

HON. RICARDO S. MARTINEZ

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NAMECHEAP, INC., a Delaware Corporation,

Plaintiff,

v.

TUCOWS, INC., a Pennsylvania Corporation; ENOM, INC., a Nevada corporation; and DOES 1 through 10,

Defendants.

NO. 2:17-cv-01310

PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR
October 27, 2017

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

I. INTRODUCTION 1

II. STATEMENT OF FACTS 4

 A. The Internet Domain Name System, ICANN, Registries, Registrars And Resellers 4

 B. Namecheap’s Acquisition Of The VeriSign Domains From eNom 6

 C. Tucows Admits It Stands In eNom’s Shoes With Respect To The Master Agreement..... 7

 D. ICANN Approved VeriSign To Offer and Determine Eligibility for BTAPPA 8

 E. VeriSign Has Determined Namecheap’s Acquisition Qualifies For BTAPPA 9

 F. Defendants Refuse To Sign A BTAPPA Transfer Request..... 11

 G. Tucows Has No Valid Reason For Its Refusal To Complete The Transfer..... 12

III. LEGAL STANDARD..... 14

IV. LEGAL ANALYSIS..... 15

 A. The Facts And Law Clearly Favor Namecheap’s Success On The Merits Of Its Breach Of Contract Claim Against Defendants..... 15

 1. The Master Agreement Is Clearly Valid, And The Evidence Clearly Shows That Defendants Are In Breach..... 16

 2. Namecheap Will Suffer Damage As A Result Of Defendants’ Breach 18

 B. Namecheap Will Suffer Immediate And Irreparable Harm Absent The Requested Injunction 19

 C. The Equities Weigh Decidedly In Namecheap’s Favor..... 22

 D. The Public Interest Weighs In Favor Of The Injunction Being Granted..... 22

 E. The Court Should Not Require Any Bond..... 24

V. CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases

Anderson v. United States
612 F.2d 1112 (9th Cir. 1979) 15

Apple Computer, Inc. v. Formula Int’l Inc.
725 F.2d 521 (9th Cir. 1984) 20

Clune v. Publishers’ Ass’n of New York City
214 F. Supp. 520 (S.D.N.Y.) 15

Color Me House, Inc. v. Discovery Commc’ns, Inc.
No. C12-5935 RJB, 2013 U.S. Dist. LEXIS 44234 (W.D. Wash. Mar. 27, 2013)..... 14

Conceptus, Inc. v. Hologic, Inc.
2012 WL 44064 at *2 (N.D. Cal. Jan. 9, 2012) 19

Crafts v. Pitts
162 P3d 382 (Wash 2007)..... 16

Eastern Airlines, Inc. v. Gulf Oil Corp.
415 F.Supp. 429 (S.D. Fla. 1975) 15

Egbert v. Way
15 Wash. App. 76, 546 P.2d 1246 (1976)..... 16

Farris v. Seabrook
677 F.3d 858 (9th Cir. 2012) 14

Gorbach v. Reno
219 F.3d 1087 (9th Cir. 2000) 24

Jorgensen v. Cassidy
320 F.3d 906 (9th Cir. 2003) 24

Lehrer v. State Dept. of Social and Health Servs.
5 P.3d 722 (Wash. App. 2000)..... 16

Martinez v. Mathews
544 F.2d 1233 (5th Cir. 1976) 15

Mercedes-Benz U.S. International, Inc. v. Cobasys, LLC
605 F.Supp.2d 1189 (N.D. Ala. 2009)..... 14

Microsoft Corp. v. Motorola, Inc.
871 F.Supp.2d 1089 (W.D.Wash.2012)..... 19

Rent-a-Center, Inc. v. Canyon Television & Appliance Rental, Inc.
944 F.2d 597 (9th Cir. 1991) 20

1 *Traveler’s Casualty and Surety Co. of Amer. v. Padron, et al.*
2015 WL 1981563 (W.D. Tex. May 1, 2015) 15

2 *United States v. Odessa Union Warehouse Co-op*
3 833 F.2d 172 (9th Cir. 1987) 14

4 *Walczak v. EPL Prolong, Inc.*
198 F.3d 725 (9th Cir. 1999) 24

5 *Winter v. Natural Res. Def. Council, Inc.*
6 555 U.S. 7 (2008)..... 14

7 *Zurn Constructors, Inc. d/b/a Vinylplex v. The B.F. Goodrich Co.*
685 F.Supp. 1172 (D. Kansas 1988) 15

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9

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I. INTRODUCTION

1
2 Plaintiff Namecheap, Inc. (“Namecheap”) seeks a preliminary injunction compelling
3 Defendants Tucows, Inc. (“Tucows”) and eNom, Inc. (“eNom”) to specifically perform their
4 contractual obligation to sign the transfer request necessary to complete a bulk transfer of the
5 VeriSign Domains from eNom to Namecheap using BTAPPA. BTAPPA stands for Bulk Transfer
6 After Partial Portfolio Acquisition, and refers to an ICANN-approved service offered by VeriSign,
7 Inc. (“VeriSign”) to transfer the sponsorship of domain name registrations in the .COM and .NET
8 registries, in bulk, from one registrar to another, following the gaining registrar’s acquisition of
9 such transfer rights, for consideration, from the losing registrar.

10 Namecheap, eNom and Tucows are ICANN-accredited registrars. The evidence in this case
11 clearly demonstrates that Namecheap acquired the transfer rights to the VeriSign Domains from
12 eNom pursuant to a written contract, whereby Namecheap promised eNom one and a half years of
13 exclusivity for “all new registrations, transfers and renewals” on the .COM and .NET registries
14 (i.e. the VeriSign Domains) in exchange for eNom’s promise to transfer them to Namecheap “in
15 any manner, bulk or otherwise,” upon request, following the end of the exclusivity period.
16 Namecheap fully performed its obligations, and eNom received millions of dollars in fees from
17 Namecheap and its customers in connection with the VeriSign Domains over the term of the
18 exclusivity period, which ended on December 31, 2016. Tucows completed a corporate acquisition
19 of eNom a few weeks later, and Tucows expressly concedes its contractual obligation (as eNom’s
20 successor-in-interest) to transfer the VeriSign Domains to Namecheap.

