J. W. Ring (Oregon State Bar #85430)
PRESTON GATES & ELLIS LLP
222 SW Columbia Street
Suite 1400
Portland, OR 97201-6632
Telephone: (503) 228-3200
Facsimile: (503) 248-9085

Kathleen O. Peterson (SBN 124791)
Aaron M. McKown (SBN 208781)
PRESTON GATES & ELLIS LLP
1900 Main Street, Suite 600
Irvine, CA 92614
Telephone: (949) 253-0900
Facsimile: (949) 253-0902

Attorneys for Plaintiffs DOTSTER, INC, GO DADDY SOFTWARE, INC., and eNOM, INCORPORATED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: October 6, 2003
Time: 1:30 p.m.
Ctrm: 16
Judge: Hon. John F. Walter

(Oral Argument Requested)

Pursuant to Fed. R. Civ. P. 65, Plaintiffs Dotster, Inc., Go Daddy Software, Inc., and eNom, Incorporated respectfully submit this Memorandum of Points and Authorities in Support of their Motion for Preliminary Injunction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

I. INTRODUCTION

The entire domain name registration industry is on the verge of upheaval and indeed, is already reeling from the repercussions of Defendant Internet Corporation for Assigned Names and Numbers' ("ICANN" or "Defendant") refusal to adhere to its contractual obligations with Plaintiffs and other similarly situated domain name registrars ("Registrars"). Specifically, Defendant has ignored its contractual obligation to obtain a consensus among Internet stakeholders, including the approximately 160 domain name Registrars who have entered into identical Registrar Accreditation Agreements (the "Agreements") with Defendant, before the establishment of any policy affecting the allocation of registered domain names, in this case the implementation of the "Wait Listing Service" ("WLS"). Defendant's refusal to adhere to the mandatory consensus provisions in the Agreements, and indeed its intentional defiance of these provisions has caused and will continue to cause irreparable harm to Plaintiffs and the entire domain name registration industry.

The consensus requirement in the Agreements is the sole device by which the playing field between the parties is leveled and, as is becoming evident, may be all that stands in the way of a Defendant-created monopoly. Defendant, realizing that it could not obtain a consensus from the Internet stakeholders on the WLS policy, decided to ignore them, to breach the terms of the Agreements, and to proceed at its whim with the implementation of the WLS policy. Defendant is doing so despite the fact that an independent Task Force provided a recommendation *against* the WLS system and the Internet stakeholders voiced near-universal opposition to the WLS system. That conduct is in blatant breach of the Agreements, Agreements that specifically contemplate the very motion Plaintiffs now seek from this Court in order to maintain the status quo until serious questions regarding Defendant's conduct can be adjudicated.

Defendant suggests the "proposed" WLS policy is still in its infancy and that various contingencies must first transpire before implementation may occur. This

sham is being carefully maintained by Defendant for the specific purpose of avoiding an injunction.[1] The Defendant knows that we are nearing the stage where we are only a mouse click or two away from actual implementation of WLS. One need only look to the website and public statements of the entity in charge of administering the new WLS system, VeriSign, Inc. ("VeriSign"), to read that the WLS system *will* be launched on October 27, 2003. In preparation for the launch date, VeriSign has already announced and made available the software code and guidebook required for implementation; its wholly owned subsidiary, Network Solutions, Inc. ("Network Solutions"), is currently accepting pre-orders from customers; and VeriSign will begin operational testing on September 24, 2003. The alleged contingencies that the Defendant claims must occur prior to implementation are mere formalities.

Moreover, the speed by which these "contingencies" will occur makes it impossible for Plaintiffs to obtain adequate relief other than through this request for preliminary injunction. Therefore, it is imperative that the Court issue a preliminary injunction to maintain the status quo so as to prevent irreparable and permanent harm to Plaintiffs while this matter proceeds to trial.

II. STATEMENT OF FACTS

The subject of this action is Internet names and addresses, referred to as domain names, for which the registration has expired. Domain names function for the Internet like telephone numbers function for the telephone system (e.g., cacd.uscourts.gov). Plaintiffs are competitors and leading participants in this secondary market for re-registration of expired domain names on behalf of their customers. Defendant proposes to destroy this competitive secondary market by approving a new, sole-source for re-registration of expired domain names through its establishment of the

[1] In an effort to preempt this motion, Defendant's published a letter on September 4, 2003 to VeriSign reiterating their claim that several contingencies must still occur before the implementation of the WLS. This letter, however, is nothing more than a sham by Defendant to manufacture "evidence" in support of its opposition to this motion, a motion Defendant has anticipated for more than a month. Indeed, the obviousness of Defendant's efforts is demonstrated by the fact that this is the first time that Defendant has ever published any communication between it and VeriSign regarding their negotiations for the WLS.

WLS policy.

A. Plaintiffs

Go Daddy Software, Inc. ("Go Daddy") is the fastest growing domain Registrar. *See* Parsons Decl. at ¶ 1.[2] Dotster, Inc. ("Dotster") is an industry pioneer through its development of cutting edge technology and processes to register expiring domain names when the names are not renewed and are deleted from the Registry. *See* Second Page Decl. at ¶ 1.[3] eNom, Incorporated ("eNom") is one of the largest domain name Registrars in the world, managing more than 2.3 million domain names. *See* Stahura Decl. at ¶ 2.[4] One of eNom's primary services is the registration of expiring domain names when names are not renewed and are deleted from the Registry. *See id.* at ¶ 3.

B. Background

The Department of Commerce ("Commerce") charged Defendant with overseeing the assignment of domain names through a multilevel system. *See* Page Decl. at ¶ 2,[5] Ex. A. At the highest level, Defendant delegated to VeriSign the work of registering domain names for .com and .net domains. *See id.*, Exs. B and C. VeriSign is referred to as a "Registry Operator" or "Registry." *See id.* VeriSign itself is not permitted to accept requests for domain names from customers. *See id.*, Exs. B at C. However, VeriSign's wholly owned Registrar, Network Solutions, is permitted to accept requests for domain names. *See id.*, Ex. B at § 23.D.

