognizable "antitrust injury" or a relevant market; and plaintiff's claims are further belied by the evidence and common sense. Finally, the balance of hardships to the parties and the public interest favor denying plaintiff's application because the harm to ICANN and the public interest far outweigh any potential harm to plaintiff.

I. PLAINTIFF HAS NOT DEMONSTRATED AN IMMEDIATE THREAT OF IRREPARABLE HARM.

A party seeking to enjoin a future injury "must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Services Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original); *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980) ("L.A. Coliseum"). "Establishing a risk of irreparable harm in the indefinite future is not enough. The harm must be shown to be imminent." *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 1996 U.S. Dist. LEXIS 11646, *12 (C.D. Cal. 1996). "Subjective apprehensions and unsupported predictions of revenue loss are not sufficient to satisfy a plaintiff's burden of demonstrating an immediate threat of irreparable harm." *Caribbean Marine Services Co.*, 844 F.2d at 675-76.

A. Plaintiff Has Not Demonstrated An Imminent Threat.

To obtain a TRO, plaintiff must establish an ***immediate*** threat of irreparable harm. In *L.A. Coliseum*, the Los Angeles Coliseum Commission sought a preliminary injunction barring the

National Football League from using its veto power to prevent the Oakland Raiders from moving to Los Angeles. *See L.A. Coliseum*, 634 F.2d at 1198. The Ninth Circuit ruled that the plaintiffs had not demonstrated any immediate threatened harm and that an injunction was improper because the Raiders' move to Los Angeles was not finalized and there was no evidence that the League was in fact going to use its threatened veto. *See id.* at 1201.

The court reached a similar conclusion in *Burbank*, in which the City sought an order enjoining the Airport Authority from purchasing land it intended to use as part of its expansion plan, which—the City alleged—would inflict a number of harms on the City. *See Burbank*, 1996 U.S. Dist. LEXIS 11646 at *3-*6, *14. The court, however, found that any harm arising from the expansion plan was not immediate because the land purchase was not imminent -- negotiations had been ongoing for months and had not resulted in a signed agreement. *See id.* at *13-*16.

Other courts have held that injunctive relief is improper when the alleged future injury is contingent on the occurrence of uncertain future events. *See Caribbean Marine Services Co.*, 844 F.2d at 675-76 (reversing the district court's grant of a preliminary injunction because "[m]ultiple contingencies must occur before [the plaintiffs'] injuries would ripen into concrete harms"); *Nelsen v. King County*, 895 F.2d 1248, 1254 (9th Cir. 1990) (affirming the denial of injunctive relief where the plaintiffs' "complaints for injunctive relief consist only of a set of highly speculative contingencies"); *Midgett v. Tri-County Metropolitan Transportation District of Oregon*, 254 F.3d 846, 850-51 (9th Cir. 2001) (affirming the court's denial of a permanent injunction where the record did "not support a finding that Plaintiff faces an immediate threat of irreparable harm"); *Skelly v. Dockweiler*, 75 F. Supp. 11, 17 (S.D. Cal. 1947) (dismissing plaintiff's complaint to enjoin a company from causing the stock of another corporation to be voted in favor of a merger because damage resulting therefrom "is not immediate, but remote and flowing from contingencies which have not arisen and may never arise.").

Here, plaintiff has presented no evidence of any immediate threatened injury. Plaintiff argues that "harm is imminent; defendants may sign the new 2005 .com Agreement as soon as November 30, 2005 (Plaintiff's App., 1:18-19)," but plaintiff provides no support for that assertion. And the facts are to the contrary. As plaintiff is fully aware, ICANN will not enter the

proposed 2005 .com Registry Agreement until its Board has approved it. (Halloran Decl., ¶ 17; App. 6:23-24.) ICANN's Board, in turn, will not approve the .com Agreement until the completion of a public comment period. (Halloran Decl., ¶ 17; App. 6:23-24.) As posted on ICANN's web site, that public comment period has been extended, and ICANN has invited all constituencies and advisory committees "to meet with the Board during ICANN's Vancouver meeting to discuss the settlement, and the Board also will listen to comments regarding the settlement offered during the Vancouver Public Forum." (Halloran Decl., ¶¶ 18-19; Ex. A (web site statement re extension of Comment Period); App. 6:23-24.) Individuals can take part in these meetings by attending in person or by taking part in the webcast and remote participation opportunities. (*Id.*, 20.)