21 VeriSign already considered these same facts in July of this year when it conducted a “pre-
22 qualification” review and approved the transfer for BTAPPA. As a result, VeriSign stands ready
23 to implement a bulk transfer of the VeriSign Domains to Namecheap upon its receipt of a BTAPPA
24 transfer request signed by eNom/Tucows. Despite conceding their obligation to transfer the
25 VeriSign Domains to Namecheap, however, Defendants have refused to sign a BTAPPA transfer
26 request on the frivolous grounds that transferring the VeriSign Domains **in bulk** would violate
27 ICANN and VeriSign rules, regulations and processes. VeriSign’s own determination that the

1 transfer qualifies for BTAPPA, along with the other evidence advanced in support of this motion,
2 clearly proves the lack of merit in Defendants' position. Moreover, as Namecheap's expert will
3 testify, the "Inter-Registrar Transfer" method proposed by Defendants to complete the transfer of
4 the VeriSign Domains to Namecheap individually at the time of renewal is neither suitable, nor
5 was it ever intended by ICANN, for such a task; and, if implemented, would cause an extraordinary
6 amount of confusion among Namecheap's customers.

7 The logical inference is that Defendants have fabricated these objections to delay the
8 transfer of the VeriSign Domains and keep them on the eNom platform for as long as possible to
9 further Defendants' own economic and strategic interests. Defendants' obligation to facilitate and
10 complete the bulk transfer of the VeriSign Domains is plain on the face of the contract, and the
11 law cannot adequately compensate Namecheap for the consequences of Defendants' failure to
12 immediately perform. Based on this record, the facts and the law clearly favor Namecheap to
13 prevail on its breach of contract (and specific performance) claims because Defendants expressly
14 concede their contractual obligation to transfer the VeriSign Domains to Namecheap, and have no
15 legitimate basis for refusing to facilitate and complete the transfer by signing the BTAPPA transfer
16 request.

17 A preliminary injunction compelling Defendants' specific performance of this obligation
18 is necessary to avoid immediate and irreparable harm to Namecheap. Pursuant to BTAPPA policy,
19 the gaining registrar must request BTAPPA from VeriSign within one calendar year of the closing
20 date of the acquisition, which in this case occurred on December 31, 2016 when Namecheap
21 completed performance of its exclusivity obligations to eNom. Thus, Namecheap will forfeit its
22 ability to transfer the VeriSign Domains **in bulk** unless VeriSign receives the fully signed
23 BTAPPA transfer request by no later than December 31, 2017. In that event, Namecheap will
24 suffer immediate and unquantifiable harm to its reputation, market position, and customer
25 goodwill, as well as lost business opportunities and other consequential injuries, which the law
26 cannot adequately compensate.

27 Defendants will not suffer any prejudice by this Court's granting the preliminary

1 injunction. Because Defendants expressly concede their contractual obligation to transfer the
2 VeriSign Domains to Namecheap in any manner that complies with ICANN and VeriSign rules,
3 regulations and processes, and because the evidence advanced in support of this motion
4 demonstrates that the requested transfer fully complies with same, Defendants will suffer no
5 prejudice from the injunction being granted. At worst, Defendants will have submitted for third-
6 party approval—pursuant to court order—a proposed transfer that the third parties may reject. On
7 the other hand, allowing Defendants to avoid their legal obligation to complete the bulk transfer
8 of the VeriSign Domains would deprive Namecheap of the benefit of the bargain it has already
9 fully performed and unjustly enrich Defendants at Namecheap’s expense. Accordingly, the
10 equities weigh decidedly in favor of granting the preliminary injunction and compelling
11 Defendants to sign the BTAPPA transfer request for the VeriSign Domains.

12 The public interest also clearly supports this Court’s granting the requested injunction.
13 Namecheap manages the VeriSign Domains under its own brand using eNom’s platform as a
14 reseller affiliate of eNom. Thus, even though eNom sponsors the VeriSign Domains, Namecheap
15 is the contracting service provider, and the end users are all Namecheap customers. Absent a bulk
16 transfer, Namecheap customers are likely to face a high degree of confusion by suddenly and
17 involuntarily finding themselves dealing with eNom/Tucows (with whom they have had no
18 relationship) at the time of renewal rather than Namecheap (the service provider with whom they
19 contracted), and being told to perform several tasks in order to be moved from eNom to
20 Namecheap. Pursuant to ICANN’s transfer policy, they will also be required to extend the domain
21 registrations for an additional one-year term (at an additional cost) in order to move to
22 Namecheap’s platform. Some of those customers are also likely to encounter situations where the
23 domain name expires before the transfer is completed, which may lead some domains to end-up
24 being stuck in mandatory “grace periods” (with large fees for reinstatement), or even being deleted
25 and thus available for someone else to register. Finally, recurring issues of instability and
26 insecurity associated with the eNom platform pose a separate and ongoing risk of harm to the
27 actual registrants of the VeriSign Domains (all of them Namecheap customers) for so long as they

1 remain under eNom's sponsorship.

2 For all these reasons, Namecheap is entitled to a mandatory preliminary injunction,
3 compelling Defendants to specifically perform their contractual obligation to facilitate and
4 complete the transfer of the VeriSign Domains to Namecheap by signing the BTAPPA transfer
5 request.

6 II. STATEMENT OF FACTS

7 A. The Internet Domain Name System, ICANN, Registries, Registrars And Resellers

8 Resolution of this dispute requires a basic understanding of certain technical information
9 regarding registries, registrars, domain names and the functioning of the Internet. By way of
10 background, the Internet Corporation for Assigned Names and Numbers ("ICANN") is a nonprofit
11 organization responsible for coordinating the maintenance and procedures of key technical
12 services critical to the function of the Internet's underlying address book, the Domain Name
13 System ("DNS"). (See **Exhibit A** to Namecheap's Request for Judicial Notice ("RJN")). ICANN
14 assigns IP Address numbers to devices on the Internet, and technically operates the DNS system
15 mapping domain names to those Addresses, as well as setting policy on registrars and gTLD
16 registries. (*Id.*; see also supporting Declaration of Jeff Yoak ("Yoak Decl.") at ¶¶7-8).

17 Namecheap, eNom and Tucows are all ICANN-accredited registrars providing domain
18 name registration services to Internet users around the globe. (See **Exhibit B** to RJN). A domain
19 name **registrar** is an organization or commercial entity that manages the reservation of Internet
20 domain names for generic top-level domain ("gTLD") (such as .COM or .NET) and/or country
21 code top-level domain ("ccTLD") (such as .AU, .CA, or .JP) registries for which it has been
22 accredited by ICANN. (Yoak Decl., ¶¶7, 8(c)). Domain registration process and management is
23 maintained by the domain name **registries** (such as VeriSign), which contract with domain
24 registrars (like Namecheap and eNom) to provide registration services to the public. (Yoak Decl.,
25 ¶8(b)). An end user selects a registrar to provide the registration service, and that registrar becomes
26 the designated registrar for the domain name chosen by the user. (Yoak Decl., ¶8). Namecheap,
27 eNom and Tucows are all approved by VeriSign to provide such services in the .COM and .NET

1 TLDs. (*See* supporting Declaration of Tina Dam (“Dam Decl.”), ¶35(e)).

2 Only the designated registrar may modify or delete information about domain names in a
3 central registry database. (Yoak Decl., ¶8(c)). It is not unusual for an end-user to switch registrars,
4 invoking a domain transfer between the registrars involved, as governed by specific domain name
5 transfer policies and protocols promulgated by ICANN and the registries. (Yoak Decl., ¶¶11-12).
6 Many registrars offer domain name registration services through **reseller** affiliates, which are, in
7 effect, third parties offering domain name registration services through the registrar’s
8 accreditation. (Yoak Decl., ¶8(d)). An end-user registers either directly with a registrar, or
9 indirectly through one or more layers of resellers. In the latter example, the registrant is the
10 reseller’s customer, but the registered domain name is registered under the registrar’s sponsorship.
11 (Yoak Decl., ¶8(d)).