Plaintiffs, referred to as "Registrars," are at the second level, and accept requests for domain names from customers and register domain names with VeriSign for the .com and .net domains. *See* Second Page Decl. at ¶ 1; Parsons Decl. at ¶ 1; Stahura Decl. at ¶ 1. As Registrars, Plaintiffs are accredited by Defendant, which requires each Registrar to enter into separate, identical Agreements with Defendant.

---

[2] Declaration of Robert R. Parsons in Support of Plaintiffs' Motion for Preliminary Injunction.
[3] Second Declaration of Clint Page In Support of Plaintiffs' Motion for Preliminary Injunction.
[4] Declaration of Paul Stahura in Support of Plaintiffs' Motion for Preliminary Injunction.
[5] Declaration of Clint Page in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

See Page Decl., Ex. D; Ruiz Decl.,[6] Ex. A; Garthwaite Decl.,[7] Ex. A.

Approximately fifty (50) motivated Registrars, including Plaintiffs, invested resources and developed technology to compete against one another in the secondary domain market. *See* Second Page Decl. at ¶ 1; Parsons Decl. at ¶ 1; Stahura Decl. at ¶¶ 1, 3. Plaintiffs' re-registration products provide services that fairly, cost effectively, and in a competitive manner distribute deleted names to people who wish to re-register those names. *See* Parsons Decl. at ¶¶ 4, 5; Stahura Decl. at ¶¶ 3, 11. The WLS proposal will destroy this efficient, cost-competitive re-registration system.

C. Wait Listing Service

At present, all domain names that are not renewed, and therefore have expired, are first deleted and then re-registered. *See* Page Decl. at ¶¶ 11-13; Page Second Decl. at ¶ 3; Parsons Decl. at ¶ 6; Stahura Decl. at ¶ 5. Registrars compete to re-register names that have been deleted. *See* Page Decl. at ¶¶ 14-16; Second Page Decl. at ¶ 1; Stahura Decl. at ¶ 3.

In late 2001, VeriSign proposed a new service, WLS, (*see* Page Decl. at ¶ 22) that fundamentally changes Defendant's principles for allocating registered domain names. Under the WLS policy, a person wishing to register a currently registered domain name would pay a fee to purchase a subscription for the chance to register the domain name should the existing domain registration expire within the subscription period. WLS will allow only one subscription to exist at a time for a domain name. *See id.* at ¶ 23.

A domain name with a WLS subscription will simply be transferred to the WLS subscription holder without ever deleting. *See* Second Page Decl. at ¶ 3; Parsons Decl. at ¶ 6; Stahura Decl. at ¶ 6. The fact that WLS is offered at the Registry level makes WLS a service that, by its technical nature, the Registrars, including Plaintiffs, cannot compete with, regardless of the quality, reliability, cost, or innovation of their

[6] Declaration of Tim Ruiz In Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.
[7] Declaration of Martin S. Garthwaite In Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

services because Plaintiffs' technology requires a domain name to be deleted before that name can be assigned to a third party. *See* Second Page Decl. at ¶ 6; Parsons Decl. at ¶ 6; Stahura Decl. at ¶¶ 6, 7.

Defendant, notwithstanding its contractual obligations and federal policy[8] to the contrary, will replace intense competition among Plaintiffs and other Registrars with a monopoly operated solely by VeriSign. *See* Second Page Decl. at ¶ 3; Parsons Decl. at ¶¶ 7, 8; Stahura Decl. at ¶¶ 3, 5. Plaintiffs will be devastated, and their reputations, a critical factor in the Internet industry, irreparably damaged. See Second Page Decl. at ¶¶ 4-6; Parsons Decl. at ¶ 9; Stahura Decl. at ¶¶ 12, 13.

D. Defendant Violated Its Contracts and Procedures

Defendant must not unreasonably restrain competition, and must promote and encourage robust competition. *See* Page Decl., Ex. A at §§ II.A., C.2; Agreements § 2.3.2. The Agreements also obligate Defendant to ensure that any new policies or specifications identified in the Agreements and imposed on Registrars are approved by a consensus of Internet stakeholders. *See* Agreements §§ 4.2, 4.3.

VeriSign formally requested that its contract with Defendant be modified to allow for implementation of the WLS policy on March 21, 2002. *See* Page Decl. at ¶ 25. Defendant's chief legal counsel, in a memorandum dated April 17, 2002, stated that "given the existing conceptual approach of ICANN to seek consensus where possible, it is my judgment that the Board should not seek to decide how to deal with this request without invoking the formal consensus development processes currently established within ICANN." Page Decl., Ex. E.

Defendant's Board of Directors ("Board"), responding to its counsel's prudent

---

[8] The Department of Commerce ("Commerce"), the agency charged by law with overseeing the administration of domain names, selected competition among Registrars as its preferred method of awarding domain names to customers instead of housing such activity in a single entity such as VeriSign. "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). Commerce 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." *Id.* at 31746.

guidance, decided that "it is plausible that legitimate interests of others could be harmed by the proposed amendments, so that more than a 'quick-look' analysis is appropriate and the formal consensus-development processes currently established within ICANN should be employed to determine whether the amendment should be approved." Stahura Decl. at ¶ 17; Ex. 4. It is this interpretation of the Agreements that the Plaintiffs ask the Court to uphold – affirming the Defendant's chief legal counsel and Board.

Pursuant to Section 4.3.1 of the Agreements, Defendant's Board directed a Task Force of the Domain Name Supporting Organization (the "Task Force")[9] to examine the WLS issues and to prepare a report and recommendations on whether WLS policy should be implemented. *See* Page Decl. at ¶ 27; Spigal Decl., Ex. 2.[10] The Task Force was comprised of Internet stakeholders interested in the WLS policy. The Task Force's report, issued on July 14, 2002, recommended against adoption of WLS on the grounds that a consensus of Internet stakeholders did not support the proposal. *See* Second Page Decl. at ¶ 9; Complaint, Ex. 2.

