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11 **UNITED STATES DISTRICT COURT**

12 **CENTRAL DISTRICT OF CALIFORNIA**

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DOTSTER, INC., a Washington corporation, GO DADDY SOFTWARE, INC., an Arizona corporation, and eNOM, INCORPORATED, a Nevada corporation, Plaintiffs, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation, Defendant.	Case No. CV03-5045 JFW (MANx) **PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: October 6, 2003 Time: 1:30 p.m. Ctrm: 16 Judge: Hon. John F. Walter (Oral Argument Requested)

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24 Plaintiffs respectfully submit this Reply to Defendant's Opposition to Plaintiffs'
25 Motion for Preliminary Injunction.

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INTRODUCTION

Defendant's Opposition mistakenly focuses on the *likelihood of success on the merits* element of the legal standard for granting of a preliminary injunction. Defendant asserts that Section 4.1 of the Registrar Accreditation Agreements between each of the Plaintiffs and Defendant ("Agreements"), when read in isolation, requires an interpretation that Defendant must only adhere to the consensus procedures enumerated in Section 4.3 of the Agreements (the "Consensus Procedures") when Defendant implements a policy that obligates Registrars to actively engage in certain conduct. Otherwise, Defendant claims that it may implement any policy, including those policies specifically identified in Section 4.2, without any requirement of obtaining Registrar consensus, regardless of how egregious or devastating the proposed policy may be to those Registrars. The plain language of Section 4.1, however, does not provide such unilateral and arbitrary rights to Defendant. When the Agreements are read as a whole, it is apparent that Section 4.1 merely creates an obligation on the part of Registrars to implement any adopted policy that has satisfied the Consensus Procedures within a reasonable time. Moreover, if there are any ambiguities in these Agreements, those ambiguities are to be construed in a manner most favorable to Plaintiffs.

Defendant suggests that it will be harmed through "institutional paralysis" if it is required to comply with the Agreements and obtain consensus. In fact, Defendant will suffer no harm cognizable by this Court in the context of this Motion. These Agreements give the Registrars certain rights and one of these rights is the right to have the Consensus Procedures applied to ICANN's approval of the WLS. There is no "institutional paralysis," there is a contractually guaranteed opportunity for the Plaintiffs to have a voice on ICANN's approval of this policy. And as to the Plaintiffs' harm, Defendant cannot refute repeated Ninth Circuit opinions recognizing harm to business goodwill, reputation, market share, and product lines as irreparable harm worthy of protection through the issuance of a protective order.

The final argument advanced by Defendant in its Opposition is that somehow the public interest will be benefited by the establishment of WLS, a monopoly. Not only have the federal courts repeatedly rejected this contention, but the U.S. Department of Commerce ("Commerce"), in establishing the current, tiered structure for the Internet, expressly stated that competition amongst the Registrars, not isolation within a single entity, was the most appropriate means for dealing with the registration of domain names. It should be noted that the proposed entity who would run the WLS monopoly, VeriSign, was just recently forced to agree to a stipulated permanent injunction with the Federal Trade Commission ("FTC") for engaging in deceptive trade practices and unlawful efforts to eliminate competitors.[1] The WLS policy benefits VeriSign, not the public.

LEGAL ARGUMENT

I. The Defendant Misinterprets its Obligations Under the Agreements

A. Section 4 Requires Adherence to the Consensus Procedures

In addressing contractual disputes, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code § 1641. The technical words of a contract are to be interpreted as usually understood by persons in the business to which they relate. *See* Civ. Code § 1645. If terms of a writing are in any way ambiguous or uncertain, the writing must be interpreted in the sense in which the promisor (*i.e.*, the Defendant) believed at the time of making it that the promisee (*i.e.*, Plaintiffs) understood it. *See* Civ. Code § 1649. If the parties have different reasonable constructions as to the meaning of a particular provision, the construction which will

[1] On September 11, 2003, the FTC forced VeriSign's wholly owned subsidiary, Network Solutions, Inc. ("Network Solutions"), to enter into a permanent injunction prohibiting further deceptive and unfair business practices after Network Solutions sent out "domain name expiration notices" to competitors' customers. *Federal Trade Commission v. Network Solutions, Inc.*, Civ. No. 03-1907 (D.C. filed Sept. 11, 2003). In that case, Network Solutions warned domain name holders that they could lose control of domain names like "www.example.com" if they did not promptly send $29 to Network Solutions. According to the FTC, the forms were intended to trick domain owners into unwittingly transferring their accounts to Network Solutions.

be most favorable to the party in whose favor the provision(s) were made prevails. *See* Code of Civ. Pro. § 1864; *Fricke v. Brader*, 55 Cal.App.2d 266, 269-70 (1942). Here, the Consensus Procedures provision was made in favor of Plaintiffs to grant Plaintiffs various rights to participate in shaping certain policy and specifications, including the WLS policy.