12 The maximum period of registration for a domain name is ten (10) years before the
13 registration must be renewed. (Yoak Decl., ¶8(e)). Many domain names are registered for just one
14 or two-year periods pursuant to automatic renewal plans selected at signup, whereby the
15 consumer’s payment card on file is charged upon each renewal of the registration. (*See* supporting
16 Declaration of Richard Kirkendall (“Kirkendall Decl.”) at ¶32). Other domain names (such as
17 “premium” domain names) are registered for longer periods. (*Id.*) Where a reseller is involved, the
18 reseller typically collects all registration, transfer and renewal fees for all domain names under its
19 management, but pays a portion those fees to the registrar for its sponsorship of those domains.
20 (Yoak Decl., ¶8(d); Kirkendall Decl., ¶8).

21 In this case, Namecheap has acted as a reseller for eNom for more than 17 years.
22 (Kirkendall Decl., ¶3). As a reseller, Namecheap registered and managed millions of domain
23 names in various TLDs on the eNom platform under the Namecheap brand, and eNom has received
24 millions of dollars in fees in connection with the registration, transfer and renewal of those
25 domains, as well as parking and post-expiry auction revenue. (Kirkendall Decl., ¶4).
26 Approximately 4,000,000 Namecheap-managed domains still reside on the eNom platform,
27 3,161,000 of which are registered on the .COM and .NET registries maintained by VeriSign (the

1 “VeriSign Domains”) at issue in this Motion. (Kirkendall Decl., ¶5). At the present moment,
2 Namecheap is also the contracting registrar of record for another 4,370,000 domain names that it
3 manages directly on its own platform as the registrar of record. (Kirkendall Decl., ¶5).

4 **B. Namecheap’s Acquisition Of The VeriSign Domains From eNom**

5 On or about July 31, 2015, Namecheap entered the Master Agreement with eNom and
6 United TLD Holdco, Ltd. *trading as* Rightside Registry (“Rightside”). (See **Exhibit A** to
7 Kirkendall Decl.). The Master Agreement acknowledged the existing reseller relationship between
8 Namecheap and eNom, and served to define other aspects of the parties’ business relationship. (*Id.*
9 [Recitals]). Pursuant to Section 3 of the Master Agreement, Namecheap agreed that all
10 registrations, transfers, and renewals of the VeriSign Domains would occur exclusively on the
11 eNom platform through at least September 30, 2016, plus an additional three months following
12 written notice by Namecheap of its decision to end the exclusivity period. (*Id.* at §3 [Exclusivity]).

13 As discussed in greater detail below, Namecheap’s promise of exclusivity was worth
14 millions of dollars in fees to eNom; and, in exchange for this promise, Namecheap acquired the
15 right to transfer the VeriSign Domains to its own platform, upon request, following the end of the
16 exclusivity period. (Kirkendall Decl., ¶¶7-10). Specifically, eNom promised that:

17 For the term of this Agreement plus a period of two (2) years thereafter, eNom
18 hereby consents to the transfer **in any manner, bulk or otherwise**, of the [VeriSign
19 Domains]; **provided that any such transfer complies with all applicable ICANN
20 and registry rules, regulations and processes. eNom shall not obstruct, delay,
deny, obfuscate or otherwise restrict the transfer** of the [VeriSign Domains],
and shall provide EPP transfer codes if required for said domains to Namecheap
forthwith upon request, in any quantity requested.

21 (See **Exhibit A** to Kirkendall Decl., at §7(a) [Transfer Agreement] [emphasis added].) eNom
22 expressly acknowledged the *quid pro quo* nature of this exchange, and agreed that Namecheap had
23 furnished the promise of exclusivity as consideration for its transfer rights in the Namecheap-
24 managed domains (including the VeriSign Domains), when it consented to the bulk transfer of the
25 .BIZ domains using BTAPPA on or about July 29, 2016. (Kirkendall Decl., ¶25, and **Exhibit M**
26 thereto). Namecheap completed performance of its exclusivity obligations to eNom upon the
27 sunset of exclusivity on December 31, 2016. (Kirkendall Decl., ¶¶10-11). During that time, eNom

1 received millions of dollars in fees from Namecheap and its customers in connection with the
2 VeriSign Domains, thereby reaping the full benefit of Namecheap's promise of exclusivity.
3 (Kirkendall Decl., ¶¶8, 26).

4 **C. Tucows Admits It Stands In eNom's Shoes With Respect To The Master Agreement**

5 Tucows acquired eNom (along with its complete assets) from Rightside on or about January
6 20, 2017. (**Exhibit B** to Kirkendall Decl.). By its terms, the Master Agreement remains in effect
7 through December 31, 2018. (*See Exhibit A* to Kirkendall Decl. at §1 [Term]). The Master
8 Agreement prohibits the parties from assigning any of their rights and obligations without the prior
9 written consent of the other party, and expressly provides that the "Agreement will remain binding
10 upon, inure to the benefit of and be enforceable by the parties and their respective successors and
11 assigns." (*Id.* at §11 [Assignment]). Namecheap was not asked for, and did not provide, its consent
12 to any assignment of eNom's or Rightside's obligations under the Master Agreement. (Kirkendall
13 Decl., ¶13).

14 Nonetheless, by letter dated August 2, 2017, Tucows' attorney, Elisa P. McEnroe,
15 conceded in writing that Tucows stands in eNom's shoes with respect to the Master Agreement.
16 As Ms. McEnroe put it, "Tucows will comply (and has complied) with the obligations under the
17 Master Agreement, including those listed in Section 7(a) thereof"; and, "as a practical matter, we
18 have always understood that Namecheap intended to transfer .COM and .NET names to its own
19 registration credential." (*See Exhibit L* to Kirkendall Decl.). Ms. McEnroe further stated: "[w]e
20 **do not object to such transfers, 'provided that any such transfer complies with all applicable**
21 **ICANN and registry, rules, regulations and processes,' as the Master Agreement requires at**
22 **Section 7(a).**" (*Id.* [emphasis added]; *see also Exhibit O* to Kirkendall Decl., McEnroe letter to
23 Rome, dated August 25, 2017, at p.4: "as I wrote in my letter dated August 2, 2017, **there is no**
24 **disagreement about the fact that the registrations will be transferred.**") [emphasis added]).