Despite the Task Force's recommendation, the Board subsequently adopted a resolution on August 23, 2002, instructing the Defendant's President and General Counsel to begin negotiations with VeriSign for the establishment of the WLS policy. *See* Complaint, Ex. 3. Upon the Board's decision to implement the WLS policy, Plaintiff Dotster continued its efforts to work within the Defendant-established review procedures that are part of its Agreement in an effort to implore the Board to abide by its consensus policy obligations and its own prior decision. Dotster submitted a request for review by the Defendant's Independent Review Panel, which was filed on September 9, 2002. *See* Complaint, Ex. 4. Unfortunately, but consistent with its determination to ignore its obligation to the Plaintiffs, Defendant did not, and has not, established the required Independent Review Panel to review Dotster's request. *See*

[9] The term "Task Force" and the term "Domain Name Supporting Organization" are used interchangeably throughout because the Task Force is part of the Domain Name Supporting Organization.

[10] Declaration of Harvard P. Spigal in Support of Plaintiffs' Motion for Preliminary Injunction.

Second Page Decl. at ¶ 10; Spigal Decl., Ex. 3.

In addition, Dotster also submitted a Reconsideration Request to again ask Defendant to reconsider its actions. *See* Complaint, Ex. 5. Defendant did not respond to Dotster's Reconsideration Request until May 20, 2003, more than eight months after Dotster's request. *See* Second Page Decl. at ¶ 11. When Defendant did respond, it decided to take no action at all. *See* Complaint, Ex. 6. Plaintiffs' consistent, multiple attempts to engage in a constructive discourse regarding their ongoing concerns related to the WLS approval process have been rejected repeatedly by Defendant despite its contractual obligations to the contrary. *See* Second Page Decl. at ¶¶ 10, 11; Stahura Decl. at ¶ 6.

E. Implementation of WLS Is Imminent

Defendant is undeterred in its commitment to ignore the harm to Plaintiffs and its obligation to encourage robust competition. As a result, implementation of the WLS is imminent. *See* Parsons Decl. at ¶¶ 10-16. While VeriSign and Defendant claim they must reach an agreement related to the WLS policy, it is unlikely that either party will announce the progress of their negotiations until an agreement has been reached in order to avoid the very relief Plaintiffs seek by way of this motion. *See id.* Although Commerce's consent will be required for WLS to be implemented, there is no process for Plaintiffs to participate in the negotiations between Commerce and Defendant. *See* Spigal Decl. at ¶3. Commerce will not even admit whether it has already given the required consent. *See id.*

VeriSign has made significant efforts to have WLS established prior to its actual approval. *See* Parsons Decl. at ¶¶ 10-16; Stahura Decl. at ¶ 23. On July 28, 2003, VeriSign posted on its website a guidebook entitled, *Wait Listing Service Program Product Guidebook*, and a software developers' kit became available for those Registrars wishing to implement WLS. *See* Parsons Decl. at ¶ 13; Stahura Decl. at ¶ 23. The VeriSign website also states that September 24, 2003, will signal the "OT&E Launch," which means that VeriSign, and Registrars that are adopting WLS,

will begin "operational testing and evaluation" of the Registrars' ability to connect with VeriSign's systems to allow WLS to work for customers. *See* Parsons Decl. at ¶ 13. Of greatest immediate concern, VeriSign's website indicates that the WLS service will launch on October 27, 2003. *See id.* at Ex. ¶ 14; Dunham Decl. at ¶ 13.[11]

Further evidence of WLS' imminency is that on August 27, 2003, Network Solutions announced that it was accepting pre-orders for WLS. *See* Parsons Decl. at ¶¶ 15, 16; Ex. 3. Since August 27, 2003, Network Solutions has been accepting pre-ordered subscriptions, cheerfully advising customers that with WLS "there's no competition or auction when the name deletes." Dunham Decl. at ¶ 5; Ex. 5.

III. LEGAL ARGUMENT

A. Legal Standard

All preliminary injunctions are provisional remedies, the purpose of which is to preserve the status quo and to prevent irreparable loss of rights prior to final disposition. *See Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). In the Ninth Circuit, a party seeking a preliminary injunction must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) that the balance of hardship tips in its favor and serious questions exist regarding the merits. *See Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990). The required degree of irreparable injury increases as the probability of success decreases, and vice versa. *See id.* The moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991).

The proponent of preliminary injunctive relief must demonstrate a threat of irreparable injury. *See Diamontiney*, 918 F.2d at 795. "Irreparability of injury pending trial turns on the nature of the loss and the ability of the court to make the plaintiff whole after the trial; it does not necessarily turn on the meritoriousness of the plaintiff's legal claim." *Napa Valley Publ. Co. v. City of Calistoga*, 225 F.Supp. 2d

[11] Declaration of Sharon K. Dunham in Support of Plaintiffs' Motion for Preliminary Injunction.

1176, 1181 (N.D. Cal. 2002).

For purposes of injunctive relief, "serious questions" refers to "questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). "Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits.'" *Id.*

The Plaintiffs have a contract case involving serious questions requiring preservation of the status quo. Moreover, with clear contract language and an ongoing contractual breach, not only is there a substantial likelihood of the Plaintiffs prevailing on the merits, but there also is a demonstrated imminent risk of irreparable injury to the Plaintiffs for which there are no adequate remedy at law. That risk of irreparable injury tips the "hardship balancing" clearly in Plaintiffs' favor, especially considering that the Defendant alleged no risk of injury to itself stemming from entry of a preliminary injunction.

B. Plaintiffs Have a Substantial Likelihood of Success on the Merits

1. Defendant Breached the Agreements by Ignoring The Task Force

It is a basic tenet of contract interpretation that "[t]he whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." California Civil Code § 1641. Moreover, "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." California Code of Civil Procedure § 1858. Applying these principles, it is evident that the WLS policy is the type of policy that would require consensus under Section 4.3.1.[12]

[12] Where ambiguities in a contract exist, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Cal. Civ. Code § 1654. In this case, Defendant is the sole drafter of the Agreements, which Registrars are required to accept in order to become accredited. Accordingly, any ambiguities in the Agreements should be construed against Defendant.

The Agreements contemplate a variety of specific topics for new and revised policies. The list enumerated in Section 4.2 is not exclusive. However, the policies enumerated in Section 4.2 were identified for a specific reason; these are the types of policies that can and will have a substantial and profound impact on the Registrars. Included among these topics is any policy regarding the "principles for allocation of Registered Names (e.g. first-come/first-served, timely renewal, holding period after expiration)." Agreement § 4.2.4.

