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INTERNET CORPORATION FOR
7 ASSIGNED NAMES AND NUMBERS

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

11 COALITION FOR ICANN
TRANSPARENCY INC.,

12 Plaintiff,

13 v.

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

16 Defendant.
17

Case No. 05-4826 (RMW)

**DECLARATION OF DANIEL E.
HALLORAN IN SUPPORT OF ICANN'S
OPPOSITION TO PLAINTIFF'S EX
PARTE APPLICATION FOR
TEMPORARY RESTRAINING ORDER**

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19 I, Daniel E. Halloran, declare:

20 1. I am an attorney admitted to the State Bar of California, and I am the Deputy
21 General Counsel of defendant Internet Corporation for Assigned Names and Numbers
22 ("ICANN"). I have personal knowledge of the matters set forth herein and am competent to
23 testify to those matters. I make this declaration in support of ICANN's Opposition to Plaintiff's
24 *Ex Parte* Application for Temporary Restraining Order.

25 **History and Function of ICANN**

26 2. ICANN is a not-for-profit public benefit corporation that was organized under
27 California law in 1998. Pursuant to a series of agreements with the United States Department of
28 Commerce ("DOC"), ICANN is responsible for administering certain aspects of the Internet's

1 domain name system. Among its various activities, ICANN accredits companies known as
2 "registrars" that make Internet "domain names," such as "cnn.com" or "pbs.org," available to
3 consumers. Each registrar enters into a Registrar Accreditation Agreement with ICANN that
4 permits it to sell the right to use domain names in a particular domain (such as ".com," ".net,"
5 ".biz," ".org" and so forth, along with hundreds of country-code top-level domains). Registrars,
6 in turn, contract with consumers and businesses that wish to register Internet domain names.
7 Typically, those contracts last one or two years, and at the end of that term, the consumer is given
8 the option to renew the contract so as to retain that particular domain name.

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

14 **VeriSign's Wait Listing Service.**

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

3 5. The WLS would not have affected current domain name registrations. An existing
4 registrant would continue to be the registrant of its domain name for so long as it continues to
5 renew the domain name in a timely fashion and to meet the requirements of its chosen registrar.
6 A WLS subscription matures into an actual domain name registration *only* when a domain name
7 is finally deleted by the registry.

8 6. On August 23, 2002, the ICANN Board determined that the WLS “promotes
9 consumer choice” and that the “option of subscribing to a guaranteed ‘wait list’ service is a
10 beneficial option for consumers.” For these reasons, the Board approved a resolution (Resolution
11 02.100) authorizing (with certain conditions, imposed largely to address the stated concerns of
12 registrars) ICANN's President and General Counsel to negotiate appropriate revisions to
13 VeriSign’s registry agreements to allow for the offering of the WLS.

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

17 **Dotster Lawsuit**

18 8. On September 9, 2002, after the Board had approved the WLS, counsel for
19 Dotster, Inc. (“Dotster”) submitted a letter to ICANN and then filed a formal request for
20 reconsideration of the Board’s decision regarding the WLS. On May 20, 2003, ICANN’s
21 Reconsideration Committee determined that Dotster’s request lacked merit.

22 9. On July 16, 2003, plaintiffs initiated litigation and filed a request for a temporary
23 restraining order, which the Court denied via its order of July 18, 2003. Plaintiffs subsequently
24 filed a motion for preliminary injunction, which the Court denied via its order of November 10,
25 2003.

26 **Pool.com Litigation**

27 10. In 2003, Pool.com, which is a subsidiary of Momentous.ca Corp., sued ICANN in
28 Canada in connection with the WLS. ICANN moved to dismiss the case for lack of jurisdiction

1 over it, and, in the alternative, for a transfer of the case to Los Angeles, California. In July 2004,
2 the parties agreed to stay the matter. Recently, Pool.com has unilaterally sought an end to the
3 stay.

4 **Registersite Litigation**

5 11. On August 4, 2004, Registersite.com and several other registrars filed a complaint
6 seeking specific performance and declaratory and injunctive relief in connection with VeriSign's
7 introduction of the WLS. On October 4, 2004, the Company filed a demurrer, and on January 10,
8 2005, the plaintiff stipulated to a dismissal of the Company without prejudice.