25 However, Tucows has refused to sign a BTAPPA transfer request for the VeriSign Domains
26 on the purported grounds that doing so "would be in direct contravention to the [Master
27 Agreement] because [it] has the potential to wreak such havoc and confusion that there is no way

1 that such transfer could ‘compl[y] with all applicable ICANN and registry rules, regulations and
 2 processes.’” (See **Exhibit L** to Kirkendall Decl., at p.2). Tucows also contends that “BTAPPA
 3 does not apply” based on its suggestion that Namecheap’s acquisition of the transfer rights to the
 4 VeriSign Domains does not fall within BTAPPA’s definition of a “Qualifying Event,” and
 5 therefore fails to satisfy BTAPPA requirements. (*Id.*).

6 **D. ICANN Approved VeriSign To Offer and Determine Eligibility for BTAPPA**

7 VeriSign obtained ICANN approval to offer BTAPPA for the .COM and .NET registries
 8 via the Registry Request Service process on or about December 9, 2009. (Dam Decl., ¶19; **Exhibit**
 9 **D** to RJN). The terms and conditions for the BTAPPA service (as approved and agreed by ICANN)
 10 are set forth in identical terms in Part 8.1 of Appendix 7 (Functional and Performance
 11 Specifications) to the .COM, and Renewed .NET, Registry Agreements, respectively dated
 12 December 1, 2012 and July 1, 2017. (Dam Decl., ¶31; **Exhibits E** and **F** to RJN). Appendix 7 by
 13 its own terms makes clear that VeriSign is responsible for determining whether a transfer qualifies
 14 for BTAPPA: “BTAPPA is a registry service available to consenting registrars in the circumstance
 15 where, **pursuant to VeriSign’s policies**: (1) one ICANN-accredited registrar purchases (the
 16 “Gaining Registrar”), by means of a stock or asset purchase, merger or similar transaction, a
 17 portion, but not all, of another ICANN-accredited registrar’s domain name portfolio (the “Losing
 18 Registrar”) in the .COM/.NET top-level domain[.]” (**Exhibits E** and **F** to RJN).

19 VeriSign’s discretion and responsibility for determining whether a transfer request
 20 qualifies for BTAPPA is also clear from the plain language of the Registry Request Service
 21 proposal by which VeriSign obtained ICANN’s approval for BTAPPA:

22 VeriSign will offer BTAPPA to all ICANN-registrars in the .com and .net top-level
 23 domains. **In order to access the service, Gaining Registrars must submit a form**
 24 **to VeriSign’s Customer Service team ... VeriSign’s [Customer Service team]**
 25 **will validate the registrar’s identity, verify the contents of the submission and**
 26 **schedule the date for BTAPPA. VeriSign may request additional**
 27 **documentation or take additional steps it deems appropriate to ensure that all**
 28 **requirements are met with regard to Registrar Affiliate relationships.**

(See **Exhibit C** to RJN; Dam Decl., ¶¶39, 44-48). Thus, VeriSign offers BTAPPA only in cases
 where VeriSign has already conducted a “pre-qualification review” to verify that the Gaining

1 Registrar’s acquisition transfer request satisfies all BTAPPA requirements and VeriSign policies.
2 (*Ibid.*; *see also* **Exhibit C** to Kirkendall Decl.).

3 According to VeriSign’s own guidelines for BTAPPA, an acquisition transfer request must
4 satisfy each of the following requirements to qualify:

- 5 • Both registrars, losing and gaining, must be ICANN-accredited for the TLD and in good
6 standing;
- 7 • Both registrars, losing and gaining, must consent to the domain names being transferred;
8 and
- 9 • A notice must be sent to all potentially impacted registrants notifying them of the pending
10 change in sponsorship, and must be included with the Gaining Registrar’s transfer request.

11 (*See* **Exhibit C** to Kirkendall Decl.; *see also* Dam Decl., ¶35).

12 In addition, “the Gaining Registrar must provide to VeriSign an affidavit signed by an
13 authorized representative attesting to the nature of the acquisition, the closing date (which must be
14 within the 12 months preceding the transfer request), and the fact that consideration was given.”
15 (*Ibid.*). The guidelines specifically note that, “such an affidavit must be provided in all acquisition
16 transfer requests, including those involving a reseller of a registrar that becomes an accredited
17 registrar and obtains the rights to transfer a partial domain name portfolio that it was previously
18 managing as a reseller.” (**Exhibit C** to Kirkendall Decl.).

19 Thus, where a Gaining Registrar (e.g., Namecheap) believes a transfer qualifies for
20 BTAPPA, VeriSign’s BTAPPA guidelines instruct the Gaining Registrar to submit to VeriSign
21 for “pre-qualification” review: (i) a proposed affidavit from Gaining Registrar’s authorized
22 representative regarding the acquisition; (ii) a copy of the advance 30-days transfer notice to end-
23 users; (iii) a statement of the approximate number of domains to be transferred per TLD; and (iv)
24 a statement of the Gaining and Losing Registrar Name, GURID (an ICANN-provided ID number
25 identifying the registrar), contact name, title, address and email information. (*Id.*).

26 **E. VeriSign Has Determined Namecheap’s Acquisition Qualifies For BTAPPA**

27 Namecheap has already provided each of these items to VeriSign for pre-qualification
review. (Kirkendall Decl., ¶¶16-21, and **Exhibits D, H** and **I** thereto). On or about July 19, 2017,

1 VeriSign confirmed in writing that Namecheap's acquisition of the transfer rights for the VeriSign
2 Domains is a "Qualifying Event" for purposes of BTAPPA. (See **Exhibit G** to Kirkendall Decl.).
3 On or about July 21, 2017, VeriSign also expressly approved the 30-day notice to registrants
4 prepared by Namecheap, and provided Namecheap with authorization to execute the notice to start
5 the 30-day clock running on VeriSign's ability to implement the transfer request. (See **Exhibit J**
6 to Kirkendall Decl.). That determination is not only a matter uniquely within VeriSign's discretion,
7 it is also consistent with the stated purpose and policy of BTAPPA, as expressly approved and
8 agreed by ICANN, and the definition of Qualifying Event contained in VeriSign's own BTAPPA
9 guidelines. (Dam Decl., ¶¶35-39).