Because of the impacts the types of policies identified in Section 4.2 can and will have on Registrars, the Agreements further dictate specific procedures for the adoption of any policy identified in Section 4.2. *See* Agreement § 4.3.[13] Specifically, the Agreements require "a consensus among Internet stakeholders represented in the ICANN process" through a three-step process:

(1) the Defendant Board must establish the specification or policy;

(2) there must be a recommendation that the policy be adopted by at least a two-thirds (2/3) vote of the council of the Defendant Supporting Organization to which the matter is delegated; and

(3) there must be a written report and supporting materials that address a number of specific issues. *See* Agreement § 4.3.1.

The WLS policy squarely falls within the definition of Section 4.2.4 in that it establishes new principles for the allocation of Registered Names. Accordingly, the establishment of the WLS policy by Defendant must adhere to the consensus requirements of Section 4.3.1. However, the Task Force recommended against the WLS because the majority of the Internet stakeholders voted against it. Defendant's refusal to accept the results of the consensus and its decision to continue pursuing the adoption and implementation of the WLS is a direct breach of the Agreements.[14]

---

[13] Indeed, the language of the headings is further support that those policy topics identified in § 4.2 are subject to the requirements including the consensus requirement, of § 4.3. *Compare* § 4.2 ("Topics for New and Revised Specification and Policies") *with* § 4.3 ("Manner of Establishment of New and Revised Specifications and Policies").

[14] Defendant is in further breach of the Agreement in that Defendant has never issued a written report and supporting materials that address a number of specific issues under § 4.3.1(c).

Defendant's conduct demonstrates that at one time it supported the view that the WLS policy requires adherence to the consensus requirement. Defendant's Board directed the Task Force to prepare a report and recommendation on WLS. *See* Page Decl. ¶ 9. That report, issued on July 14, 2002, recommended against the adoption of WLS on the grounds that a consensus of Internet stakeholders did not support the proposal. *See id.* In direct contravention of the Task Force recommendation, however, the Board adopted a resolution on August 23, 2002 instructing Defendant's President and General Counsel to begin negotiations with VeriSign for the establishment of WLS. *See id.* at ¶ 18. Having commenced the consensus process described in Section 4.3, and implicitly acknowledging that the WLS policy required consensus approval, ICANN cannot abandon the process mid-stream because it disagrees with the Task Force's recommendation.

It is this resolution coupled with Defendant's subsequent negotiations with VeriSign that constitute a continuing breach of the Agreements. As such, Plaintiffs are more than likely to succeed on the merits of their claim. In fact, the Agreements expressly contemplate that any party to the Agreements "may seek specific performance of any provision of this Agreement." Agreements § 5.1. This is precisely what Plaintiffs seek to do with this motion.

Plaintiffs anticipate that Defendant will claim that the consensus is only one method by which Defendant, at its sole discretion, may adopt any given policy. *See* Complaint, Ex. 6. However, such a contention ignores the express language of the Agreements. Specifically, Section 4.2 delineates a set of specific policies and specifications that may be established by Defendant. Section 4.3 provides the "Manner of Establishment of New and Revised Specifications and Policies." Nowhere in the Agreements does it state that the procedures established in Section 4.3 are optional or discretionary. Accordingly, Defendant's claim lacks merit.

2. Defendant's Establishment of the WLS Policy Violates Defendant's Obligations Under the Agreement

In addition to violating the consensus requirement for the adoption of a policy under Section 4.3, Defendant's adoption of the WLS policy also constitutes a breach of Sections 2.3 of the Agreements. These provisions obligate Defendant "[w]ith respect to *all* matters that impact the rights, obligations, or role of [Plaintiffs] . . . [to]:

> [1] exercise its responsibilities in an open and transparent manner;
> [2] not unreasonably restrain competition and, to the extent feasible, promote and encourage robust competition;
> [3] not apply standards, policies, procedures, or practices arbitrarily, unjustifiably, or inequitably and not single out [Plaintiffs] for disparate treatment unless justified by substantial and reasonable cause; and
> [4] ensure, through its reconsideration and independent review policies, adequate appeal procedures for [Plaintiffs], to the extent [they] are adversely affected by ICANN standards, policies, procedures or practices." Agreement §§ 2.3.1-2.3.4 (emphasis added).

In this case, Defendant's adoption of the WLS policy violates each and every one of the above-enumerated obligations.

(1) Negotiations with VeriSign Have Been Shrouded In Secrecy – Defendant has made a concerted effort to withhold the substance, nature, and extent of its negotiations with VeriSign in direct contravention to its obligation to "exercise its responsibilities in an open and transparent manner." Agreement § 2.3.1. After the Board authorized VeriSign and Defendant to negotiate the implementation of the WLS policy, both parties have refused to discuss the negotiations with Internet stakeholders, including Plaintiffs. *See* Parsons Decl. at ¶ 10.

(2) The WLS Policy Promotes Anti-Competitive Practices – The entire purpose of the WLS policy is to hoard re-registration services for domain names into a single entity, VeriSign, instead of spreading such services among the more than 160 competing Registrars. *See* Parsons Decl. at ¶ 3. In other words, the WLS preempts the competitive process that currently exists and allows only VeriSign to control when, and now if, domain names expire. *See* Parsons Decl. at ¶ 6.

(3) The Rejection of the Consensus Procedure Is Arbitrary, Unjustifiable, and an Inequitable Application of Standards, Policies, Procedures or Practices – The Agreement requires an independent review board to recommend by two-thirds vote

the adoption of any policy whose topic is covered under Section 4.2. *See* Agreement § 4.3.1. In recognition of this requirement, Defendant initiated the process by establishing the WLS policy and then submitting it to the Task Force. However, after the Task Force rejected the WLS policy, Defendant elected to ignore the Task Force's recommendation and instead proceeded with negotiations with VeriSign for the implementation of the policy, which is now scheduled to launch on October 27, 2003. *See* Second Page Decl. at ¶ 9. Defendant's conduct is arbitrary, unjustified, and inequitable and Defendant is in direct dereliction of its obligations.