The agenda for this week's ICANN meeting in Vancouver has also been posted on ICANN's web site. (*Id.*, ¶¶ 20-21; Ex. B.) That agenda reflects the fact that on November 29, 2005, there will be a public forum to discuss the proposed .com Agreement. (*Id.*) The agenda does not, however, state that the ICANN Board will take action on the settlement or the .com Agreement this week. (*Id.*, ¶¶ 21-22; Ex. B.) To the contrary, the agenda merely states that at the end of the week, the Board of Directors will hold its meeting. (*Id.*) In addition, the agenda for the Board's meeting, to be held on Sunday, December 4, 2005, does ***not*** include a vote on the .com settlement or proposed 2005 .com Agreement. (*Id.*, ¶¶ 22-23; Ex. C.) And there are no other Board meetings scheduled to take place in 2005. (*Id.*, ¶ 22.)

Most importantly, if and when the Board does decide to approve the proposed .com Agreement, there would remain several other steps that would have to occur before either the CLS service or SiteFinder, the two "services" on which plaintiff's TRO Application focuses, could be implemented. First, the agreement would have to be approved by the United States Department of Commerce, and there is no timetable for any such DOC decision. (*Id.*, ¶ 24.) If the Department of Commerce were to approve the agreement between VeriSign and ICANN,

VeriSign would then have to undertake the significant task of successfully implementing the services. (*Id.*, ¶ 24.)[1]

In sum, any injury plaintiff may suffer from the successful implementation of CLS or SiteFinder "is not immediate, but remote and flowing from contingencies which have not arisen and may never arise." *Skelly*, 75 F. Supp. at 17. There are multiple steps that would have to occur, and there obviously is no certainty that any, much less all, of these steps will occur.

Plaintiff's month-long delay in bringing this action is further evidence that there is no imminent threat of harm to plaintiff. (App. 6:21 ("VeriSign and ICANN announced on October 24, 2005 that they had agreed to terms for a new .com registry agreement".) Delay is relevant in determining whether a TRO should issue because it "[i]mplies a lack of urgency and irreparable harm." *Oakland Tribune, Inc.*, 762 F.2d at 1377 (finding that the district court's finding of no irreparable harm was supported by the plaintiff's delay in bringing its action). A district court "may legitimately think it suspicious that the party who asks to preserve the status quo through interim relief has allowed the status quo to change through unexplained delay." *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1092 n.27 (3rd Cir. 1984) (a three month delay in bringing an action was relevant evidence that interim injunctive relief is not truly necessary). Here, the main driver for the timing of this lawsuit -- which is virtually identical to the timing of the *Dotster* lawsuit -- is that plaintiff (whose members appear to be active participants in the Vancouver meeting) is aware that ICANN's officers are out of the country. (Halloran Decl., ¶ 25.) Thus, the only "urgency" is that plaintiff wanted ICANN to have to deal with a TRO Application when it was most inconvenient to ICANN to have to do so.

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[1] Plaintiff cites to an announcement by VeriSign that VeriSign intends to launch CLS in early December 2005. App., 8:11-14 (citing Naidu Decl. ¶ 20). However, the statement in the Naidu declaration is hearsay. Furthermore, as plaintiff states in its Application, even if VeriSign has or believes it has the right to offer the CLS or SiteFinder, that does not mean that VeriSign will in fact offer those services imminently or at all. *See* App., 18:25-28, n. 7 ("VeriSign has consistently maintained that it has the right to offer both [SiteFinder and WLS] under the ***2001*** .com Registry Agreement, but has not offered either.")