10 When VeriSign proposed adding BTAPPA as a service for the .COM and .NET registries
11 to ICANN in July 2009, it explained BTAPPA's purpose as follows: "There is no ICANN policy
12 or provision that currently addresses the business situation where only a portion of a Registrar's
13 domain name portfolio is acquired. This service would facilitate the smooth transfer of a partial
14 portfolio of domain names from one ICANN accredited registrar or recognized family of registrars
15 to another ICANN accredited registrar." (**Exhibit C** to RJN; Dam Decl., ¶¶30, 49). VeriSign
16 further explained that, "[t]he service is designed to facilitate registrars conducting business through
17 the acquisition and sale of partial portfolios of domain name registrations, which will support
18 registrars current and ever changing business models." (**Exhibit C** to RJN).

19 VeriSign's BTAPPA guidelines define a "Qualifying Event" to include an "acquisition
20 transfer request" (such as this one) "involving a reseller of a registrar that becomes an accredited
21 registrar and obtains the rights to transfer a partial domain name portfolio that it was previously
22 managing as a reseller" by giving consideration for those transfer rights. (**Exhibit C** to Kirkendall
23 Decl.). Here, the evidence plainly demonstrates that Namecheap is an ICANN-accredited registrar
24 for .COM and .NET that acquired the transfer rights to the VeriSign Domains it was previously
25 managing as a reseller from eNom, for consideration, to accommodate its changing business
26 model. (Dam Decl., ¶35(a)). Indeed, on or about July 29, 2016, eNom agreed to a BTAPPA transfer
27 of approximately 400,000 Neustar domains (.BIZ) to Namecheap pursuant to Section 7 of the

1 Master Agreement, thereby conceding that Namecheap’s acquisition of the transfer rights to the
2 Namecheap-managed domains (including the VeriSign Domains) pursuant to the Master
3 Agreement constituted a Qualifying Event for purposes of BTAPPA based on the same policy
4 considerations presented here. (Kirkendall Decl., ¶25, and **Exhibit M** thereto; *see also* Dam Decl.,
5 ¶¶16-19 [same BTAPPA service and same policy considerations apply]).

6 Thus, Namecheap’s acquisition of the transfer rights for the VeriSign Domains falls
7 squarely within the definition of a Qualifying Event for BTAPPA, is consistent with the purpose
8 and policy of BTAPPA to provide a business solution in such cases, and also satisfies each of the
9 remaining BTAPPA requirements, as approved by ICANN. (Dam Decl., ¶22, 35-38, 67-68).

10 **F. Defendants Refuse To Sign A BTAPPA Transfer Request**

11 On or about July 27, 2017, Namecheap’s attorneys informed Tucows that VeriSign had
12 approved Namecheap’s pre-qualification submission for BTAPPA, and authorized Namecheap to
13 execute the notice to start the 30-day clock running on VeriSign’s ability to implement the bulk
14 transfer request of the VeriSign Domains. (*See Exhibit K* to Kirkendall Decl.). Namecheap
15 requested Tucows to perform its contractual obligation under Section 7 of the Master Agreement
16 as eNom’s successor-in-interest to complete and “not obstruct, delay, deny, obfuscate or otherwise
17 restrict the transfer” of the VeriSign Domains by signing the BTAPPA transfer request, and
18 confirming the accuracy of the list of VeriSign Domains subject to the transfer request for
19 submission to VeriSign, as necessary for VeriSign to implement BTAPPA and transfer the
20 VeriSign Domains in bulk to Namecheap’s sponsorship. (*Id.*)

21 On or about August 2, 2017, Tucows, via its attorneys, refused to sign the BTAPPA transfer
22 request for the VeriSign Domains. (*See Exhibit L* to Kirkendall Decl.). Tucows based that refusal
23 on two purported grounds: first, that the transfer “would wreak such havoc and confusion that there
24 is no way that such transfer could ‘comply with all applicable ICANN and registry, rules,
25 regulations and processes,’” as required under the Master Agreement; and second, that Tucows is
26 “not aware of any agreement in which Namecheap has agreed to purchase any (or all) of the
27 portfolio of domain names managed by eNom (sic) or any other entity” that would satisfy the

1 Qualifying Event requirements for an “acquisition” under the BTAPPA guidelines. (*Id.*).

2 **G. Tucows Has No Valid Reason For Its Refusal To Complete The Transfer**

3 In regard to the former argument, Tucows appears to argue that a bulk transfer of the
4 Verisign Domains would wreak “havoc and confusion” because .COM and .NET are “thin”
5 registries. (*Id.*). As explained by ICANN, “A thin registry only includes technical data sufficient
6 to identify the sponsoring registrar, status of the registration, and creation and expiration dates for
7 each registration in its WHOIS data store. .COM and .NET are examples of thin registries. Thick
8 registries maintain the registrant’s contact information and designated administrative and technical
9 contact information, in addition to the sponsoring registrar and registration status information
10 supplied by a thin registry. .INFO and .BIZ are examples of thick registries.” (*See Exhibit G* to
11 *RJN*; *see also* *Yoak Decl.*, ¶¶9-10). Tucows appears to argue that a bulk transfer of the VeriSign
12 Domains presents a data integrity issue because the registrant data resides with eNom (as the
13 registrar) rather than VeriSign (as the registry) due to the fact that .COM and .NET are “thin”
14 registries. (*See Exhibit L* to *Kirkendall Decl.*). Thus, Tucows appears to contend that transfers on
15 thin registries pose a greater risk that data may be lost during the migration between registries, and
16 therefore violate ICANN policy in a stable Internet. (*Id.*; *see also* *Dam Decl.*, ¶42-43).

17 This is a complete red herring. A bulk transfer of the VeriSign Domains does not present
18 any complicated technical issue, or other risk of havoc or confusion. (*Dam Decl.*, ¶38-39, 44-52;
19 *Yoak Decl.*, ¶22-24, 26, 28). In a thick registry, all of the information (such as contacts, names,
20 email, etc.) is stored in the registry database and changing registrars is as simple as changing the
21 field in that record at the registry that identifies the contracted registrar. In thin registries, such
22 information is stored in a database at the losing registrar. (*Yoak Decl.*, ¶¶9-10).