(4) Defendant Violated the Independent Review Obligation – Despite Plaintiffs' request, Defendant has not established an Independent Review Panel as required by the Agreements. *See* Second Page Decl. ¶ 10; Agreements at § 4.3.2. Defendant should not benefit from its breach by now claiming that Plaintiffs are not entitled to injunctive relief on the grounds that the non-existent Independent Review Panel has not acted on Dotster's request.

C. The Balance of Hardships Substantially Weigh in Favor of Plaintiffs

1. Plaintiffs Will Suffer Irreparable Injury Without an Adequate Remedy if the Preliminary Injunction Is Denied

Implementation of the WLS policy would have an immediate, discernible but unquantifiable adverse impact on Plaintiffs' goodwill, reputation, earnings, and market share as well as their ability to maintain their existing customers. However, difficulty in quantifying injury does not make injury speculative. *See Gilder*, 936 F.2d at 423. In *Gilder*, the Ninth Circuit affirmed the issuance of a preliminary injunction where a golf club manufacturer and golf professionals sought to prohibit the PGA from implementing a rule banning the use of golf clubs with U-shaped grooves. *See id.* at 425. The Court recognized that the plaintiffs had demonstrated irreparable harm for which there was no adequate remedy at law because: (1) the golf professionals showed that they would be competitively disadvantaged if they were forced to change clubs; and (2) the club manufacturer showed that the PGA's ban of

U-groove clubs, one of plaintiff's primary business lines, would harm its reputation, which had become a leader in U-groove clubs. *See id.* at 423. The Court found that "[t]he difficulty in quantifying the injury ... does not make the injuries speculative" *Id.* at 423. "Additionally, where the threat of injury is imminent and the measure of that injury defies calculation, damages will not provide a remedy at law." *Id.*

Upon implementation of the WLS policy, Plaintiffs, like the plaintiffs in *Gilder*, will suffer a variety of difficult to quantify harms justifying the issuance of a preliminary injunction. Plaintiffs' goodwill and reputations will be irreparably harmed due to the loss of their well-established and highly regarded expiring domain business lines as well as the obsolescence of their developed technologies. *See* Second Page Decl. at ¶¶ 4-6. As a result, Plaintiffs would be required to try to develop entirely new technology, retool their business models and strategies, and abandon their well-established expiring domain name market. *Id.* Moreover, the years of experience gained, coupled with the tremendous marketing efforts and resources expended positioning themselves in the expiring domain market, will be immediately lost upon the implementation of the WLS. *See* Stahura Decl. at ¶ 14. Accordingly, Plaintiffs have been and will continue to be competitively disadvantaged by Defendant's adoption of the WLS policy. *See id.* at ¶¶ 10-14. This harm alone warrants the issuance of Plaintiffs' preliminary injunction. *See Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (holding that harm to advertising and goodwill qualify as irreparable injuries); *Regents of Univ. of Cal. v. American Broadcasting Cos.*, 747 F.2d 511, 519-20 (9th Cir. 1984) (recognizing that intangible injuries, such as dissipation of goodwill and reduction in the attractiveness of a product qualify as irreparable harm).

In addition to the harm to Plaintiffs' goodwill, reputations, and market share, Plaintiffs will also suffer substantial, yet unquantifiable financial harm as a result of the WLS policy. For example, Plaintiffs' customers will be less likely to seek out Plaintiffs' services because the WLS will provide customers with a means of

obtaining "first priority" to register an expiring domain before the expiring domain is ever deleted. *See* Stahura Decl. at ¶ 12. Plaintiffs' revenues will be further impacted, the duration of which is unknown, by the loss of business the Plaintiffs would have otherwise received from registering the domains of customers that secure the right to an expired domain through their respective expiring domain businesses. *See* Second Page Decl. at ¶ 6. Moreover, no adequate remedy exists to address these harms, as they would require quantifying damages over an indeterminate time frame.[15]

While Plaintiffs' revenues will decrease from customers using WLS, Plaintiffs anticipate that their business costs will substantially increase due to increased need for customer support. *See* Parsons Decl. at ¶ 9. Plaintiffs' customers are likely to increase their contacts with Plaintiffs because they are concerned about WLS implementation or are confused as to what impact a WLS subscription will have on their existing domain registration. *See id.* Since Plaintiffs' reputations are based on their responsiveness to customers, it is vital that Plaintiffs be able to meet their increased concerns. *See id.* at ¶¶ 3, 9. Unfortunately, with the reduced revenues due to the implementation of WLS, it is unlikely that the Plaintiffs will be able to afford the increased customer support staffing that will be required. *See id.* at ¶ 9. This will further harm Plaintiffs' reputation and make it more difficult for Plaintiffs to effectively market to and maintain customers. *See id.* Indeed, absent the Plaintiffs' expiring domain name businesses, it will be increasingly difficult for them to differentiate their services from their competitors. *See* Stahura Decl. at ¶ 13.

2. Irreparable Injury Is Not Contingent on Uncertain Events

In its opposition to Plaintiff's Motion for Temporary Restraining Order, Defendant identified alleged contingencies, which it claimed had to first occur before any harm could result to Plaintiffs. Each of these alleged contingencies are exaggerated. As VeriSign's public statements make crystal clear, the WLS program

[15] Additionally, the Agreements cap damages at the fees paid by the Registrars to Defendant. *See* Agreements § 5.7. These insignificant sums will not provide adequate relief for the monetary harm Plaintiffs will suffer.

will *launch* on October 27, 2003 absent an order from this Court.

(a) For All Intents and Purposes, WLS Is Already Implemented

Defendant asserts that VeriSign will be required to "undertake the significant technical and operational tasks of implementing WLS."[16] The assertion ignores the fact that VeriSign has already taken virtually every step necessary to establish and implement WLS so that all that will be required on the announced Launch date is nothing more than a flip of a switch. On July 28, 2003, VeriSign posted on its web site a guidebook and a software developers' kit for those Registrars wishing to implement WLS. As a result, all of the Registrars who wish to participate in the WLS will already have the necessary software developed and in place by the launch date. *See* Parsons Decl. at ¶ 13. In fact, Network Solutions "announced that it is now accepting pre-orders for its new Next Registration Rights service." *See* Parson Decl. at ¶ 15, Ex. 3.[17] In other words, VeriSign has already started accepting WLS subscriptions as of August 27, 2003. *See* Dunham Decl. at ¶¶ 1, 2.

