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1 **Stuart M. Brown (SBN 170028)**  
2 PRESTON GATES & ELLIS LLP  
3 222 SW Columbia Street  
4 Suite 1400  
5 Portland, OR 97201-6632  
6 Telephone: (503) 228-3200  
7 Facsimile: (503) 248-9085  
8 Email: [sbrown@prestongates.com](mailto:sbrown@prestongates.com)

9 **Kathleen O. Peterson (SBN 124791)**  
10 **Aaron M. McKown (SBN 208781)**  
11 PRESTON GATES & ELLIS LLP  
12 1900 Main Street, Suite 600  
13 Irvine, CA 92614  
14 Telephone: (949) 253-0900  
15 Facsimile: (949) 253-0902  
16 Email: [aaronm@prestongates.com](mailto:aaronm@prestongates.com)

17 Attorneys for Plaintiffs

18 **UNITED STATES DISTRICT COURT**  
19 **CENTRAL DISTRICT OF CALIFORNIA**

20 **DOTSTER, INC., a Washington**  
21 **corporation, GO DADDY**  
22 **SOFTWARE, INC., an Arizona**  
23 **corporation, and eNOM, INC., a**  
24 **Washington corporation,**

25 Plaintiffs,

26 v.

27 **INTERNET CORPORATION FOR**  
28 **ASSIGNED NAMES AND**  
**NUMBERS, a California corporation,**

Defendant.

Case No. **03-5045**

**JFW**  
(MANx)

**PLAINTIFFS' MOTION FOR**  
**TEMPORARY**  
**RESTRAINING ORDER,**  
**PRELIMINARY**  
**INJUNCTION, AND**  
**EXPEDITED DISCOVERY**


(Oral Argument Requested)

Pursuant to Fed. R. Civ. P. 65, Plaintiffs respectfully move the Court for a Temporary Restraining Order and Preliminary Injunction restraining Defendant

1 Internet Corporation for Assigned Names and Numbers. Plaintiffs also move the  
2 Court for expedited discovery pursuant to Fed. R. Civ. P. 30(a) and 34(b). In support  
3 of its motion, Plaintiffs rely on the provisions of Fed. R. Civ. P. 65, 30(a), and 34(b),  
4 the attached Memorandum of Points and Authorities, the pleadings and admissions on  
5 file in this action, and the Declaration of Clint Page filed herewith.

6  
7 DATED this 15 day of July, 2003.

8  
9 PRESTON GATES & ELLIS LLP

10  
11 By   
12 Stuart M. Brown, SBN #170028  
13 Of Attorneys for Plaintiffs  
14 Dotster, Inc., Go Daddy Software, Inc. and  
15 eNOM, Inc.

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28 Trial Attorney: Stuart M. Brown

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**Stuart M. Brown (SBN 170028)**  
PRESTON GATES & ELLIS LLP  
222 SW Columbia Street  
Suite 1400  
Portland, OR 97201-6632  
Telephone: (503) 228-3200  
Facsimile: (503) 248-9085  
Email: [sbrown@prestongates.com](mailto:sbrown@prestongates.com)

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**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  
Email: [aaronm@prestongates.com](mailto:aaronm@prestongates.com)

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**JFW**

**03-5045**

(MANx)

Case No.

**DOTSTER, INC., a Washington corporation, GO DADDY SOFTWARE, INC., an Arizona corporation, and eNOM, INC., a Washington corporation,**

Plaintiffs,

v.

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation,**

Defendant.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EXPEDITED DISCOVERY**

(Oral Argument Requested)

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

1 **I. INTRODUCTION**

2 Plaintiffs, Registrars of Internet domain names, seek to restrain defendant  
3 Internet Corporation for Assigned Names and Numbers, ("ICANN") from breaches of  
4 the Registrar Accreditation Agreement ("Agreement") between the parties. The  
5 Agreement is attached as Plaintiff's Exhibit 1. Plaintiffs seek to restrain ICANN from  
6 conducting negotiations toward the establishment of a proposal known as WLS, or  
7 ~~Wait List System~~. Currently, ICANN is negotiating with VeriSign, Inc., a third party,  
8 to establish WLS in contravention of ICANN's contractual obligations.