B. Even If The Board Were To Act In The Near Future, There Would Be No Irreparable Harm to Plaintiff.

The party seeking a preliminary injunction "must demonstrate a significant threat of irreparable injury." *Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989). This requirement is even more important when the Court is asked to take grant a temporary restraining order.

To demonstrate irreparable harm, plaintiff relies only on its unsupported statement that certain of its members will be harmed. The only ***evidence*** plaintiff provides are declarations from Pool.com and Chambers LLC (neither of which are specifically identified as members of plaintiff's "coalition"), which assert that they will be put out of business if three uncertain events occur: (1) VeriSign and ICANN enter into the proposed .com Agreement; (3) the DOC approves the proposed .com Agreement; and (3) VeriSign implements CLS. (*See* App., ¶¶ 15:25-16:18, 17:5-13, Chambers Decl., ¶¶ 11-12, Naidu, ¶¶ 20-21.) As noted above, these contingencies fall far short of demonstrating irreparable harm.

But even assuming that each of these actions were to occur, blanket statements that a company will be "driven out of business" do not automatically support a finding of irreparable injury. *See Dollar Rent A Car of Washington, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1375 (9th Cir. 1985). Moreover, "[s]ubjective apprehensions and unsupported predictions of revenue loss are not sufficient to satisfy a plaintiff's burden of demonstrating an immediate threat of irreparable harm." *Caribbean Marine Services Co.*, 844 F.2d at 675-76; *see also L.A. Coliseum*, 634 F. 2d at 1201.

The reason that these types of allegations are insufficient is that injuries that can be remedied by a money damages award -- such as those injuries alleged here -- are *not* irreparable, and are not injuries sufficient to support the granting of a preliminary injunction. *L.A. Coliseum*, 634 F.2d at 1202 ("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.") (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974))

(emphasis added); *Stanley v. Univ. of So. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (the inadequacy of legal remedies is a prerequisite to the issuance of an injunction).

Plaintiff has not pointed to *any* potential injury to an identified member that could not be compensated through an award of damages. If Pool.com or Chambers LLC, plaintiff's declarants, lose customers, any lost revenues that are ultimately attributed to illegal conduct by defendants are capable of being quantified. Moreover, to the extent that any of plaintiff's conclusory statements can be read as alleging injury to its members' goodwill or reputation, this argument similarly fails. *Oakland Tribune, Inc.*, 762 F.2d at 1377 (holding that conclusory statements by interested parties that plaintiffs would suffer the loss of reputation, competitiveness, and goodwill did not support a finding of irreparable loss).

Plaintiff's allegations of irreparable injury seek to raise issues *already decided* by Judge Walter in the *Dotster* litigation. In that case, three registrars that provided services that involved ordering deleted domain names attacked VeriSign's earlier proposal for a Wait Listing Service (WLS). (Jaquez Decl., Exs. B-D.) Plaintiff acknowledges that the previous WLS proposal and VeriSign's current CLS proposal are "essentially the same idea." (App., 13 n.5; *see also* Compl., ¶¶ 49; App., 8:11-15.) The *Dotster* plaintiffs made the same claims of irreparable injury and sought a temporary restraining order followed by a preliminary injunction to block WLS. Judge Walter denied *both* motions, and in his Order made clear that the similar arguments of the *Dotster* plaintiffs provided *no basis* for relief. (Jaquez Decl., Ex. B (the alleged irreparable injuries were "speculative and any damage incurred can be compensated by money damages").)

II. PLAINTIFF HAS FAILED TO DEMONSTRATE PROBABILITY OF SUCCESS ON THE MERITS.

A Sherman Act "claimant must, at a minimum, sketch the outline of the antitrust violations with allegations of supporting factual detail." *Les Shockley Racing, Inc. v. National Hot Rod Assoc.*, 884 F.2d 504, 508 (9th Cir. 1989); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) (stating that if facts alleged do not outline a Sherman Act violation, the plaintiff "will get nowhere merely dressing them up in the language of antitrust."). Plaintiff, however, has failed to "sketch" such a violation on a number of levels.

