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SENT VIA FEDEX, E-MAIL, AND FAX TO (310) 823-8649

February 17, 2004

Dr. Paul Twomey
President/CEO
Internet Corporation for Assigned Names & Numbers
4676 Admiralty Way, Suite 330
Marina Del Rey, CA 90292-6601

**Re: Demand to Withdraw Approval for Unfair, Unlawful, and
Deceptive Wait Listing Service**

Dear Dr. Twomey:

This firm represents an ad hoc coalition of ICANN-accredited registrars organized for the purpose of challenging Verisign's proposed Wait Listing Service ("WLS"). The WLS purports to offer consumers a "guaranteed" right to register an already registered domain name if the current registrant lets it expire. However, under most circumstances the guarantee is meaningless because the likelihood that a desirable domain name will be allowed to expire ranges from low to non-existent. Neither Verisign nor ICANN has suggested that the average success rate of the WLS should be disclosed to consumers¹, and no information on that subject is available on Verisign's Web site. Such information, if provided, would reveal that most consumers who purchase a WLS subscription can expect to receive nothing in return.

Each of our clients offers a service to assist consumers in registering deleted domain names. None of our clients charges a fee for its service unless and until it actually registers a domain name on behalf of its customer. Our clients make no spurious "guarantees" about their services in marketing materials or elsewhere. Unlike Verisign and the few registrars currently marketing the WLS, our clients do not attempt to frighten registrants into buying unnecessary "insurance" to "protect" their domain names.

In contrast to our clients' services, the WLS if launched would constitute an unlawful and fraudulent protection racket in violation of state and federal consumer protection and unfair competition laws. To the extent that our clients remain in business following a launch of the WLS (and the resulting decrease in revenue from the competing services they currently provide), they will find themselves in the untenable position of having to choose between breaking the law or foregoing whatever revenue they might otherwise obtain from the WLS in

¹For any particular currently-registered domain name, it is impossible to predict whether, or when, the registrant will let the domain expire.

order to save their businesses. This is wholly unacceptable.

We are aware the ICANN Board is scheduled to meet tomorrow, Wednesday, February 18, 2004 to discuss the proposed WLS. As ICANN's negotiations with Verisign have been neither open nor transparent, we have no way of knowing the specific issues that the Board intends to cover. However, in the event the WLS is authorized as publically proposed, ICANN, Verisign, and any registrars that offer the WLS will be in violation of numerous laws, some of which are summarized below. Accordingly, we request that the ICANN Board of Directors withdraw its approval of the WLS until such time as the issues raised herein have been addressed to our clients' satisfaction. Otherwise, our clients will take legal action to enjoin the WLS and recover any damages they may suffer.

1. THE WLS VIOLATES THE FTC ACT AND STATE CONSUMER PROTECTION LAWS

Verisign and ICANN have made misleading statements to consumers and to Congress relating to the WLS and its ostensible benefits. On July 31, 2003, you testified before the United States Senate Committee on Commerce, Science, and Transportation that the WLS "if implemented, would allow potential registrants to subscribe to a 'wait list' that would **guarantee** they would be next in line to register a name if the current registrant lets it expire." [emphasis added] The truth that should be disclosed to consumers is that in most cases the domain names to which they are subscribing will never become available. The word "guarantee" is inherently deceptive in this context because Verisign does not (and could not) disclose the likelihood that any particular domain name will expire². The most desirable domain names, of course, will never become available, a fact that neither ICANN nor Verisign have ever publically disclosed.

The materiality of such information is self-evident. Even under the best of circumstances, for every consumer who obtains a domain name through the WLS service, we estimate based on empirical data that there will be between 100 and 1000 consumers who obtain nothing. For the vast majority of domain names likely to be considered desirable, the possibility that the current registrants will let them expire is vanishingly small.

Section 45 of the FTC Act, 15 U.S.C. §§ 41-58, makes unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." An advertisement is deceptive if it contains a statement or omits information that is likely to mislead consumers acting reasonably under the circumstances and is material or important to a consumer's decision to buy or use the product. ICANN cannot reasonably dispute that any advertisement for the WLS service that fails to disclose this information "omits information that is likely to mislead consumers acting reasonably under the circumstances and is material or important to a consumer's decision to buy or use the product." Furthermore, under the circumstances, no disclosure is likely to be adequate to

²There is also a duty to disclose that the current domain name registrant will be provided notice of the WLS subscription, and that such notice may *decrease* the likelihood that the domain name will expire by alerting the current registrant to its perceived desirability or value.

cure the deception inherent in selling WLS subscriptions. See FTC Policy Statement on Deception ("disclaimer or disclosure alone usually is not enough to remedy a false or deceptive claim").

2. THE WLS IS AN ILLEGAL LOTTERY

For any domain name that is not in "PENDINGDELETE" status or registered to the subscriber, purchasing a WLS subscription is nothing more than wagering that the current registrant will allow the domain name to lapse. As in any game of chance, it is only the house – in this case Verisign – that comes out ahead.

Under California law, a lottery is "any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known." Bell Gardens Bicycle Club v Department of Justice, 36 Cal App. 4th 717 (1995, 2nd Dist.). WLS subscriptions on currently registered domain names plainly meet this description. Moreover, the WLS is worse than a traditional lottery because in most circumstances there will be no winner; despite paying consideration to Verisign for years, no person will ever win the domain name for which the consumer purchases the chance to register.