9 **II. STATEMENT OF FACTS**

10 ICANN is a nonprofit corporation charged by the federal government with the  
11 administration of the domain name system ("DNS"), the Internet's addressing system.  
12 See Declaration of Clint Page ("Page Decl."), attached as Exhibit 2, ¶ 2. Dotster is a  
13 Registrar, authorized by Defendant to register domain names. Id., ¶ 18. When an  
14 individual or corporation, known as a registrant, wishes to establish an Internet  
15 presence, the registrant contacts a Registrar such as Dotster, and registers a domain  
16 name. Id., ¶ 5. That domain name can then be used to access the Internet resources of  
17 the registrant. Id., ¶ 1.

18 The relationship between ICANN and all Registrars, including plaintiffs, is  
19 governed by the Agreement. The Agreement obligates ICANN to not unreasonably  
20 restrain competition, and to promote and encourage robust competition. Plaintiff's  
21 Exhibit 1 at 3. The Agreement also obligates ICANN to ensure that any new policies  
22 or specifications imposed on Registrars are approved by a consensus of Internet  
23 stakeholders. Plaintiff's Exhibit 1 at 11. That consensus is to be demonstrated by a  
24 specific procedure: first, ICANN's board is to enunciate the specification or policy;  
25 second, the council of the appropriate ICANN Supporting Organization is to adopt a  
26 recommendation approving the new policy by a two-thirds vote of its council; and  
27 third, a written report is to be generated that documents the extent of agreement and  
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1 disagreement with the policy among impacted groups. Plaintiffs' Exhibit 1 at 12-13.

2 Domain names are registered for a limited period of time, and if the registration  
3 is not renewed, they once again become available for registration. See Page Decl., ¶  
4 11-13. Currently, there is a thriving industry providing "waiting list" services, under  
5 which a Registrar will attempt to obtain an already-registered domain name coveted  
6 by another registrant. Id., ¶ 15-17. These services endeavor to immediately register a  
7 domain name ~~upon the~~ expiration of the previous registration. Plaintiff Dotster  
8 maintains such a service, called NameWinner. Id., ¶ 19.

9 VeriSign, Inc. ("VeriSign") is an accredited registrar, and also the operator of  
10 the .com and .net registries, which are the central databases containing all records on  
11 .com and .net domain name registrations. See Page Decl., ¶ 4. In late 2001, VeriSign  
12 proposed a change to ICANN's policies called Wait Listing Service ("WLS"). Under  
13 that proposal, a customer who wishes to register an occupied domain name can pay a  
14 fee to register that domain, should its registration expire. Id., ¶ 23. VeriSign would  
15 administer the program, and would receive \$24 for each WLS subscription. Id.

16 Under WLS, an expired domain name would only be available for registration  
17 by Registrars if there was not a WLS subscription on that name. See Page Decl., ¶ 23.  
18 For this reason, WLS would eliminate the market for "waiting list" services currently  
19 offered by Registrars. Id., ¶ 33. VeriSign's position as operator of the .com and .net  
20 registries allows it to intercept expiring domain names as they become available, and  
21 before they are offered for registration to Registrars or their customers. Id., ¶ 24.  
22 WLS would effectively replace existing services, creating a monopoly in place of the  
23 currently competitive market. Id., ¶ 37. Virtually all Registrars, and a substantial  
24 number of other Internet stakeholders, have expressed opposition to WLS since its  
25 proposal, on the grounds that WLS would restrain competition in the industry. Id., ¶  
26 28.

27 A Task Force of the Domain Name Supporting Organization ("Task Force"), an  
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1 ICANN Supporting Organization, was asked by ICANN's Board of Directors  
2 ("Board") to prepare a report and recommendations on WLS. See Page Decl., ¶ 27.  
3 That report, issued on July 24, 2002, recommended against adoption of WLS, on the  
4 grounds that a consensus of Internet stakeholders did not support the proposal. Id., ¶  
5 27. Despite that recommendation, the Board adopted a resolution on August 23, 2002  
6 instructing ICANN's President and General Counsel to begin negotiations with  
7 VeriSign for the establishment of WLS. Id., ¶ 28.

8 Pursuant to the Agreement, Dotster submitted a Reconsideration Request and  
9 formal request for review under ICANN's Independent Review Policy, requesting that  
10 ICANN reconsider its August 23 decision. See Page Decl., ¶ 30. Dotster requested  
11 that ICANN follow the consensus procedures provided for in the Agreement. Id.