The provisions of Section 4 are laid out in a logical order: Section 4.1 requires Registrars to comply with specifications or policies; Section 4.2 provides the list of new and revised specifications and policies that be may established; Section 4.3 provides the manner in which the new and revised specifications and policies must be established, should such specification or policy be established; and Section 4.4 sets forth the timeframe in which Registrars must comply with new and revised specifications and policies.

Specifically, Section 4.1 requires that Registrars adhere to specifications and policies established by Defendant as Consensus Policies in accordance with Section 4.3 where the specification or policy concerns one or more topics described in Section 4.2. *See* Agreements at § 4.1. In other words, Section 4.1 merely identifies Registrars' obligations to comply with properly established specifications or policies.

Section 4.2 indicates that specifications and policies "may" be established on the following topics. That is, such specifications and policies may or may not be established, but if a specification or policy is established relating to the subjects set forth in Subsections 4.2.1 to 4.2.9, such specification or policy must be established in accordance with Section 4.3. *See* Agreements at §§ 4.1, 4.2; Bennett Decl. at ¶¶ 31-34. Here, Defendant sought to establish a consensus policy relating to the allocation of domain names and with respect to registry services. *See* Bennett Decl. at ¶¶ 6-17.

To the extent any ambiguities exist regarding whether those policies and specifications specifically identified in Section 4.2 are subject to the Consensus Procedures of Section 4.3, those ambiguities are to be construed against Defendant. *See* Civil Code § 1654; Opposition at 21:13-15. Furthermore, even if Defendant's

interpretation of the Agreements is reasonable (which it is not),[2] California Code of Civil Procedure § 1864 requires that because the Agreements generally, and the Consensus Policies provisions specifically, are drafted in Plaintiffs favor, the Agreements are to be construed in a manner most favorable to Plaintiffs. Accordingly, Plaintiffs have more than a substantial likelihood of success on the merits.

However we are not here asking the Court to decide the merits of the contract dispute, rather we are asking to maintain the status quo until the Court rules on the Agreements. The potential need for a consideration of extrinsic evidence to interpret the Agreements supports the issuance of a preliminary injunction in order to maintain the status quo until the serious questions regarding the interpretation of the Agreements, specifically whether Defendant was required to adhere to the Consensus Procedures before recommending the WLS, can be addressed at trial.[3]

B. <u>The Defendant Ignores Its Obligations Under Section 2.3</u>

In its Opposition, Defendant claims that Section 2.3 of the Agreement is limited to Defendant having to maintain adequate appeal procedures. *See* Opposition at 16:5-21. A plain reading of Section 2.3, however, directly contradicts Defendant's contention. Defendant intentionally ignores Subsection 2.3.2, which expressly

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[2] Indeed, Defendant's interpretation of the Agreements is not only unreasonable, it is unconscionable. There is no dispute that the Agreements are adhesion contracts; indeed, Defendant's opposition papers admit as much. *See* Opposition 21:13-15 (admitting that Defendant not only was the drafter of the Agreements, but "compel[led] each register to sign as a condition of receiving accreditation"). Defendant's interpretation would require the Court to find an unjustified one-sided result strictly in Defendant's favor whereby Defendant could, at its whim, impose any policy that, regardless of the devastating impacts that policy may have, Registrars would have no participation in whatsoever. As in *Armendariz*, the unconscionable one-sidedness of Defendant's interpretation is compounded by the fact that the Agreements do not permit the full recovery of damages by Registrars. *See Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal.4th 83, 118 (2000); *see also* Agreements at § 5.7. As such, Defendant's interpretation of the Agreements should not be endorsed by this Court. *See* Civ. Code § 1670.5.