VeriSign's substantial efforts to make sure that every element is in place for the October 27, 2003, launch date is not limited, however, to the necessary software development and pre-ordering by customers. In addition, VeriSign has publicly announced that on September 24, 2003, VeriSign will begin "operational testing and evaluation" of the Registrar's ability to connect with VeriSign's WLS systems in order to work out whatever "kinks" exist prior to the announced launch date. *See* Parson Decl. at ¶ 9. As such, the entire WLS system will be fully operational by the time the Court hears this motion. Accordingly, Defendant's claim that VeriSign would have some Herculean task in order to implement WLS is a sham.

(b) Defendant Has Already Tacitly Provided VeriSign With Approval

Defendant's conduct over the previous twelve months clearly indicates that Defendant has already tacitly approved VeriSign's implementation of the WLS

[16] Defendant's Preliminary Opposition to Plaintiffs' Temporary Restraining Order and Preliminary Injunction at 8.
[17] Next Registration Rights is Network Solutions' business name for its WLS service.

policy. As a preliminary matter, it is inconceivable that VeriSign would go through all of the efforts to have WLS in place and make numerous public announcements, both through itself and through Network Solutions, unless Defendant had provided VeriSign with a strong indication that it was going to grant approval. Moreover, Defendant's approval of VeriSign's WLS proposal is evident from Defendant's own pattern of conduct over the past year. For example, despite the overwhelming opposition to the WLS among Internet stakeholders and the subsequent rejection of WLS by the Task Force, Defendant's Board nonetheless instructed its President and General Counsel to continue negotiations with VeriSign to implement WLS. *See* Page Decl. at ¶ 28. Defendant would not provide such instructions in the face of such overwhelming opposition (and in breach of its Agreements) unless it had every intention of approving WLS.

Moreover, when Dotster exercised its contractual right by submitting to Defendant a Request for Reconsideration, Defendant decided to take no action. *See* Complaint, Ex. 6. The totality of Defendant's conduct clearly demonstrates that any formal announcement of its approval of the WLS is nothing more than a mere formality and that this claimed "contingency" will in no way prevent VeriSign from making good on its public announcement to launch the WLS on October 27, 2003.

(c) Department of Commerce Approval Is a Mere Formality

Defendant claims that harms cannot occur until WLS is approved by Commerce at some uncertain, future date. However, Commerce will not permit Plaintiffs to participate in the approval process, nor will Commerce give prior notice of its intent to approve the proposed WLS. *See* Spigal Decl. at ¶ 4. In fact, Commerce, in response to a telephone inquiry on September 6, 2003, refused to confirm or deny whether Commerce had approved an amendment regarding WLS. *See id.*

Defendant and Commerce have executed five amendments to the MOU. The last amendment to the MOU was "Approved September 17, 2002," signed by Defendant the following day, and signed by Commerce two days later, on September

20, 2002. *See* Page Decl., Ex. A. Commerce never published notice for comment regarding this amendment, or any of the four preceding amendments. *See* Spigal Decl. at ¶ 7. Given past experience, Commerce's approval of the WLS will be negotiated in secret between Defendant and Commerce (as the September 6, 2003 inquiry seems to suggest), and approved by Commerce within days after receipt, all without notice or warning to Plaintiffs. Defendant's argument that harm to Plaintiffs is not immediate, and the implicit argument that Plaintiffs will be able to seek injunctive relief at a later point, but before approval by Commerce, is misleading and contradicts the prior course of dealings between Commerce and Defendant.

3. Maintaining Status Quo Will Have Minimal Impact on Defendant

Contrasted to the severe irreparable harms to Plaintiffs, Defendant does not have, nor can it articulate, any credible, tangible harm that Defendant would suffer in the event the Court issues the requested preliminary injunction. Defendant used its opposition to Plaintiffs' Motion for Temporary Restraining Order to allege potential harm to a non-party, VeriSign. Defendant failed to articulate, however, any actual or potential harm to it.

Defendant can not allege harm to itself because the requested injunction merely seeks Defendant's adherence to its contractual obligations. To the extent that Defendant may claim that the injunctive relief sought by Plaintiffs conflicts with its commitments to VeriSign, the harm resulting from inconsistent contractual obligations is a risk the Defendant assumed and it should not be shifted onto the Plaintiffs. *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).

D. Serious Questions Regarding Defendant's Breaches Require the Issuance of a Preliminary Injunction to Maintain the Status Quo

For purposes of injunctive relief, "serious questions" refers to "questions which

cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). "Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits.'" *Id.*

In this case, there are serious questions concerning whether the WLS policy is a policy subject to the consensus requirement under the Agreements. Plaintiffs contend that contract principles support a reading of the Agreements that requires Defendant to obtain a consensus before further action on the WLS policy. Moreover, Defendant's own conduct in initially following the consensus procedures further supports a finding that a consensus was indeed required. Defendant's rejection of the consensus *against* the WLS policy and its subsequent negotiations with VeriSign for implementation of WLS constitute a breach of the Agreements that will continue to result in substantial and irreparable harm to Plaintiffs.

Defendant claims that the WLS policy is not the type of policy subject to the consensus procedures, and that only two such policies actually exist.[18] Moreover, Defendant claims that it has adhered to all of its obligations under the Agreements, which Plaintiffs dispute. Consequently, there are serious questions requiring further litigation. As discussed above, however, Plaintiffs have more than a "fair chance" of success on the merits. As in *Gilder*, the Court should issue a preliminary injunction in order to maintain the status quo until such questions are resolved at trial. *See Gilder*, 936 F.2d at 417, 424-25.

E. <u>The Plaintiffs Were Diligent In Pursuing Injunctive Relief</u>

1. <u>The Plaintiffs Did Not Unreasonably Delay</u>

Although the initial concept of the WLS policy may have been spawned almost

[18] Defendant's Preliminary Opposition to Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, and Expedited Discovery at 9-11.

two years ago, the identification of a policy does not trigger the clock for purposes of evaluating the issue of delay. The factual history leading up to the filing of this case demonstrates Plaintiffs' diligence.