3. THE WLS IS ANTI-COMPETITIVE

The two circumstances in which a WLS subscription is not merely a wager – (i) domain names registered to the subscriber and (ii) domain names in PENDINGDELETE status – are no more favorable to consumers. Registrars who offer WLS subscriptions will certainly, and some currently do, market WLS as an "insurance policy" for current domain registrants. The value of insurance, of course, can only be measured with reference to risk – in this case, the risk that a particular domain will be deleted, and would not have been recoverable in the redemption grace period. Again, this critical information is nowhere to be found in ICANN and Verisign public communications on the subject.

WLS subscriptions placed on domains scheduled to be deleted might appear to provide a benefit to consumers were it not for the fact that from the consumer's perspective the primary difference between the current situation and the situation under the WLS will be the additional approximate \$35 they will be required to pay to obtain an expiring domain name. The competition for WLS subscriptions on domain names pending deletion status is likely to be just as frustrating for consumers as the competition for expiring domains is today. In this context, ICANN's approval of the WLS is little more than a \$24 tax on each domain registered, payable to Verisign. The same number of domains will ultimately be registered, to the same number of people, but at much greater cost to consumers. The great bulk of this revenue, of course will end up in Verisign's pockets, but consumers who object will not have any alternative. All the while our clients will lose legitimate business and may even be forced to close their doors as a result.

4. THE WLS DEFRAUDS CONSUMERS

Since the Shared Registry System was implemented in 1999, registrants have been able to renew their domain names for up to ten years. WLS subscriptions to domain names, however, will be available (at a retail price expected to be in the area of \$40/year) only in one year increments, and will be offered without regard to whether the subscribed domain name is scheduled to expire during that year. Obviously, a consumer who purchases a subscription to a domain name that is not scheduled to expire during the subscription period has no possibility of obtaining the desired domain name during the subscription period. Accepting money from consumers on the basis of false representations (or omissions) of material fact, without providing any benefit in return, is fraud. At a minimum, any consumer who purchased such a subscription would be entitled to rescind the subscription agreement for want of consideration.

Similarly, an issue arises in connection with the sale of subscriptions on domain names that are also trademarks. Even if the subscriber becomes fortunate enough to obtain the subscribed domain name, the new registrant would almost certainly lose it shortly thereafter through a lawsuit or UDRP proceeding. ICANN has effectively authorized Verisign to extract money from consumers by selling them worthless chances to bid on trademarked domain names belonging to third parties. The proposed WLS does not provide a means for trademark owners to prevent this type of activity, nor does it put consumers on notice of the risk involved in subscribing to a domain name confusingly similar to the trademark.

5. ICANN PLACES NO COMPETITIVE RESTRICTIONS ON VERISIGN

Although ICANN has been quick to ascribe our clients' position to self-interest, it has failed to scrutinize Verisign's conduct in any meaningful way, notwithstanding the fact that Verisign, as a monopoly, can engage in anticompetitive conduct on a level that no mere registrar can. Consistent with this approach, ICANN has not imposed any meaningful limits on Verisign's ability to "purchase" WLS subscriptions on its own behalf, or to analyze registry data to identify domain names likely to expire, or otherwise appropriate valuable expiring domain names for its own use and benefit³. As far as we can determine, ICANN has not taken any steps to insure that addition of the WLS does not interfere with ICANN's ability to select a different registry provider for the .net zone next year. ICANN has failed to take such actions in the face of Verisign's repeated efforts to exploit its position as the registry operator for the .com and .net TLDs in order to misappropriate domain names, traffic, and entire market lines, all to the detriment of consumers and the Internet community in general. Prior to Verisign's designation as the registry operator, its (now) partially-owned subsidiary Network Solutions, Inc. ("NSI") engaged in similar conduct, to such an extent that the FTC took action against its deceptive and misleading marketing practices. With the WLS, Verisign proposes a system that is impossible to audit for self-dealing by the registry, the exact sort of conduct that ICANN is responsible for preventing under its charter.

³e.g., With Verisign's Sitefinder technology and statistics generated therefrom, Verisign will have a proprietary advantage in determining which domain are not used, and consequently on which domain names a WLS subscription would be most likely to succeed. This is inherently unfair to consumers and other registrars competing with Verisign for those domain names.

6. CONCLUSION

Approval of the WLS should be withdrawn, or, at a minimum, delayed until such time as ICANN can: 1) solicit an advisory opinion from the FTC on the impact of the WLS on consumers; 2) prevent the sale of subscriptions to domains that are not scheduled to expire during the trial period; 3) prevent the sale of subscriptions to domains consisting of registered trademarks, 4) prevent the sale of subscriptions to current registrants of the domain names subscribed, and 5) impose meaningful limitations on Verisign's ability to use the WLS for its own benefit. In the event that ICANN proceeds with its plan to implement the WLS notwithstanding this letter, our clients will take all necessary measures to protect their interests.

This letter does not contain a complete statement of the facts or law relating to this matter, nor a waiver of any of our clients' rights, claims, or causes of action against ICANN or any other party, all of which our clients expressly reserve and shall vigorously pursue.

Should you have any questions, please do not hesitate to contact me.

Very Truly Yours,

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