23 In this case, based on its role as a reseller, Namecheap is the initial entry point for customer
24 data and, therefore, it is the authoritative source of data for the VeriSign Domains: all changes and
25 information are already populated directly into the Namecheap interface, and immediately modify
26 all WHOIS data for the VeriSign Domains in real-time. (*Kirkendall Decl.*, ¶24). This means that
27 authoritative data is already contained within Namecheap databases. No data transfer has to occur

1 to perform the bulk transfer. VeriSign will simply update the registry record identifying
2 Namecheap instead of eNom as the registrar, and Namecheap will rely on its own database and
3 processes to perform its responsibilities as the gaining registrar. (Yoak Decl., ¶¶22-24). As a final
4 point, any bulk transfer on the .COM and .NET registries, by definition, necessarily takes place on
5 a “thin” registry, and ICANN obviously considered this fact when it approved BTAPPA for
6 VeriSign. (Dam Decl., ¶¶44-47; Yoak Decl., ¶21). Accordingly, there is no merit to Defendants’
7 assertion that a bulk transfer of the VeriSign Domains would violate any rules, regulations or
8 processes of either ICANN or VeriSign. (Yoak Decl., ¶¶22-24, 26, 28; Dam Decl., ¶¶52, 67-68).

9 In regard to Defendants’ suggestion that “BTAPPA does not apply,” VeriSign’s approval
10 of Namecheap’s acquisition transfer request for BTAPPA compels the opposite conclusion.
11 (**Exhibit G** to Kirkendall Decl.). Again, VeriSign alone is responsible for determining whether a
12 bulk transfer qualifies for BTAPPA pursuant to VeriSign’s own policies; and, VeriSign has already
13 determined that Namecheap’s acquisition of the transfer rights to the VeriSign Domains from
14 eNom is a Qualifying Event. (**Exhibit G** to Kirkendall Decl.). Moreover, eNom previously
15 conceded that Namecheap’s acquisition of the transfer rights to the Namecheap-managed domains
16 (including the VeriSign Domains) under the Master Agreement qualifies for BTAPPA when it
17 agreed to complete the bulk transfer of 400,000 .BIZ domains to Namecheap using Neustar’s
18 BTAPPA service on or about July 29, 2016. (Kirkendall Decl., ¶25, and **Exhibit M** thereto; *see*
19 *also* Dam Decl., ¶¶16-19 [same BTAPPA service and same policy considerations apply]).
20 Nonetheless, on August 15, 2017, in a further effort to resolve this dispute informally and procure
21 Defendants’ voluntary compliance with their obligations, Namecheap offered to pay Tucows
22 \$50,000 in additional consideration, and execute a separate purchase agreement with Tucows, to
23 complete the transfer of the VeriSign Domains. (Kirkendall Decl., ¶27 and **Exhibit N** thereto).

24 These additional steps would have placed Namecheap’s “acquisition” of the VeriSign
25 Domains squarely within Tucows’ own prohibitively narrow (and erroneous) interpretation of the
26 “asset purchase” requirement language contained in the .COM and .NET registry agreements, and
27 would thereby have obviated Defendants’ professed concerns about BTAPPA not applying.

1 (*Ibid.*). Yet Tucows rejected this proposal out of hand. (See **Exhibit O** to Kirkendall Decl.). The
2 logical inference is that Defendants have fabricated these objections in bad faith to delay the
3 transfer of the VeriSign Domains and keep them on the eNom platform for as long as possible to
4 further Defendants' own economic and strategic interests. (Dam Decl., ¶¶38-41; Kirkendall Decl.,
5 ¶¶42-44). Regardless, Defendants' refusal to perform has placed Namecheap in imminent risk of
6 irreparable harm (Kirkendall Decl., ¶¶30-37; Dam Decl., ¶¶22, 67-68; Yoak Decl., ¶¶18, 25, 27),
7 and left Namecheap with no other option than to ask this Court for equitable relief in the form of
8 a mandatory preliminary injunction compelling Defendants to facilitate and complete the bulk
9 transfer of the VeriSign Domains by signing the BTAPPA transfer request.

10 III. LEGAL STANDARD

11 A party seeking a preliminary injunction must show “[it] is likely to succeed on the merits,
12 that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
13 equities tips in [its] favor, and that an injunction is in the public interest.” *Winter v. Natural Res.*
14 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit Court of Appeals has articulated an
15 alternate formulation of the *Winter* test, under which “‘serious questions going to the merits’ and
16 a balance of hardships that tips sharply towards the plaintiff can support the issuance of a
17 preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable
18 injury and that the injunction is in the public interest.” *Farris v. Seabrook*, 677 F.3d 858, 864 (9th
19 Cir. 2012); *Color Me House, Inc. v. Discovery Commc’ns, Inc.*, No. C12-5935 RJB, 2013 U.S.
20 Dist. LEXIS 44234, *12 (W.D. Wash. Mar. 27, 2013). These are not separate tests but rather
21 “represent two points on a sliding scale in which the required degree of irreparable harm increases
22 as the probability of success decreases.” *United States v. Odessa Union Warehouse Co-op*, 833
23 F.2d 172, 174 (9th Cir. 1987). When a preliminary injunction goes beyond the status quo and seeks
24 to force one party to act, it becomes a mandatory or affirmative injunction and the burden placed
25 on the moving party is increased. *Mercedes-Benz U.S. International, Inc. v. Cobasys, LLC*, 605
26 F.Supp.2d 1189, 1196 (N.D. Ala. 2009).

27 Because Namecheap does not simply seek a prohibitive injunction, but instead seeks a

1 mandatory injunction compelling Defendants' specific performance by signing a BTAPPA
 2 transfer request for the VeriSign Domains, Namecheap is subject to a higher burden in bringing
 3 this motion and, in order to prevail, must demonstrate that the facts and the law are clearly in its
 4 favor. *See, e.g., Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979); *Martinez v.*
 5 *Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976); *Clune v. Publishers' Ass'n of New York City*, 214
 6 F. Supp. 520, 531 (S.D.N.Y.), *aff'd per curiam*, 314 F.2d 343 (2d Cir. 1963). Namecheap meets
 7 that stricter standard here because the facts and law clearly favor the granting of Namecheap's
 8 preliminary injunction based on the record before this Court. *See, e.g., Traveler's Casualty and*
 9 *Surety Co. of Amer. v. Padron, et al.*, 2015 WL 1981563, *8 (W.D. Tex. May 1, 2015) (granting
 10 mandatory preliminary injunction compelling specific performance requiring access to books and
 11 records); *Zurn Constructors, Inc. d/b/a Vinylplex v. The B.F. Goodrich Co.*, 685 F.Supp. 1172,
 12 1187 (D. Kansas 1988) (granting plaintiff's motion for mandatory preliminary injunction
 13 compelling defendant to specifically comply with contractual obligation to continue supplying
 14 plaintiff with scarce resources); *Eastern Airlines, Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429, 443
 15 (S.D. Fla. 1975) (granting mandatory preliminary injunction compelling specific performance of
 16 obligation to provide fuel in quantities and at prices agreed upon in contract).