12 ICANN responded to that request on May 20, 2003, issuing a Recommendation  
13 that the Board take no action on Dotster's request. The Recommendation is attached  
14 as Exhibit 3. See Page Decl., ¶ 31. The Board adopted that Recommendation on June  
15 2, 2003, and again authorized negotiations with VeriSign toward the establishment of  
16 WLS. Upon information and belief, those negotiations continue.

### 17 **III. LEGAL ARGUMENT**

#### 18 **A. THIS COURT SHOULD TEMPORARILY RESTRAIN AND** 19 **PRELIMINARILY AND PERMANENTLY ENJOIN DEFENDANT** 20 **FROM NEGOTIATING THE INTRODUCTION OF WLS**

21 In the 9th Circuit, a party who demonstrates either (1) a combination of  
22 probable success and the possibility of irreparable harm, or (2) that serious questions  
23 are raised and the balance of hardship tips in its favor, may obtain preliminary  
24 injunctive relief. Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 938 (9<sup>th</sup> Cir.  
25 1987). The required degree of irreparable harm increases as the probability of success  
26 decreases, and vice versa. Oakland Tribune, Inc. v. Chronicle Publishing Co., 762  
27 F.2d 1374, 1376 (9<sup>th</sup> Cir. 1985). The moving party must demonstrate a fair chance of  
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1 success on the merits, or questions serious enough to require litigation. Sports Form,  
2 Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9<sup>th</sup> Cir. 1982).

3 The proponent of preliminary injunctive relief must demonstrate a significant  
4 threat of irreparable injury. Oakland Tribune, supra. Irreparable injury cannot be  
5 shown where the loss or deprivation pending trial is reparable; if the plaintiff can be  
6 made whole in the event of success at trial, irreparable injury is not present. Napa  
7 Valley Publ. Co. v. City of Calistoga, 225 F. Supp. 2d 1176, 1181 (N.D. Cal. 2002).  
8 "Irreparability of injury pending trial turns on the nature of the loss and the ability of  
9 the court to make the plaintiff whole after the trial; it does not necessarily turn on the  
10 meritoriousness of the plaintiff's legal claim." Id.

11 Courts have enjoined negotiations that threatened to violate established rights of  
12 plaintiffs. In Pignotti v. Sheet Metal Workers' International Assoc., 343 F. Supp. 236  
13 (D. Neb. 1972), plaintiff union members sued to halt negotiations between local  
14 management and the national union designed to enroll the local in a national pension  
15 plan. Plaintiffs alleged that the local's leaders had disregarded membership votes and  
16 placed the local under a trusteeship in order to obtain the local's participation in the  
17 national pension plan. Id. at 242. The court held that such conduct violated the  
18 plaintiffs' right to participate in the deliberations and voting upon the business of their  
19 union under 29 U.S.C. § 411(a)(1), and enjoined the local leaders from further  
20 negotiations. Id. at 245. The court made it clear that its ruling was designed to protect  
21 the established contractual rights of the plaintiffs: "[T]he defendants will be enjoined  
22 from negotiating into the new contract any pension provision more binding on Local  
23 #3 or its members than the present contractual provisions." Id. The injunction was  
24 upheld on appeal. Pignotti v. Sheet Metal Workers' International Assoc., 477 F.2d  
25 825 (8<sup>th</sup> Cir. 1973).

26 In Pignotti, the plaintiffs were members of an organization who successfully  
27 sought to enforce their contractual right to participate in the decisionmaking process  
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1 of that organization. The instant case presents a remarkably similar fact pattern:  
2 plaintiffs seek to enforce their right to participate in a decisionmaking process that  
3 necessarily affects not only their legal rights, but their very existence as legal entities.  
4 In Pignotti, it was clear to the court that the leadership had violated the contractual  
5 decisionmaking procedures, and that a consensus of the union's members was  
6 opposed to the national plan. Id. at 242. Here, plaintiffs will make an equally clear  
7 showing that a consensus of Registrars opposes the introduction of WLS, and that any  
8 implementation of WLS would violate ICANN's explicit contractual obligation to  
9 establish new policies only with the approval of a consensus of stakeholders.<sup>1</sup>

10           1.    **THE IMPLEMENTATION OF WLS THREATENS**  
11                   **IRREPARABLE HARM TO PLAINTIFFS AND THE**  
12                   **PUBLIC.**

13           Currently, many Registrars, including plaintiffs, offer competing services that  
14 would be eliminated by WLS. Many Registrars derive a significant amount of  
15 revenue from these services; that revenue would evaporate upon implementation of  
16 WLS. Because they cannot be made whole at trial, these Registrars will suffer  
17 irreparable harm if WLS is implemented. Additionally, ICANN's flagrant disregard  
18 of its contractual obligations threatens to irreparably harm not only plaintiffs, but the  
19 public and the Internet community at large.