[3] The California courts have recognized that where the meaning of words used in a contract are disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. *See Pacific Gas & Electric Co. v. G.W. Thomas Drayage*, 69 Cal.2d 33, 39-40 (1968). "Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible." *Id.* at 40, n.8.

requires Defendant to "not unreasonably restrain competition and, to the extent feasible, promote and encourage robust competition." The adoption of WLS directly contravenes Defendant's obligation to not unreasonably restrain competition and to promote robust competition. Bennett Decl. at ¶¶ 7, 21, 24. Indeed, Defendant's counsel specifically recognized that the WLS will result in displacement of existing registrar-level competition. Bennett Decl. at ¶ 24, Ex. 1. By adopting WLS, Defendant has eliminated all existing competition in the expiring domain name market and replaced it with a sole-source, monopolistic, and deceptive entity in exclusive control of expiring domain names. *See* footnotes 1, 5, herein; Bennett Decl. at ¶ 44, Ex. 13.

II. A Balancing of the Hardships Overwhelmingly Tip in Plaintiffs' Favor

A. Loss of Goodwill and Damage to Reputation Constitute Irreparable Injury

Defendant relies on *L.A. Memorial Coliseum Comm. v. National Football League*, 634 F.2d 1197 (9th Cir. 1980), for support of its contention that the irreparable harm to Plaintiffs' goodwill and reputations are nothing more than "monetary injuries which could be remedied by a damage award." Opposition at 18:9-14. Defendant's reliance on *L.A. Memorial Coliseum* is surprising because *L.A. Memorial Coliseum* supports Plaintiffs' position: in *L.A. Memorial Coliseum*, the Ninth Circuit held that the plaintiffs were not entitled to injunctive relief because the "Coliseum's lost revenues would be compensable by a damage award should the Commission ultimately prevail on the merits." *See* 634 F.2d. at 1202. In contrast, the Agreements cap the damages that Plaintiffs could receive if they were to seek monetary damages to the amount each Registrar paid Defendant in order to receive accreditation. *See* Agreements at § 5.7. Unlike in *L.A. Memorial Coliseum*, Plaintiffs damages would *not* be compensable by a damage award. *See* Bennett Decl. at ¶¶ 22, 23, 25-30.

Moreover, Defendant relies on *L.A. Memorial Coliseum* to support its assertion

that damage to Plaintiffs' goodwill and reputations is a "recasting" of Plaintiffs' monetary claims. *See* Opposition at 18:9-13. In *L.A. Memorial Coliseum*, the L.A. Coliseum asserted that its loss of goodwill and diminution of the market value of its property would leave the L.A. Coliseum unable to "enter into a lease agreement, begin stadium renovations, obtain financing," or respond to a demand for a refund. "All of these are but monetary injuries which could be remedied by a damage award." *See id.* at 1202. In contrast, Plaintiffs have not claimed that damage to their reputations and goodwill result in calculable monetary injuries, and Defendants have not offered evidence that such damages can be remedied by a damage award. Bennett Decl. at ¶¶ 25-30.

Defendant claims that the cases relied upon by Plaintiffs are easily distinguished because Defendant claims the Plaintiffs seek to restrict Defendant from introducing competition, whereas all of the cases cited by Plaintiffs sought to preserve competition. *See* Opposition at 18:15-24. Defendant claims that in *Glider v. PGA Tour, Inc.*, 936 F.2d 417 (9th Cir. 1991), where plaintiffs sought to enjoin defendant from barring its product, Plaintiffs are seeking to *stop* Defendant from introducing a new product, WLS.[4] *See id.* Defendant argues that court in *Gilder* granted the injunction because the relief sought by plaintiffs was pro-competition, but Plaintiffs are not entitled to an injunction because an injunction would be anticompetitive.

Defendant's Orwellian argument that Defendant supports competition, but Plaintiffs oppose competition, is contradicted by its earlier acknowledgement that the WLS policy is anticompetitive. "Because the registry-level WLS would divert deleted names from being returned to the available pool, it would 'trump' all of the

[4] Defendant constructs a similar response for *Regents of the Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511 (9th Cir. 1984), cited by Plaintiffs. In *Regents*, an injunction was granted "to avoid restricting consumer choice." Defendant's comment regarding *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597 (9th Cir. 1991), are confusing. Defendant describes *Rent-A-Center* as involving an injunction to enforce a covenant not to compete, whereas Plaintiffs here seek an injunction that would, in essence, create a covenant not to compete. Opposition 19:25-28. Aside from the obvious, that Plaintiffs seek an injunction to enforce a contract provision, as did the plaintiffs in *Rent-A-Center*, it is the Defendant, not Plaintiffs, that seek to stop competition.

competitive registrar-level services." *See* Bennett Decl. at Ex. 1. One is surprised that Defendant did not take a more consistent position by claiming that it was necessary to destroy competition (among Registrars) to save the anti-competitive, sole-source WLS service offered by VeriSign.