As an initial, and dispositive, matter plaintiff—a trade association—does not have standing to bring this claim on its members' behalf. Nor has plaintiff alleged the elements of a conspiracy to monopolize, a cognizable "antitrust injury," or a proper antitrust relevant market. And plaintiff's claim that ICANN had the specific intent to provide its long-time adversary VeriSign with a monopoly is belied by the evidence and common sense.

A. Plaintiff Lacks Standing To Bring Its Claim On Behalf Of Its Members.

The TRO Application and the Complaint lack the necessary averments that would allow this Court to determine whether plaintiff has standing to bring its claim on behalf of its members. From what little has been alleged, it appears that plaintiff does *not* have the requisite standing.

When an association seeks an injunction in an antitrust action, it must meet traditional associational standing doctrines. *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380 (7th Cir. 1987). According to the Supreme Court, an association may bring an action on its members' behalf when: (1) its members would otherwise have standing to sue; (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 individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiff fails in each of these respects.

Not a single one of the declarations supporting the Application sheds any light on plaintiff, its purpose, its membership, or its alleged injuries. Nor do any of the declarants even claim to be members of the "coalition." Indeed, the sum total plaintiff provides to the Court is the following:

> "CFIT is a not-for-profit membership corporation, organized and existing under the laws of the State of Delaware, and having its principal place of business in the District of Columbia. Members of CFIT include certain Internet domain name registrars, registrants, back order service providers, and other Internet stakeholders."

(Compl. ¶ 7.) This does not establish that plaintiff has standing to sue on its members' behalf.

First, while some members *might* have standing to sue, it is impossible to tell whether that is the case. But, even then, those individual members will have significant difficulty demonstrating antitrust injury, as discussed below.

Second, whether plaintiff is promoting an interest germane to its purpose is also a complete mystery. Obviously, the handful of complaining declarants—each of whom is in the "back order service" business—have some interest, but what of the registrars, registrants, and "other Internet stakeholders" that form the Coalition (Compl. ¶ 7), none of whom is identified? Without this type of evidence, the Court cannot determine whether "[the members'] status and interests are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members." *Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 691 (8th Cir. 1979).

Finally, the claims and requested relief will require the involvement of individual members. Indeed, the only evidence of irreparable harm offered in support of the Application are the declarations of Pool.com and R. Lee Chambers LLC -- which may be members of plaintiff and litigants in other lawsuits against ICANN on these issues. Moreover, while individualized proof is ordinarily not necessary where injunctive relief is sought, "[t]he central inquiry is whether asserting the claim requires individual participation in establishing the proof." *American Baptist Churches in the U.S.A. v. Meese*, 712 F.Supp. 756, 765-66 (N.D. Cal. 1989) (denying associational standing in injunctive relief case because of need for individualized proof). Antitrust claims present just such individualized questions, in part because "establishing antitrust injury involves complex questions of fact and, given the allegations of the complaint, will require proof of actions taken by the defendants against individual [trade association] members." *Suburban Realtors*, 830 F.2d at 1381. For these reasons, plaintiff has not established that it has associational standing, which means that plaintiff is not likely to succeed on the merits of its claim.

B. Plaintiff Has Not Suffered An Antitrust Injury.

Proving antitrust injury is an essential element of a private cause of action under the antitrust laws. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). "[T]o

bring suit for an antitrust violation, one must make a showing that it has been economically injured and that the injury stems from the defendant's violation of the antitrust laws." *Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261, 1268 (C.D. Cal. 2000); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). "If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal *per se*." *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition.").