20                   a.    **WLS will irreparably harm plaintiffs by eliminating a**  
21                           **substantial portion of their business.**

22           Many Registrars offer services that currently perform substantially the same  
23 function as WLS. These services would be rendered obsolete by WLS. Monetary  
24 harm does not normally constitute irreparable harm for purposes of a temporary  
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26 \_\_\_\_\_  
27 <sup>1</sup> It cannot be questioned that an injunction is an appropriate remedy to preserve contractual rights,  
28 and that a court is well within its powers to enjoin the negotiating process. See La Motte et al v.  
United States, 254 U.S. 570, 577 (1921); Grand Union v. Cord Meyer, 761 F.2d 141, 147 (2<sup>nd</sup> Circ.  
1985).



1 restraining order. L. A. Memorial Coliseum Commission v. National Football  
2 League, 634 F.2d 1197, 1202 (9<sup>th</sup> Cir. 1980). However, that principle only applies  
3 where the harm complained of can be fully remedied at trial by an award of money  
4 damages. In this case, the Agreement limits ICANN's liability to the amounts paid as  
5 Accreditation Fees. If WLS is implemented, the plaintiffs' damages will be many  
6 times greater than the contract limitation.

7 A plaintiff may establish irreparable harm by showing that the "existence of its  
8 business life... is threatened." Foremost Int'l Tours, Inc. v. Qantas Airways Ltd., 379  
9 F. Supp. 88, 97 (D. Haw. 1974), aff'd, 525 F.2d 281 (9<sup>th</sup> Cir. 1975). The  
10 implementation of WLS would threaten the business life of each plaintiff by  
11 eliminating the most profitable source of revenue for each. Plaintiffs derive  
12 substantial revenue from "waiting list" services that would be rendered obsolete by  
13 WLS. Since WLS may force some or all plaintiffs out of business, a showing of  
14 irreparable harm can be made.

15 Thus, plaintiffs cannot be made whole by an award of money damages at trial,  
16 and injunctive relief is appropriate.

17 **b. The manner in which WLS has been implemented**  
18 **irreparably harms plaintiffs by allowing ICANN to**  
19 **unilaterally modify its contractual obligations.**

20 The Agreement provides a clear, precise procedure by which ICANN can  
21 modify the obligations placed on Registrars. As described above, ICANN is to  
22 demonstrate that a consensus of Internet stakeholders supports any new policy or  
23 procedure through a three-step process. In this case, ICANN has ignored this  
24 contractually mandated procedure. For instance, the Agreement obligates ICANN to  
25 only adopt a new policy or procedure when the appropriate ICANN Supporting  
26 Organization adopts a recommendation approving the new policy by a two-thirds vote  
27 of its council. Here, the appropriate organization, the Domain Name Supporting  
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1 Organization, issued a recommendation that the Board deny the WLS proposal. Faced  
2 with a clear rejection of the policy and an obligation under the Agreement to drop  
3 WLS, the Board opted instead to jettison the consensus procedure and order private  
4 negotiations.

5 ICANN's cavalier attitude toward its obligation to observe the procedures  
6 mandated by the Agreement is evident in its response to Dotster's Reconsideration  
7 Request, issued in a Recommendation on May 20, 2003. In that document, the  
8 Reconsideration Committee notes that "Dotster is correct that the Board's  
9 decision... was not made according to the procedures stated in subsection 4.3.1 of  
10 Dotster's registrar accreditation agreement for the creation of 'consensus policies' as  
11 defined there." Plaintiff's Exhibit 3 at 3. However, the Committee goes on to state  
12 that ICANN is not bound by the consensus policy, arguing that "the consensus-policy  
13 mechanism is *only one way of defining additional obligations for registrars*"  
14 (emphasis in original). *Id.* at 4. ICANN thus argues that despite clear language in the  
15 Agreement mandating a specific procedure for changes in the relationship between the  
16 parties, it still may unilaterally impose new conditions on that relationship. ICANN  
17 goes on to state that "the particular Board action challenged by Dotster *does not*  
18 *involve any change in Dotster's obligations to ICANN* under the registrar accreditation  
19 agreement" (emphasis in original). Technically, this is true; the Board action,  
20 however, does involve a change in ICANN's obligations to Dotster, and a substantial  
21 change in the competitive landscape of the domain name industry. The arguments  
22 espoused by ICANN demonstrate its view of the Registrar-ICANN relationship as a  
23 one-way street; ICANN's policy as stated in the Recommendation is that it may  
24 unilaterally revise its own contractual obligations at any time, so long as it does not  
25 revise the obligations of Registrars. This view is counter to the basic principles of  
26 contract law, which require mutuality of obligation. If ICANN is permitted to  
27 implement WLS in contravention of the contractual procedures, those procedures will  
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1 become irrelevant, and plaintiffs will have no recourse to complain of future arbitrary  
2 and unilateral modifications to the terms of their relationship with ICANN. Thus,  
3 WLS threatens irreparable harm to plaintiffs.