17 IV. LEGAL ANALYSIS

18 The facts and law clearly favor Namecheap's success on the merits of its breach of contract
 19 claim against Defendants, and overwhelmingly demonstrate that Namecheap will suffer immediate
 20 and irreparable harm absent this Court's granting of the requested injunction. The balance of the
 21 equities and the public interest also weigh decidedly in Namecheap's favor. Accordingly,
 22 Namecheap respectfully submits that it is entitled to a mandatory preliminary injunction
 23 compelling Defendants' specific performance of their contractual obligation to facilitate and
 24 complete the bulk transfer of the VeriSign Domains by signing the BTAPPA transfer request.

25 A. The Facts And Law Clearly Favor Namecheap's Success On The Merits Of Its 26 Breach Of Contract Claim Against Defendants

27 The Master Agreement provides for Washington law. (MA, §12 [Governing Law]). In

1 Washington, the essential elements of an action for breach of contract are: (1) a valid contract
2 between the parties; (2) breach; and (3) resulting damage. *Lehrer v. State Dept. of Social and*
3 *Health Servs.*, 5 P.3d 722, 727 (Wash. App. 2000). When a court’s legal powers cannot adequately
4 compensate a party’s loss with money damages, then a court may use its broad equitable powers
5 to compel a party to specifically perform its promise. *See Crafts v Pitts*, 162 P3d 382, 385-86
6 (Wash 2007). Because specific performance is uniquely a contract remedy, a trial court may order
7 specific performance only if there is a valid binding contract; a party has committed or is
8 threatening to commit a breach of its contractual duty; the contract has definite and certain terms;
9 and the contract is free from unfairness, fraud, and overreaching. *Crafts*, 162 P.3d at 385-86, citing
10 *Egbert v. Way*, 15 Wash. App. 76, 79, 546 P.2d 1246 (1976).

11 **1. The Master Agreement Is Clearly Valid, And The Evidence Clearly Shows That**
12 **Defendants Are In Breach**

13 The Master Agreement between Namecheap and eNom is clearly valid. Indeed, Defendants
14 do not dispute their obligation to transfer the VeriSign Domains to Namecheap pursuant to Section
15 7 of the Master Agreement. (*See Exhibits L and O* to Kirkendall Decl.). Section 7 unambiguously
16 requires Defendants to transfer the VeriSign Domains to Namecheap “in any manner, bulk or
17 otherwise,” “provided that any such transfer complies with all applicable ICANN and registry
18 rules, regulations and processes.” Section 7 also expressly prohibits Defendants from obstructing,
19 delaying, denying, obfuscating or otherwise restricting the transfer of the VeriSign Domains. (*See*
20 **Exhibit A** to Kirkendall Decl.).

21 Notwithstanding these explicit obligations, Defendants refuse to sign a BTAPPA transfer
22 request on the frivolous grounds that (a) a bulk transfer of the VeriSign Domains has “the potential
23 to wreak such havoc and confusion that there is no way that such transfer could” comply with
24 ICANN requirements, and (b) Namecheap’s transfer request does not qualify for BTAPPA. (*See*
25 **Exhibit L** to Kirkendall Decl.). For the reasons discussed below, the evidence demonstrates the
26 clear lack of merit in both of these objections. As a result, Defendants have no legitimate basis for
27 their refusal to sign the BTAPPA transfer request, and the evidence clearly favors Namecheap’s

1 position that Defendants are in breach of their obligation to complete a transfer of the VeriSign
2 Domains pursuant to Section 7 of the Master Agreement.

3 **a. A Bulk Transfer Of The VeriSign Domains Will Not Violate Any ICANN Or**
4 **VeriSign Rules, Regulations, Or Processes**

5 There is simply no basis for Defendants' claim that a bulk transfer of the VeriSign Domains
6 presents any complicated technical issue or other risk of havoc or confusion. (Yoak Decl., ¶¶20,
7 22-24, 26, 28; Dam Decl., ¶¶36-52). Instead, the evidence clearly demonstrates that a bulk transfer
8 of the VeriSign Domains does not pose any risk of customer confusion, or present any data
9 integrity issue, that would cause it to run afoul of any ICANN or VeriSign rule, regulation or
10 process. (Yoak Decl., ¶¶20, 22-24, 26, 28; Dam Decl., ¶¶22, 36-52, 67-68). By definition, any bulk
11 transfer in the .COM and .NET registry necessarily takes place on a "thin" registry, and ICANN
12 obviously considered this fact when it approved BTAPPA for these registries. (Dam Decl., ¶¶44-
13 47; Yoak Decl., ¶21).

14 It bears separate emphasis that Namecheap is the initial entry point for customer data and,
15 therefore, it is the authoritative source of data: all changes and information are already populated
16 directly into the Namecheap interface, and immediately modify all WHOIS data for the VeriSign
17 Domains in real-time. (Kirkendall Decl., ¶24). This means that authoritative data is already
18 contained within Namecheap databases. No data transfer has to occur to perform the bulk transfer
19 in this case. VeriSign will simply update the registry record identifying Namecheap instead of
20 eNom as the registrar, and Namecheap will rely on its own database and processes to perform its
21 responsibilities as the gaining registrar. (Yoak Decl., ¶¶22-23). Accordingly, implementing
22 BTAPPA is exceedingly straightforward in this case, and involves a relatively trivial amount of
23 integration. (Yoak Decl., ¶22-24; *see also* Dam Decl., ¶¶50-52).

24 Thus, Defendants have no legitimate basis for refusing to sign the BTAPPA transfer
25 request on the grounds that a bulk transfer of the VeriSign Domains would wreak any havoc or
26 confusion, or otherwise violate any ICANN rules, regulations, or processes. To the contrary, a
27 BTAPPA transfer is the **only** appropriate way to complete the transfer of the VeriSign Domains.

1 (Dam Decl., ¶¶22, 67-68; Yoak Decl., ¶¶16-19, 25-28).