The Agreements expressly provide specific procedures both for establishment of policies and for an appeals process. *See* Agreements §§ 2.3.4, 4.2, 4.3. The WLS policy was only a general proposal until Defendant's Board requested a comprehensive review and recommendation from the Domain Names Supporting Organization on April 22, 2002. *See* Spigal Decl., Ex. 2. Prior to this date, Plaintiffs had participated in the process by providing their initial opposition to both Defendant and VeriSign. *See* Second Page Decl. at ¶¶ 7, 8. In addition, Plaintiff Dotster voted against the WLS policy as part of the process. *See* Second Page Decl. ¶ 8.

On July 14, 2002, the Task Force issued recommendations against adoption of the WLS policy on the grounds that a consensus of Internet stakeholders did not support the policy. *See* Complaint, Ex. 2. Despite this recommendation, the Board adopted a resolution on August 23, 2002, instructing Defendant's President and General Counsel to begin negotiations with VeriSign for the WLS policy's implementation. *See* Complaint, Ex. 3; Page Decl. at ¶ 9. In response, little more than two weeks later on September 9, 2002, Dotster submitted a request for review by an Independent Review Panel pursuant to Section 4.3.2 of its Agreement. *See* Complaint, Ex. 4. On June 23, 2003, nearly ten months after Dotster's request, Defendant finally responded, rejecting Dotster's request. *See* Second Page Decl. at ¶ 4; Spigal Decl., Ex. 3.

Further, Plaintiff Dotster requested reconsideration of Defendant's decision on September 12, 2002. *See* Complaint, Ex. 5. It was not until May 20, 2003, more than eight months after receiving Dotster's request, that Defendant responded, issuing a Recommendation that the Board take no action. *See* Complaint, Ex. 6. As in *Gilder*, Plaintiffs' repeated efforts to resolve these issues through the procedures mutually agreed upon by the parties refutes Defendant's argument that Plaintiffs delayed in

seeking the relief now requested. *See Gilder,* 936 F.2d at 423.[19]

2. The Defendant's Claim that Plaintiffs Unreasonably Delayed Is Inconsistent with Its Claim That Plaintiffs' Request for Relief is Premature

Defendant's argument regarding Plaintiffs' alleged delay is inconsistent with its contention that injunctive relief is premature. In an effort to avoid being enjoined from their contract-breaching activities, the Defendant claims that a preliminary injunction is improper because the harm alleged has not ripened because too many contingencies exist before the harm would occur. Simultaneously, the Defendant claims that Plaintiffs delayed nearly two years and their failure to bring this action two years ago renders their claim stale. Plaintiffs' request for relief cannot be simultaneously premature and belated. Accordingly, Plaintiffs' requested relief is timely, proper, and appropriate.

F. VeriSign is Neither a Necessary Nor an Indispensable Party

1. VeriSign Is Not a Necessary Party Because Complete Relief Can Be Accorded Without Joinder of VeriSign

The determination of whether a potential party is a necessary party "is a practical one and fact specific, and is designed to avoid the harsh results of rigid application." *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558 (9th Cir.1990). The litigant asserting that an absent party is necessary must carry the burden of persuasion. *See id.* A necessary party is one that "in th[at] person's absence complete relief cannot be accorded among those already parties." Rule 19(a)(1). "In determining whether a party is 'necessary' under Rule 19(a), a court must consider whether 'complete relief' can be accorded among the existing parties, and whether the absent party has a 'legally protected interest' in the subject of the suit." *Shermoen v. U.S.,* 982 F.2d 1312, 1317 (9th Cir. 1992).

In this case, Plaintiffs seek declaratory relief, specific performance, and an

[19] Moreover, even if the Court finds that Plaintiffs' adherence to the resolution procedures agreed upon by the parties constitutes a delay, the Ninth Circuit has made clear that the courts "would be loath to withhold relief solely on that ground." *Gilder,* 936 F.2d at 423 (citations omitted).

injunction, all in regards to the specific terms within the Agreements between the parties. Specifically, Plaintiffs ask for (1) a declaration that Defendant has breached and is in continuing breach of the Agreements; (2) an order requiring Defendant to perform its obligations under the same Agreements, including its own internal procedures; and (3) injunctive relief against Defendant aimed at avoiding irreparable harm that will result from a further breach of the Agreements.

VeriSign is not a party to the Agreements, and it is not a necessary party to an action to determine rights and obligations under the Agreements.[20] Plaintiffs do not seek to enjoin VeriSign from taking any action or to obtain a declaration of any obligations owed by VeriSign. It is wholly within the Court's power to provide complete relief to Plaintiffs, rather than partial relief requiring the Court to find that it cannot dispose of the claims arising in this action without joinder of VeriSign. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983).

2. <u>VeriSign is Unnecessary, Having Failed to Assert a Claim of Interest</u>

VeriSign has direct knowledge of this action, and the relief sought, and despite that knowledge, has elected not to be a party. A party that fails to assert a claim of interest in a particular action despite having direct knowledge of that action is barred from constituting a necessary party.[21] Even if we assume that VeriSign has a "direct, pecuniary interest in the outcome of this case," that assumed fact is not the end of the inquiry. If VeriSign has a claim of interest, and has knowledge of the action, VeriSign itself, not the Defendant, *must* assert the claim of interest. As the Ninth Circuit made clear in *Bowen*, "[j]oinder is 'contingent . . . upon an initial requirement that the absent party *claim* a legally protected interest relating to the subject matter of the action.'" *U.S. v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (emphasis in original). In

---

[20] "A nonparty to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract. " *Northrop Corp. v. McDonnell Douglas Corp.* 705 F.2d 1030, 1044, (9th Cir. 1983).

[21] "The Ninth Circuit has held that parties who are aware of an action and choose not to join in it, need not be considered necessary parties because they have not *claimed* an interest in the litigation." *Blumberg v. Gates*, 204 F.R.D. 453, 455-56 (C.D. Cal. 2001) (citations omitted). Of course, the Turner Declaration shows that VeriSign posses far more than "arguably constructive" knowledge.