4 **c. The manner in which WLS has been implemented**  
5 **threatens irreparable harm to the public.**

6 Preliminary injunctive relief can be granted based on advancement of the public  
7 interest. ~~E.A. Coliseum, supra.~~ Here, ICANN's actions in implementing WLS  
8 demonstrate a disregard for its responsibility to the public and to the Internet  
9 community.

10 ICANN is a nonprofit corporation, charged with the heady responsibility of  
11 ensuring the operational stability of the Internet. The Domain Name System ("DNS"),  
12 administered by ICANN, is the backbone of the Internet. Without DNS, the Internet  
13 as we know it would not function. To an ever-increasing degree, the American public,  
14 and the business community, relies on the Internet. ICANN thus has an obligation, to  
15 both the American public and the worldwide Internet community, to operate the DNS  
16 in a manner that benefits the public as a whole.

17 The Internet is a public commodity, and the DNS was only entrusted to ICANN  
18 with the understanding that it would be administered in the public interest.  
19 Previously, the federal Department of Commerce was the administrator of the DNS.  
20 That responsibility was transferred to ICANN in a Memorandum of Understanding  
21 between the parties ("MOU"), attached as Plaintiff's Exhibit 4. That MOU specifies  
22 the principles that should govern the DNS system. One such principle is competition;  
23 the MOU obligates both parties to "promote[] the management of the DNS in a  
24 manner that will permit market mechanisms to support competition and consumer  
25 choice in the technical management of the DNS." *Id.* at 2. Another such principle is  
26 representation; the parties are to "promote the design, development, and testing of  
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1 mechanisms to solicit public input, both domestic and international, into a private-  
2 sector decision making process.” Id. at 2.

3 ICANN’s decisionmaking process with regard to WLS has violated both these  
4 principles. WLS itself, representing a monopoly on “waiting list” services, violates  
5 the principle of competition, and the private negotiations currently underway violate  
6 the principle of representation. By violating the principles under which it was  
7 entrusted with the management of the DNS, ICANN has violated the public trust,  
8 threatening irreparable harm to the Internet and to the public.

9 Similar obligations are reflected in ICANN’s bylaws under Section 2, “Core  
10 Values.” The bylaws are attached as Plaintiff’s Exhibit 5. Core Value #4 requires  
11 ICANN to conduct its operations by “[s]eeking and supporting broad, informed  
12 participation reflecting the functional, geographic, and cultural diversity of the  
13 Internet at all levels of policy development and decision-making,” while the seventh  
14 item requires ICANN to employ “open and transparent policy development  
15 mechanisms that (i) promote well-informed decisions based on expert advice, and (ii)  
16 ensure that those entities most affected can assist in the policy development process.”  
17 Plaintiffs’ Exhibit 5.

18 The fifth Core Value refers to “depending on market mechanisms to promote  
19 and sustain a competitive environment,” and the next to “[i]ntroducing and promoting  
20 competition in the registration of domain names[.]” Finally, the tenth Core Value  
21 concerns “[r]emaining accountable to the Internet community through mechanisms  
22 that embrace ICANN’s effectiveness.”

23 ICANN’s actions with regard to WLS are contrary to each of these Core  
24 Values. By Board fiat, the negotiations currently taking place are private, in violation  
25 of ICANN’s stated values of openness, transparency, and participation. The  
26 negotiations are intended to result in the establishment of WLS, a monopolistic,  
27 proprietary system that contravenes ICANN’s stated values of competition and  
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1 openness. Such breaches of ICANN's own bylaws also breach the trust placed in  
2 ICANN by the federal government, and by proxy the public, to equitably manage the  
3 DNS for the public benefit.