Plaintiff's Complaint and TRO Application make this threshold analysis impossible because plaintiff does not assert who its members are, how they were purportedly injured or how any anticompetitive action by defendants was the proximate cause of those injuries. Plaintiff has an Internet website, but it does not state the name of *any* of its members.[2] (Jaquez Decl., ¶ 7.) Further, although plaintiff claims that its membership is made up of numerous "Internet domain name registrars, registrants, back order service providers, and other Internet stakeholders" (Compl., ¶ 7), as of six days ago, plaintiff stated that it had only ***one*** member. (Jaquez Decl., ¶ 8, Ex. F (24 November 2005 article stating that "plaintiff has no members other than Momentous, but it plans to recruit at ICANN's annual meeting in Vancouver").)[3]

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[2] Indeed, a recent Internet posting has admonished plaintiff for advocating issues related to ICANN's transparency while failing to disclose the names of its members that it purports to represent. (Jaquez Decl., ¶ 6, Ex. E.)

[3] Momentous.ca Corp. is a Canadian domain registration firm which "formed [plaintiff] to challenge VeriSign Inc. over proposals that would let it more easily introduce new services that would challenge Momentous's business." (*Id.*, ¶ 8, Ex. F.) Momentous.ca Corp. is the parent corporation of Pool.com, a domain name backorder service provider, which has brought an action in a Canadian court that raises a number of the same issues raised in this Action -- namely, that VeriSign's proposed waitlisting service will cause backorder service providers economic injury. (*Id.*) The Canadian action is currently adjourned. (*Id.*) Moreover, plaintiff's declarant Richard L. Chambers, is the managing principal of R. Lee Chambers Company LLC d/b/a domainstobeseen.com, which also filed the Registersite action in the Central District of California and again in the Los Angeles Superior Court claiming potential economic injury resulting from VeriSign's proposed listing service. (*Id.*, ¶¶ 11-12, Exs. H and I.) The federal action was dismissed on the merits, and the state court action was dismissed by stipulation of the parties after the superior court sustained defendants' demurrers to the plaintiffs' complaint. (*Id.*, ¶¶ 12-13, Exs. I-J.)

C. Plaintiff Cannot Prove The Elements Of A Conspiracy To Monopolize.

The elements of a conspiracy to monopolize under Section 2 of the Sherman Act are: (1) the existence of a conspiracy; (2) an overt act in furtherance of that conspiracy; and (3) the specific intent to monopolize. *United States v. Yellow Cab Co.*, 332 U.S. 218, 225 (1947). The Supreme Court has been clear that conduct is not actionable under Section 2 unless it actually monopolizes or dangerously threatens to monopolize a relevant market. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993). Here, the relevant antitrust markets alleged by plaintiff are utterly insufficient, and plaintiff has failed to allege that ICANN had the requisite, specific intent to monopolize.

1. Plaintiff has not alleged a relevant antitrust market.

For antitrust purposes, a relevant product market "includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (quoting *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988)). "Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka*, 252 F.3d at 1063 (9th Cir. 2001); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999). Plaintiff asserts that the relevant markets here consist of (i) .com domain name registrations; (ii) expiring domain name registrations within the .com TLD; and (iii) directory assistance services within the .com TLD. These markets are so simplistic that they cannot form the basis of an antitrust claim, and certainly not a claim that supports a temporary restraining order. (App. at 10.)[4]

To say that .com registrations and specific services within the .com TLD are separate antitrust markets ignores "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). Indeed, plaintiff completely ignores other TLDs to which consumers can turn, such as .biz, .org, .net and .info.

[4] In its Complaint, plaintiff also alleges that .net domain name registrations and services within the .net registry are also relevant markets (Compl. at ¶ 11), but plaintiff does not argue the point in its TRO Application.