B. Defendant's Alleged Harm Results from Interpretation of the Agreements, Not Issuance of Preliminary Injunction, and Is Immaterial

Defendant argues that Plaintiffs' interpretation of the Agreements will produce "institutional paralysis." However, Defendant provides no explanation of how the Court's issuance of a preliminary injunction would cause such paralysis.[5] If Defendant is not harmed by the issuance of the preliminary injunction, then it has no material harm that should be considered for purposes of granting the preliminary injunction.

III. Public Interest Is Served by Preventing the Establishment of a Monopoly

To the extent the district court considers the public interest in issuing a preliminary injunction, the court is limited to evaluating how such interest is affected by the selection of an injunction over other enforcement mechanisms. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 498 (2001). In this case, Defendant has failed to identify how there will be any difference between the issuance of a preliminary injunction now to maintain the status quo and a court order after trial requiring Defendant, pursuant to the express terms of the Agreements, to specifically perform its obligations to follow the Consensus Procedures before adopting the WLS policy. In the context of the Internet, to permit the public to have temporary access to the program only to subsequently order the program to be withdrawn because of

[5] Any paralysis would be self-imposed, as Defendant is solely responsible for drafting the Agreements to provide Plaintiffs' such rights. *See Halzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*, 564 F.2d 816, 819 (8th Cir. 1977) (recognizing that any inconsistency in obligations by defendant resulted from defendant's own voluntary execution of contracts with conflicting obligations). As Defendant admits in its opposition, Defendant drafted the Agreements and there was no negotiation with any Registrar signing such Agreements, thus, any ambiguities in the Agreements are construed most strongly against Defendant. *See* Opposition 21:13-15; Civ. Code § 1654. In other words, Defendant has no one to blame but itself in the event this Court interprets the Agreements so as to require adherence to the Consensus Procedures for any policy or specification specifically identified under Section 4.2.

Defendant's failure to adhere to its own contractual obligations would have substantially greater adverse impacts, primarily confusion and conflicting contractual obligations, on the public than if the Court was to issue a preliminary injunction at this stage to maintain the status quo until the resolution of the parties' dispute at trial.

The Defendant cannot explain how there would be any adverse impact on the public's interest by preventing the implementation of a program that has not yet launched. In other words, issuing a preliminary injunction does not impose any harm on the public, it merely preserves the domain name market at it currently exists today until the Court can address whether Defendant's refusal to adhere to the Consensus Procedures renders its adoption of the WLS policy invalid. The cases cited by Defendant in its Opposition further support the issuance of a preliminary injunction in order to protect the public's interest. In *Regents of the Univ. of Cal. v. American Broad. Cos.*, 747.F.2d 511, 512 (9th Cir. 1984), the defendants unsuccessfully attempted to enforce an exclusivity clause, whereas, in this case, Plaintiffs seek to prevent the exclusive domination of the domain registration market by VeriSign. Similarly, in *NCAA v. Regents*, 468 U.S. 85, 104 (1984), the Supreme Court held that "the public interest is served by preserving the competitive influence of consumer preference." This is precisely what Plaintiffs seek by way of their preliminary injunction – to preserve the competitive market influenced by consumer preference rather than to permit a single entity to dictate to the public a single choice in the registration of expiring domain names. Bennett Decl. at ¶¶ 7, 26.

The Defendant assures the Court that WLS would permit only one request per domain name, and spare the potential registrant "the fee arrangement between the registrars and end users, [charging] only a flat fee between VeriSign and the registrar listing requests on the WLS." Preliminary Opposition at 12:16-18. Defendant resorts to the argument made by all monopolists: the monopoly, WLS, by eliminating wasteful competition and market inefficiencies, will result in lower costs and better service to consumers. That is why John D. Rockefeller told us we only needed one oil

company. Moreover, Defendant ignores the fact that this service will be exclusively offered by an entity that has recently been permanently enjoined from other deceptive business practices and unlawful efforts to stifle competition.[6] When the Defendant has eliminated any meaningful role for Plaintiffs and other Registrars in securing expired domain names for customers, the public will pay the costs ultimately imposed by all monopolies.[7]

Moreover, Commerce, the agency charged by law with overseeing the administration of domain names, selected competition among the Registrars as its preferred method of awarding domain names to customers instead of housing such activity in a single entity such as VeriSign.[8] Commerce even presciently preferred competitive registries, as opposed to the monopoly granted by Defendant to VeriSign, finding that "the pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically."[9] As such, preserving the current domain name registration methods through the issuance of a preliminary injunction will not adversely impact the public.