4           **2. PLAINTIFFS WILL PREVAIL ON THEIR BREACH OF**  
5           **CONTRACT CLAIMS**

6           By disregarding the procedures mandated by the Agreement, and by failing to  
7 properly consider the anticompetitive effect of WLS, ICANN has breached the  
8 Agreement, to the detriment of plaintiffs.

9           **a. ICANN's disregard of the consensus procedure**  
10           **constitutes a breach of the Agreement.**

11           As described above, the Agreement allows ICANN to impose new policies on  
12 Registrars only through the use of the consensus procedure. That procedure requires  
13 specific steps to be taken, and specific conditions to be met. One of those conditions,  
14 a two-thirds vote of the appropriate supporting organization, was explicitly not met in  
15 this case; the Domain Name Supporting Organization recommended that WLS be  
16 denied. The Board, faced with a clear result under the consensus procedure, then  
17 withdrew from the consensus procedure and directed that negotiations proceed in  
18 private. When confronted with this discrepancy, the Board admitted that it did not  
19 follow the consensus procedure. The Board's attempt to justify WLS by arguing that  
20 it may unilaterally impose additional policies on Registrars contravenes time-honored  
21 principles of contract law, including mutuality of obligation. The Board's conduct  
22 constitutes a clear breach of its obligations under the Agreement, and plaintiffs are  
23 confident that they will prevail on that count at trial.

24           **b. ICANN's disregard of the underlying principles in the**  
25           **Agreement constitutes a breach of that Agreement.**

26           The Agreement between Registrars and ICANN reflects certain underlying  
27 principles. Section 2.3.1 requires ICANN to "exercise its responsibilities in an open  
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1 and transparent manner”, while section 2.3.2 requires ICANN to “promote and  
2 encourage robust competition.” ICANN is also obligated by Section 2.3.4 to “ensure,  
3 through its reconsideration and independent review policies, adequate appeal  
4 procedures for Registrar, to the extent it is adversely affected by ICANN standards,  
5 policies, procedures or practices.”

6 ICANN’s decisions on WLS, leading up to the private negotiations between  
7 ICANN and VeriSign have breached those underlying principles of the Agreement.  
8 The negotiations between VeriSign and ICANN are being conducted in private,  
9 violating ICANN’s stated principles, and contractual obligations, of broad  
10 participation and open and transparent procedures. Although WLS will have an  
11 enormous impact on the business of every Registrar, no Registrar is present in those  
12 negotiations, and no Registrar currently has a voice in a process that will ultimately  
13 result in the elimination of a substantial amount of each Registrar’s business. WLS  
14 will represent a monopoly for VeriSign in the “waiting list” service, in contravention  
15 of the principle of promoting and encouraging robust competition.

16 Thus, ICANN has repeatedly breached the Agreement by its conduct in regard  
17 to WLS, and plaintiffs are confident that they can prevail at trial.

### 18 **3. THE BALANCE OF HARDSHIPS FAVORS PLAINTIFFS.**

19 If the injunction is imposed, defendants will not suffer any hardships at all.  
20 ICANN is not scheduled to receive any revenue from WLS, and will not be directly  
21 affected whatsoever. By contrast, without the injunction, plaintiffs will suffer  
22 substantial and irreparable harm, including a possible threat to the life of their  
23 business, as shown above. A party that demonstrates that serious questions are raised  
24 and the balance of hardship tips in its favor may obtain preliminary injunctive relief.  
25 Arcamuzi, supra, 819 F.2d at 938. Here, plaintiffs have shown that serious questions  
26 potentially affecting the operational stability of the Internet are raised, and that the  
27 balance of hardships tips in their favor. Injunctive relief should issue restraining  
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1 defendant from negotiating the implementation of WLS.