9 **VeriSign v. ICANN Litigation**

10 12. On February 26, 2004, VeriSign filed a complaint against ICANN seeking specific
11 performance, damages, and declaratory and injunctive relief in connection with four of VeriSign's
12 proposed services ("SiteFinder," WLS, "ConsoliDate," and "Internationalized Domain Names")
13 that it sought to introduce. In April 2004, ICANN filed a motion to dismiss six of Plaintiff's
14 seven claims, pursuant to Federal Rule of Civil Procedure 12(b)(6). On May 18, 2004, Judge
15 Matz granted the ICANN's motion and dismissed plaintiffs' federal antitrust claim without
16 prejudice. Plaintiff filed a first amended complaint on June 14, 2004. ICANN responded with a
17 second motion to dismiss pursuant to Rule 12(b)(6). On August 26, 2004, Judge Matz dismissed
18 VeriSign's first amended complaint with prejudice and declined to exercise supplemental
19 jurisdiction over the remaining state court claims. Final judgment was entered on September 22,
20 2004. On September 24, 2004, VeriSign filed a notice of appeal. That appeal is currently
21 pending at the Ninth Circuit. *See VeriSign, Inc. v. ICANN*, No. 04-56761.

22 13. Subsequently, on August 27, 2004, VeriSign, re-filed its complaint, less the
23 antitrust claim, in state court. ICANN answered the complaint and cross-complained for
24 declaratory relief seeking a declaration of VeriSign's obligations under the 2001 .com Registry
25 Agreement and a determination that VeriSign breached its obligations under that agreement. On
26 November 12, 2004, ICANN filed a motion to stay the litigation pending a decision by the
27 International Chamber of Commerce, International Court of Arbitration ("ICC"), on the
28 corresponding arbitrations (discussed below).

1 14. On November 10, 2004, ICANN filed a request for arbitration with the
2 International Chamber of Commerce, International Court of Arbitration ("ICC"). ICANN is
3 seeking declaratory relief interpreting a number of contractual rights, duties, and obligations of
4 both parties under the 2001 .net Registry Agreement. Additionally, ICANN seeks a declaration
5 that VeriSign violated that agreement by engaging in a series of unauthorized conduct as Registry
6 Operator of the .net registry. On February 8, 2005, the arbitration was held in abeyance for 30
7 days pursuant to a request by the parties. The abeyance has been extended by the ICC upon the
8 requests of both parties.

9 **Proposed Settlement Agreement**

10 15. On October 24, 2005, ICANN announced that it had reached a proposed
11 agreement to end all pending litigation over its long-standing disputes with VeriSign. The
12 proposed agreement documents were posted for public comment, and are subject to final approval
13 by the ICANN Board. Those agreements included the settlement agreement, the proposed 2005
14 .com Registry Agreement and its Appendices, and the Root Server Management Transition
15 Agreement.

16 16. ICANN has independent business justifications for entering into the 2005 .com
17 Registry Agreement. For example, the proposed agreement settles many long-standing points of
18 tension between VeriSign and ICANN which have adversely affected the broader Internet
19 community. It eliminates all pending litigation between the two parties, and—importantly for the
20 community—more ICANN staff and resources can be devoted to ICANN's core functions, rather
21 than to litigation with VeriSign over the terms of the .com registry agreement. In the future, in
22 the event of a disagreement relating to the .com registry agreement, both sides will be able to
23 make use of cost-efficient and binding arbitration under the International Chamber of Commerce.

24 **Vancouver Meetings**

25 17. As plaintiff is fully aware, ICANN will not enter the proposed 2005 .com Registry
26 Agreement until its Board has approved it. ICANN's Board, in turn, will not approve the .com
27 Agreement until the completion of a public comment period.

1 18. As posted on ICANN's web site, the public comment period on the proposed
2 settlement was extended, and ICANN has invited all constituencies and advisory committees "to
3 meet with the Board during ICANN's Vancouver meeting to discuss the settlement, and the Board
4 also will listen to comments regarding the settlement offered during the Vancouver Public
5 Forum."