Indeed, several courts already have rejected the market definitions that plaintiff proposes, which might explain why plaintiff submits no evidence in its TRO Application in support of these alleged markets. In *Weber v. National Football League*, 112 F. Supp. 2d 667, 674 (N.D. Ohio 2000), the court dismissed the plaintiff's antitrust claims after finding that the relevant market could not be limited to specific domain names but must include all domain names because they are interchangeable. Similarly, the court in *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159 (N.D. Ala. 2001), concluded that all domain names are interchangeable and must be included in a relevant antitrust market. In *Smith*, the plaintiff alleged that expired domain names constituted the relevant market for purposes of his Sherman Act, Section 2 claim. The court instead ruled that the relevant market consists of *all* domain names. *Id.* at 1169-70. The court found that, to the consumer, there are "essentially unlimited" variations of "reasonable substitute[s]" for a specific domain name. *Id.* at 1170. This shows the cross-elasticity of demand among all domain names that requires them all to be viewed together for antitrust analysis purposes. *Id.*

2. Plaintiff has not provided evidence in support of any of the elements of a conspiracy to monopolize.

Plaintiff argues that the new 2005 .com Agreement, by itself, is sufficient evidence of a conspiracy between ICANN and VeriSign to permit VeriSign "to monopolize the newly-created auction market for expiring domain names." (App. at 15.) By similar sleight of hand, plaintiff attempts to do away with the elements of overt acts in furtherance of the alleged conspiracy and specific intent by claiming that "the agreement itself" is the overt act, and that merely being aware that monopolization of a relevant market would result is enough to prove specific intent. If this were the case, every contract could support a conspiracy to monopolize claim. Of course, this is not the law.

An antitrust plaintiff must present evidence tending to show that the alleged conspirators, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). While the 2005 .com Agreement is certainly evidence of an agreement between ICANN and

VeriSign, it is hardly evidence that ICANN *consciously committed* to a common scheme designed to achieve the alleged unlawful objective, *i.e.*, allowing VeriSign to monopolize the alleged relevant markets. A similar theory was rejected by the Ninth Circuit in one of the cases plaintiff cites, *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484 (9th Cir. 1991). There, the plaintiffs attempted to argue that an "exclusive services contract was itself an . . . agreement in restraint of trade," but the Ninth Circuit disagreed stating that case law "does not stand for the proposition that all contracts are illegal restraints. Nor are exclusive service contracts as such illegal." *Id.* at 1488 (citation omitted).

Where the only evidence of conspiracy is circumstantial—as is the case here—antitrust law limits the range of inferences that may be drawn. Where there is an absence of a rational economic motive to conspire, along with conduct that is consistent with legitimate, equally plausible justifications, the conduct does not give rise to an inference of conspiracy. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Plaintiff must then come forward with evidence tending to exclude the possibility that the defendant was acting independently. *Id.* at 588.

Here, ICANN has no rational economic motive to confer an alleged monopoly on VeriSign. Indeed, as plaintiff has pointed out, ICANN has litigated *against* VeriSign in the past to prevent prior attempts by VeriSign to introduce new services that ICANN believed were in contravention of prior agreements. (App. at 8.) ICANN has independent justifications for entering into the 2005 .com Agreement that have nothing to do with some illogical motive to crown VeriSign as a monopolist. (Halloran Decl. at ¶ 15.) The VeriSign-ICANN settlement eliminates all pending litigation between the parties, which will permit ICANN staff and resources to be devoted to ICANN's core functions, rather than to litigation with VeriSign over the terms of the prior registry agreement. (*Id.*, ¶ 16.) In addition, VeriSign and ICANN are agreeing to clear definitions and processes for review that further advance the stability and security of the Domain Name System. These same independent business justifications belie plaintiff's gossamer-thin attempt to prove that ICAAN had the specific intent to confer a monopoly on VeriSign. *See, e.g., Bi-Rite Oil Co. v. Indiana Farm Bureau Coop. Ass'n*, 720 F.

Supp. 1363, 1378 (S.D. Ind. 1989) (no inference of specific intent absent showing "that the defendant's conduct was without legitimate business justification other than to destroy or damage competition"), *aff'd*, 908 F.2d 200 (7th Cir. 1990).