IV. The Defendant Has Yet to Identify Any Tangible Harm Requiring a Bond

How an order requiring Defendant to temporarily continue operating in accordance with its contractual obligations – contractual obligations that it drafted – can result in damages to Defendant in excess of $25 million is unfathomable. Despite making such an exorbitant, unsupported, claim, Defendant has yet to identify any tangible harm that could possibly occur in the event the Court grants Plaintiffs'

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[6] VeriSign is also being sued for anticompetitive and monopolistic behaviors in other markets. *See Popular Enterprises, LLC v. VeriSign, Inc.*, No. 6:03-CV-1352-ORL-18JGG (M.D.Fla. Sept. 18, 2003).

[7] "While it is true that resources are most efficiently utilized and that consumers benefit when the monopolist prices at marginal cost, such beneficence cannot be expected to continue. Once the competitive threat has been extinguished, the monopolist will return to higher prices and profits. When that happens, society will suffer a greater welfare loss." *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F.Supp. 965, 993 (N.D.Cal. 1979).

[8] "Where possible, market mechanism that support competition and consumer choice should drive the management of the Internet because they will have lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction." Department of Commerce, National Telecommunications and Information Administration, *Management of Internet Names and Addresses; Statement of Policy*, 63 Fed.Reg. 31741, 31749 (June 10, 1998).

[9] *Id.* at 31746.

motion for preliminary injunction.

The only harm identified in Defendant's most recent papers[10] is the possibility of "institutional paralysis."[11] However, Defendant does not claim that the *cause* of the paralysis will be the issuance of the protective order. Instead, Defendant acknowledges that the *cause* of such paralysis, if any, would be the interpretation of the Agreements in a manner requiring Defendant to abide by the Consensus Procedures that it drafted. Such a determination, however, will not occur when this Court issues the preliminary injunction, but only after a resolution of this dispute at trial. Therefore, Defendant's claimed injury is not only speculative, but is a risk Defendant assumed when it drafted the Agreements. Thus, since Defendant cannot identify any tangible harm, the Court should exercise its discretion and waive the bond requirement. *See Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003).

IV. CONCLUSION

In light of the foregoing, Plaintiffs respectfully request that the Court issue a preliminary injunction in order to preserve the status quo while the issues in this matter proceed to trial.

DATED this 22nd day of September, 2003. PRESTON GATES & ELLIS LLP

By Aaron M McKown
J.W. Ring
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Attorneys for Plaintiffs

[10] The absence of any real harm to Defendant is evident by the fact that Defendant itself cannot seem to agree on any one harm. Originally, other than claiming harm to VeriSign, not itself, Defendant only vaguely identified possible interference with other contractual obligations and possible request load issues. In light of the federal courts' recognition that such harm is a risk assumed by Defendant in entering agreements with conflicting obligations and the fact that load issues were long ago addressed (Bennett Decl. at ¶ 45), Defendant now claims that it will suffer "institutional paralysis." The reality is that Defendant cannot identify any actual harm that it will suffer in the event the Court issues a preliminary injunction and thus, it picks a new theory of harm each time it presents papers to the Court.

[11] Defendant appears to currently be suffering from some form of paralysis or perhaps incompetence. According to recent statements by Mary Hewitt, a spokeswoman for Defendant, Defendant knew about a plan of VeriSign's to hijack domain names, but had not given final approval and did not know it was being activated. *See* Bennett Decl. at ¶ 45, Ex. 13.

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PROOF OF SERVICE BY PERSONAL DELIVERY

I, _________________________, declare as follows:

I am a citizen of the United States and a resident of the County of Orange; I am over the age of 18 years and am not a party to the within action or proceedings. My business address is Worldwide Attorney Services, Inc., 1001 North Ross Street, Santa Ana, California 92701.

On September 22, 2003, I served a true copy of the following document(s) described as: **PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** on the interested parties in this action by personally delivering a copy to:

Jeffrey A. LeVee
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I hereby declare under penalty of perjury that the foregoing is true and correct. Executed on September 22, 2003 at Irvine, California.

____
(Print Name)

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WORLDWIDE ATTORNEY SERVICES, INC.