6 19. Attached hereto as Exhibit A is a true and correct copy of ICANN's press release
7 entitled, "Comment Period Extended on VeriSign Settlement Agreement", that has been publicly-
8 posted at <http://www.icann.org/announcements/announcement-10nov05.htm>.

9 20. Individuals can take part in these meetings by attending in person, by taking part in
10 the webcast and remote participation opportunities, and/or by joining one of the various ICANN-
11 related mailing lists. The agenda for this week's ICANN meeting in Vancouver has also been
12 posted on ICANN's web site. That agenda reflects the fact that on November 29, 2005, there will
13 be a public forum to discuss the proposed settlement with VeriSign, which includes the proposed
14 2005 .com Registry Agreement. Additional public forum sessions will be held on December 2
15 and December 3, 2005.

16 21. Attached hereto as Exhibit B is a true and correct copy of the agenda for ICANN
17 meetings in Vancouver, Canada that has been publicly-posted at
18 <http://www.icann.org/meetings/vancouver/>.

19 22. The agenda does not, however, state that the ICANN Board will take action on the
20 settlement or the .com Registry Agreement this week. To the contrary, the agenda merely states
21 that at the end of the week, on Sunday, December 4, 2005, the ICANN Board will hold a meeting.
22 But the agenda for that Board meeting does not include a vote on the settlement or proposed 2005
23 .com Registry Agreement. Furthermore, there are no other ICANN Board meetings scheduled to
24 take place this year.

25 23. Attached hereto as Exhibit C is a true and correct copy of 4 December 2005
26 ICANN Board Meeting Agenda that has been publicly-posted at <http://www.icann.org/minutes/>.

27 24. Should the settlement and proposed 2005 .com Registry Agreement eventually be
28 approved by the ICANN Board, the amendments to the .com Registry agreement would have to

1 then be approved by the United States Department of Commerce. If the Department of
2 Commerce were to approve the proposed 2005 .com Registry Agreement -- and there is no telling
3 how long that could take -- VeriSign would then have to undertake the significant task of
4 successfully implementing the complained of services.

5 25. As such, it is transparent that the main driver for the timing of this lawsuit -- which
6 is virtually identical to the timing of the *Dotster v. ICANN* lawsuit -- is that plaintiff, which is an
7 active participant in this week's meeting in Vancouver, is aware that ICANN's officers are out of
8 the country.

9 26. If plaintiff is dissatisfied with the proposed settlement agreement or the proposed
10 2005 .com Registry Agreement, there are several avenues that plaintiff can pursue -- some of
11 which it is pursuing -- to have its views heard. For example, the CFIT can participate vigorously
12 in the ICANN process (as in fact it is doing this week in Vancouver) and can urge the ICANN
13 Board to reject the proposed 2005 .com Registry Agreement. If it is unsuccessful in that effort, it
14 can then use the reconsideration process available under the ICANN bylaws to challenge the
15 Board's decision.

16 27. Attached hereto as Exhibit D is a true and correct copy of ICANN's operative
17 bylaws, effective 8 April 2005.

18 **A Temporary Restraining Order Would Harm ICANN.**

19 28. Plaintiff seeks a TRO that would prevent VeriSign and ICANN from entering into
20 the new .com Registry Agreement and would require instead that ICANN and VeriSign abide by
21 the terms of the existing .com Agreement. Plaintiff's proposed TRO is completely contrary to
22 ICANN's public interest mission. ICANN is a body that seeks to develop consensus wherever
23 possible. ICANN maintains open and transparent processes; it regularly posts on the Internet its
24 minutes, transcripts of its meetings, and other important information. Indeed, its web site
25 contains virtually a day-to-day description of ICANN's activities.

26 29. This is the same transparency that ICANN has followed in relation to the proposed
27 settlement agreement and the .com Registry Agreement: there are hundreds of public comments
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1 on the settlement agreement and the .com Registry Agreement, and ICANN's Board will consider
2 these comments and other statements made this week in Vancouver.

3 I declare under penalty of perjury under the laws of the United States that the foregoing is
4 true and correct.

5 Executed this 29th day of November, 2005, at Vancouver, Canada.

6 
7 Daniel E. Halloran
8 Daniel E. Halloran

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