III. THE BALANCE OF HARDSHIPS TO THE PARTIES AND THE PUBLIC INTEREST FAVOR DENYING THE TRO APPLICATION.

A. Plaintiff Will Not Be Harmed.

Plaintiff will not be harmed if a TRO does not issue. Plaintiff's main concern is the possible implementation of the CLS, but there are several steps that would need to occur before that could happen (i.e., at a minimum, ICANN's Board would need to approve the settlement and enter into the proposed 2005 .com Registry Agreement; the DOC would need to approve the settlement and the proposed 2005 .com Registry Agreement; and VeriSign would need to successfully implement the CLS).

In the meantime, there are several other avenues that plaintiff can pursue -- some of which it is pursuing -- to have its views heard on the proposed 2005 .com Registry Agreement. Members of the coalition can participate in the ICANN process (as in fact they are doing this week in Vancouver). (Halloran Decl., ¶ 26.) Plaintiff can urge the ICANN Board to reject the new .com Registry Agreement with VeriSign. If they are unsuccessful in that effort, then they can use the reconsideration process available under the ICANN bylaws to challenge the Board's decision (if the Board approves the agreement). (*Id.*, ¶¶ 26-27; Ex. D.) And, plaintiff can urge the Department of Commerce to reject the new .com Registry Agreement, as in fact they already have begun to do.

B. A TRO Would Harm ICANN.

Plaintiff seeks a TRO that would prevent VeriSign and ICANN from entering into the new .com Registry Agreement and would require instead that ICANN and VeriSign abide by the terms of the existing .com Agreement and place a "hold" on an existing settlement of protracted litigation. Plaintiff's proposed TRO is completely contrary to ICANN's public interest mission. ICANN is a body that seeks to develop consensus wherever possible. (*Id.*, ¶ 28.) ICANN maintains open and transparent processes; it regularly posts on the Internet its minutes, transcripts

of its meetings, and other important information. Indeed, its web site contains virtually a day-to-day description of ICANN's activities.[5] (*Id.*)

If the Court were to grant plaintiff's requested TRO, the Court would necessarily become enmeshed in determining what is in the best interest of the diverse Internet stakeholders around the world. Effectively, the Court might enter the business of administering the Internet, potentially including the price that could be charged for registration services, how often the price could rise, and what new services could be offered to consumers.[6] But this is ICANN's mission, and the public already is engaged in aiding that mission: there are hundreds of public comments on the settlement agreement and the .com Registry Agreement, and ICANN's Board will consider these comments and other statements made this week in Vancouver. (*Id.*, ¶ 29.) Thus, the issuance of a TRO would have significant ramifications for ICANN and its public service mission, and for this Court as well.

C. The Public Interest Will Be Harmed.

The Court must examine whether the public interest would be advanced or impaired by the issuance of the requested injunction. *See Caribbean Marine Servs. Co.*, 844 F.2d at 674; *L.A. Coliseum*, 634 F.2d at 1200. There is no doubt that the public interest will be impaired if a temporary restraining order issues in this case.

Plaintiff claims that "the general public would be injured by consummation of the agreement and VeriSign's implementation of CLS." (App. 18:22-19:3.)[7] Nothing could be

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[5] Interestingly, plaintiff's purpose -- as articulated on the Internet -- is supposedly to promote ICANN transparency, but plaintiff's complaint does not even mention this issue.

[6] This is precisely the type of ongoing regulatory entanglement that the Supreme Court has instructed antitrust courts to avoid. Thus, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415 (2004), the Supreme Court explained that Section 2 "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."