Bowen, the alleged indispensable party "was aware of th[e] action and chose not to claim an interest. That being so, the [Ninth Circuit held that the] district court did not err by holding that joinder was 'unnecessary.'" *Id.*

Aside from the knowledge that would have been gained by VeriSign through its contacts with the Defendant, an officer of VerSign has demonstrated detailed knowledge of the action, the relief sought, and the effect of such relief, if granted, on VeriSign. In opposition to Plaintiffs' request for a temporary restraining order, Defendant submitted the Declaration of Benjamin R. Turner. Mr. Turner is the Vice President of Naming Services, a division of VeriSign Naming and Directory Service, the business unit of VeriSign Inc. that operates VeriSign's .com/.net registries. *See* Turner Decl. at ¶ 1. Mr. Turner claimed under oath to have direct knowledge of the "history, development, and role of WLS," and the alleged harm to VeriSign, if injunctive relief is granted. *See id.* at ¶¶ 13, 66. Indeed, Mr. Turner goes as far as to acknowledge that he has personally read "Plaintiffs' papers." *See id.* at 67. As such, VeriSign is more than aware of the ongoing litigation and the potential impact this litigation may have upon it. Despite this, VeriSign has elected not to assert any claim or interest in this case whatsoever. Therefore, as in *Bowen*, VeriSign's joinder is unnecessary. *See Bowen*, 172 F.3d at 689.

Nor is it appropriate, given VeriSign's apparent decision that it was not in VeriSign's interest to become a party to this action, for the Court to consider Defendant's advocacy of VeriSign's possible financial or other interests with respect to Plaintiffs' prayer for injunctive relief. *See Bowen*, 172 F.3d at 689; *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 908 (9th Cir. 1994). If VeriSign has decided that it is not in VeriSign's interest to be a party, then the court should not weigh the relief sought against the vicarious impacts to VeriSign. Accordingly, VeriSign's election to refrain from asserting any interest in this case

renders its joinder unnecessary.[22]

G. A Bond Is Unnecessary Because Defendant Will Not Suffer Any Damages

In conjunction with the issuance of a preliminary injunction, the Court is afforded wide discretion in setting the amount of the bond required of the moving party. *See Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 733 (9th Cir. 1999). The bond amount may be zero if there is no evidence the enjoined party will suffer damages from the preliminary injunction. *See Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003). As discussed above, Defendant cannot identify any credible, quantifiable harm to itself. Indeed, the only tangible harm Defendant can identify is not to itself, but to VeriSign, a non-party to this action. Such alleged harm is irrelevant to a determination of whether a bond should issue. Defendant's inability to identify any real harm stems from the fact that Plaintiffs' requested injunction merely seeks Defendant's adherence to its contractual obligations. Plaintiffs' requested injunction does not seek to impose any obligations, duties, or restrictions beyond what the Defendant has already expressly agreed to.

In response, Defendant is likely to claim that the preliminary injunction will have adverse effects on its contractual relations with others. However, any inconsistencies the Defendant may claim regarding its obligations under the Agreements and any other contractual obligations result solely from the Defendant's, voluntary execution of contracts that impose inconsistent obligations. The harm for inconsistent contractual obligations is a risk the Defendant assumed and should not be shifted onto Plaintiffs through a bond requirement when the Plaintiffs are merely seeking adherence to the Agreements. *See Halzberg's Diamond Shops,* 564 F.2d at 819 (recognizing that any inconsistency in obligations by defendant resulted from

[22] VeriSign cannot qualify as an indispensable party under Rule 19. The question of whether an absent party is an indispensable party arises only after a court determines first that the absent party is a necessary party, and then determines that the absent party cannot be joined for jurisdictional or practical reasons. *See Northrop*, 705 F.2d at 1042. As explained above, VeriSign is not a necessary party in this litigation. As such, VeriSign cannot constitute an indispensable party for purposes of Rule 19. Moreover, even assuming VeriSign does constitute a necessary party, the Defendant cannot demonstrate an inability to join VeriSign because of jurisdictional or practical reasons. Accordingly, VeriSign does not constitute an indispensable party under Rule 19.

defendant's own voluntary execution of contracts with conflicting obligations). Accordingly, the Court should exercise its discretion and set the bond amount at zero.

Alternatively, if the Court decides that a bond is required, Plaintiffs request that the amount be nominal in light of the failure of the Defendant to articulate any damages resulting from the issuance of an injunction. Regardless, Plaintiffs are ready, willing, and able to post a bond if the Court so requires.

IV. CONCLUSION

The WLS proposal is more than the sum of its parts. If implemented, it will mean more than an end to "waiting list" services offered by Registrars. The precedent set by the manner of its establishment will allow Defendant to unilaterally modify its obligations, and therefore the fundamental operations of the Internet, in any way that it sees fit, without considering input from stakeholders or considering the effect of those modifications on competition. The potential harm to Plaintiffs and others from Defendant's breaches of the Agreements, facilitation of VeriSign's monopoly, and implementation of WLS is thus substantial. Plaintiffs carefully orchestrated efforts to stray one giant step past compliance with its contract obligations while trying to stay one step short of exposure for injunction should not be countenanced by this Court. A preliminary injunction to preserve the status quo while the Court takes time to consider the merits of Plaintiffs underling claims is warranted.

DATED this 8 day of September, 2003.

PRESTON GATES & ELLIS LLP

By _____
Aaron M. McKown
J.W. Ring
Attorneys for Plaintiffs DOTSTER, INC., GODADDY SOFTWARE, INC., and eNOM, INCORPORATED.

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., 850 North Parton Street, Santa Ana, California 92701.

On September 8, 2003, I served a true copy of the following document(s) described as: **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** on the interested parties in this action by personally delivering a copy to:

Jeffrey A. LeVee
Emma Killick
Eric P. Enson
JONES DAY
555 West Fifth Street, Suite 4600
Los Angeles, CA 90013

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on September 8, 2003 at Irvine, California.

_____
(Print Name)

_____
WORLDWIDE ATTORNEY SERVICES, INC.