2       **THIS COURT SHOULD AUTHORIZE EXPEDITED DISCOVERY**  
3       **TO PERMIT PLAINTIFFS TO OBTAIN INFORMATION**  
4       **NECESSARY TO SUPPORT THEIR APPLICATION FOR A**  
5       **TEMPORARY RESTRAINING ORDER AND PRELIMINARY**  
6       **AND PERMANENT INJUNCTION**

7       Plaintiffs seek expedited discovery regarding Defendant's negotiations with  
8 Verisign concerning WLS, and Defendant's specific plans with regard to WLS. Such  
9 early discovery is permitted in appropriate cases with leave of court, and is generally  
10 granted by District Courts. Such early discovery is permitted in appropriate cases  
11 with leave of court, and District Courts routinely grant motions for expedited  
12 discovery. See e.g., Optic-Electronic Corp. v. United States, 683 F. Supp. 269, 271  
13 (D.D.C. 1987); Edudata Corp. v. Scientific Computers, Inc., 599 F. Supp. 1084, 1088  
14 (D. Minn. 1984); aff'd in part, 746 F.2d 429 (8th Cir. 1984); Recycled Paper Products,  
15 Inc. v. Pat Fashions Industries, Inc., 731 F. Supp. 624, 625 (S.D.N.Y. 1990).

16       Because plaintiffs cannot timely obtain the relevant and necessary documents  
17 and information through standard discovery requests pursuant to the Federal Rules of  
18 Civil Procedure, plaintiffs request that this Court authorize plaintiffs to pursue  
19 expedited discovery with respect to the following categories:

20       (1) Plaintiffs, upon five calendar days' notice given by personal service, may  
21 take the deposition of any and all Defendants (not to exceed four such depositions),  
22 including Defendants' officers, directors, principals, shareholders, agents, servants,  
23 employees, and successors, including depositions conducted pursuant to Fed.R.Civ.P.  
24 30(b)(6), if such testimony is reasonably believed to be necessary to obtain evidence  
25 for the hearing on the Order to Show Cause Re: Preliminary Injunction in this matter;

26       (2) Plaintiffs may propound written discovery which they reasonably believe  
27 is necessary for plaintiffs to prevail at the hearing on the Order to Show Cause Re:  
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1 Preliminary Injunction in this matter. Such written discovery shall be served by  
2 personal service, not to exceed ten requests for admissions, ten interrogatories and ten  
3 requests for production of documents per Defendant. Each Defendant must serve a  
4 written response via personal service to plaintiffs' counsel within three calendar days'  
5 of receipt. Such written discovery shall concern Defendant's interpretation of clauses  
6 contained in the Accreditation Agreement that are at issue in this case, Defendant's  
7 negotiations with Verisign concerning WLS, and any other actions taken by  
8 Defendant with regard to WLS.  
9

#### 10 **IV. CONCLUSION**

11 The WLS proposal is more than the sum of its parts. If implemented, it will  
12 mean more than an end to "waiting list" services offered by registrars. The precedent  
13 set by the manner of its establishment will allow ICANN to unilaterally modify its  
14 obligations, and therefore the fundamental operations of the Internet, in any way that  
15 it sees fit, without considering input from stakeholders or considering the effect of  
16 those modifications on competition. The potential harm to plaintiffs and others if  
17 WLS is implemented is thus substantial. Such a decisionmaking regime would work  
18 irreparable harm on plaintiffs by clouding their entire business in uncertainty.

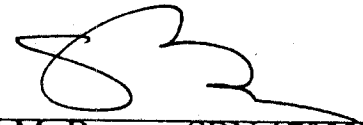
19 The issuance of preliminary injunctive relief rests upon consideration of four  
20 factors: [1] the likelihood of the plaintiffs' success on the merits; [2] the threat of  
21 irreparable harm to the plaintiffs if the injunction is not imposed; [3] the relative  
22 balance of this harm to the plaintiffs and the harm to the defendants if the injunction is  
23 imposed; and [4] the public interest. L. A. Memorial Coliseum Commission, supra,  
24 634 F.2d at 1200-01. Plaintiffs have shown each of these elements. They are likely to  
25 prevail on the merits of their breach of contract claims; if defendant's conduct is  
26 allowed to continue, irreparable harm will result; the balance of hardships  
27 unmistakably favors plaintiffs; and the public interest will be served by an injunction.  
28



1 By the time this matter goes to trial, WLS will have been implemented, to the  
2 irreparable detriment of plaintiffs. Therefore, ICANN should be restrained from  
3 negotiating and approving WLS, and should be ordered to follow the consensus policy  
4 outlined in the Agreement.

5  
6 DATED this 15 day of July, 2003.

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8 PRESTON GATES & ELLIS LLP

9  
10 By   
11 Stuart M. Brown, SBN 170028  
12 Of Attorneys for Plaintiffs

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14 Trial Attorney: Stuart M. Brown  
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