[7] Plaintiff's papers make clear that plaintiff's concern about the .com Agreement is actually limited to the fact that the .com Registry Agreement is a step toward the possible implementation of VeriSign's CLS. This is in stark contrast to plaintiff's proposed order, which is incredibly overbroad and extends to *all* aspects of the .com Agreement. Thus, if the Court were inclined to grant any TRO, the Court should require the order to be narrowly tailored to address the CLS only.

further from the truth. The current system of acquiring a newly-deleted domain name leaves a great deal to chance. (*Id.*, 6:5-10.) A potential registrant generally must pay a registrar or a back order service provider to try to obtain the requested domain name when it is deleted and becomes available, even before the registrar or back order service provider is awarded that domain name. The registrars and back order service providers compete with many others to obtain the requested domain name, decreasing the likelihood that the potential registrant will obtain a desired domain name unless (s)he pays every registrar who offers this chance to "get in line." By contrast, the CLS proposed by VeriSign would permit a simpler and far more equitable and streamlined approach to dealing with newly-deleted .com domain names.

The antitrust laws are designed to "protect competition, not competitors." *U.S. v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1989). The only members of the "public" who might be injured are plaintiff's members (although plaintiff does not provide enough information about its membership to know even this). The back order services of plaintiff's "members" involve selling an opportunity for a potential registrant to get in line, along with however many others to whom other registrars have sold the same opportunity to get in line for the very same domain name. This system, which permits multiple members of the "coalition" to sell some remote chance of obtaining a deleted domain name, may well be beneficial for the coalition members who receive money from consumers, but it is hard to see how consumers benefit. The fact that VeriSign's new system may cause fewer consumers to pay money to the members of the coalition does not mean that the new system is bad for consumers.

The introduction of the CLS will not compel the elimination of the current services offered by plaintiffs, and they are free to continue to seek to sell those non-guaranteed chances to anyone who will buy them. What plaintiff fears is that consumers will recognize that those products will become relatively less attractive to the new CLS product, and that consumers will instead prefer a CLS subscription. But the fact that consumers may find the CLS -- with its guarantee of access if and when the desired name becomes available -- to be more attractive than current services is obviously a pro-competitive, not an anticompetitive, result.

Plaintiff's position is strikingly similar to that of the defendants in *Regents of the Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 512 (9th Cir. 1984). In that case, the defendants argued unsuccessfully that a contract's exclusivity provision should be enforced to prevent competition in the broadcast of college football games. In weighing the public interest, the Ninth Circuit, citing the Supreme Court's decision in *NCAA v. Regents*, 468 U.S. 85, 104 (1984), found that "the public interest is served by preserving the competitive influence of consumer preference in the college broadcast market." The defendants should not be permitted, the Court held, to "unilaterally determine that the public would not have the choice of viewing an admittedly popular college football game." *See Regents*, 747 F.2d at 521.

As in *Regents*, the public interest here clearly weighs against, not for, the injunctive relief requested. The introduction of the CLS will give consumers a new alternative that will dramatically simplify the system of acquiring deleted domain names, offering an option that is in the aggregate less expensive, more understandable and more certain.

Dated: November 29, 2005

Respectfully submitted,

JONES DAY

By: 
Jeffrey A. LeVee

Counsel for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

PROOF OF SERVICE

I, Lynne E. Trotti, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On November 29, 2005, I caused to be served a copy of the within document(s):

ICANN'S OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a agent for delivery.

☒ by electronically delivering the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Jesse W. Markham, Jr.
William L. Stern
Jennifer Lee Taylor
Keith L. Butler
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Phone: (415) 268-7000
Fax: (415) 268-7522
Email: JMarkham@mofo.com
WStern@mofo.com
JLeeTaylor@mofo.com
KButler@mofo.com

Laurence J. Hutt
ARNOLD & PORTER
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5855
Phone: (213) 243-4000
Fax: (213) 243-4199
Email: Laurence.Hutt@aporter.com

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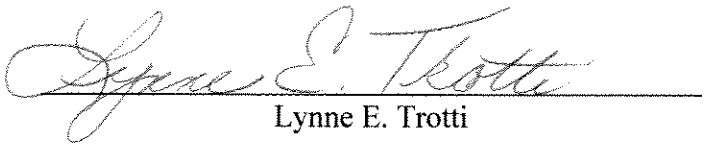
I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 29, 2005, at Los Angeles, California.



Lynne E. Trotti