2 **b. VeriSign Has Already Determined That Namecheap's Acquisition Of Its**
 3 **Transfer Rights In The VeriSign Domains Qualifies For BTAPPA**

4 VeriSign has already considered the same facts presented by this motion and determined
 5 that Namecheap's acquisition transfer request for the VeriSign Domains qualifies for BTAPPA.
 6 (**Exhibits D, F and G** to Kirkendall Decl.; Dam Decl., ¶36). VeriSign's guidelines for BTAPPA
 7 define a "Qualifying Event" to include an "acquisition transfer request" (like the one presented
 8 here) "involving a reseller of a registrar that becomes an accredited registrar and obtains the rights
 9 to transfer a partial domain name portfolio that it was previously managing as a reseller" by giving
 10 consideration for those transfer rights. (*See Exhibit C* to Kirkendall Decl.). The evidence
 11 supporting this motion clearly demonstrates that Namecheap acquired its transfer rights to the
 12 VeriSign Domains from eNom, for consideration, pursuant to the Master Agreement. (Kirkendall
 13 Decl., ¶¶7-10, 25-26; Dam Decl., ¶35). Again, Namecheap promised eNom one and a half years
 14 of guaranteed exclusivity for the VeriSign Domains in exchange for its acquisition of the transfer
 15 rights, and eNom collected millions of dollars of fees in connection with the VeriSign Domains as
 16 a direct result of Namecheap's performance of that promise. (*Ibid.*) Accordingly, as VeriSign has
 17 already concluded, Namecheap's acquisition of the transfer rights clearly constitutes a Qualifying
 18 Event for purposes of BTAPPA, and satisfies each of the other requirements for BTAPPA. (*See*
 19 **Exhibit G** to Kirkendall Decl.; *see also* Dam Decl., ¶¶22, 35, 52, 67-68).

20 Thus, the evidence clearly demonstrates the lack of merit in Defendants' refusal to sign a
 21 BTAPPA transfer request on the ground that "BTAPPA does not apply." Whether BTAPPA
 22 applies is up to VeriSign, not Defendants, and VeriSign has already decided that the transfer of the
 23 VeriSign Domains qualifies for BTAPPA. (*Ibid.*). Moreover, a BTAPPA transfer is the **only**
 24 appropriate method for transferring the VeriSign Domains. (Dam Decl., ¶¶22, 67-68; Yoak Decl.,
 25 ¶¶16-29, 25-28).

26 **2. Namecheap Will Suffer Damage As A Result Of Defendants' Breach**

27 The evidence also clearly demonstrates that Namecheap will suffer direct and

1 consequential damages that cannot be adequately quantified or remedied as a result of Defendants’
2 breach. There are 3,161,000 VeriSign Domains residing on the eNom platform, and Namecheap
3 will continue paying fees to Defendants for each new registration, transfer or renewal of the
4 VeriSign Domains for so long as they remain on the eNom platform. (Kirkendall Decl., ¶¶5, 29).
5 In addition to legal damages, Namecheap will also suffer lost business opportunities, loss of
6 goodwill and loss of market position should Defendants’ fail to perform their contractual
7 obligation to complete the bulk transfer of the VeriSign Domains by signing the BTAPPA transfer
8 request. (Kirkendall Decl., ¶¶30-32).

9 Namecheap will also suffer reputational damages due to not being able to provide
10 Namecheap platform services to its customers. The degree of competition is extremely high among
11 registrars in the domain industry, and it is essential for a registrar to provide top shelf services to
12 its customers in order to maintain a large and satisfied customer base. Namecheap has worked hard
13 on reaching above and beyond the services available in the marketplace today with a clear strategy
14 to move all Namecheap-managed domains onto its own platform to continue supporting them
15 directly under its own sponsorship, (Kirkendall Decl., ¶33). As discussed in the next section, legal
16 damages cannot adequately compensate Namecheap for these injuries. Accordingly, the facts and
17 law strongly favor Namecheap to succeed on the merits of its breach of contract claim (and request
18 for specific performance) against Defendants.

19 **B. Namecheap Will Suffer Immediate And Irreparable Harm Absent The Requested**
20 **Injunction**

21 Unless VeriSign receives the signed BTAPPA transfer request before December 31, 2017,
22 Namecheap will lose the ability to complete a bulk transfer of the VeriSign Domains. (Kirkendall
23 Decl., ¶¶11, 29 and **Exhibit C** thereto). In that event, Namecheap will suffer immediate and
24 irreparable injury. Courts of this circuit, including this Court, have found that loss of market share
25 and loss of goodwill constitute irreparable harm because such losses cannot adequately be
26 quantified. *Microsoft Corp. v. Motorola, Inc.*, 871 F.Supp.2d 1089, 1102-03 (W.D.Wash.2012),
27 citing *Conceptus, Inc. v. Hologic, Inc.*, 2012 WL 44064 at *2 (N.D. Cal. Jan. 9, 2012); *Rent-a-*

1 *Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)
2 (noting that damage to the reputation or goodwill, because it is difficult to calculate, qualifies as
3 irreparable harm); *see also Apple Computer, Inc. v. Formula Int'l Inc.*, 725 F.2d 521, 525-56 (9th
4 Cir. 1984) (jeopardy to competitive position may satisfy the irreparable harm needed to support a
5 preliminary injunction).

6 The same is true here. The evidence clearly demonstrates that Namecheap will lose market
7 share, goodwill and competitive position absent a mandatory preliminary injunction compelling
8 Defendants to sign the BTAPPA transfer request necessary to implement an immediate bulk
9 transfer of the VeriSign Domains. Having all of the VeriSign Domains under its direct sponsorship
10 (rather than transferring them individually as they come up for renewal) is material to
11 Namecheap's ability to establish itself as a dominant player in the domain marketplace via market
12 positions with both current and future customers, potential investors and financial sources.
13 (Kirkendall Decl., ¶30). Moreover, Namecheap has relied on its contractual right to transfer the
14 VeriSign Domains, in bulk, as a material factor in developing its strategic planning and
15 development over the past two years since entering the Master Agreement. (Kirkendall Decl., ¶29).

16 The alternative solutions proposed by Defendants would deprive Namecheap of the benefit
17 of the bargain it struck with eNom, and seriously damage Namecheap's goodwill among existing
18 and prospective customers. (Kirkendall Decl., ¶31). Attempting to transfer the domains upon
19 renewal pursuant to ICANN's Inter Registrar Transfer Policy, as Defendants suggest, would prove
20 extremely confusing to customers. (Dam Decl., ¶¶53-63). A general domain registrant who has at
21 all times dealt with Namecheap may reasonably be extraordinarily confused about the concept of
22 being told to perform several tasks in order to be moved from eNom or Tucows (with whom they
23 have had no relationship) to Namecheap (the contracting service provider with whom they have a
24 provider-customer relationship). (Dam Decl., ¶58). It would also require those customers to extend
25 the domain name registration by an additional one year period for additional fees pursuant to
26 ICANN policy. (*Id.*; *see also* Yoak Decl., ¶27). In short, ICANN never intended for the Inter-
27 Registrar Transfer method proposed by Defendants to be used in such a situation, and ICANN's

1 Inter-Registrar Transfer Policy is not an appropriate manner to accomplish the transfer. BTAPPA
2 is the **only** appropriate way for the transfer of the VeriSign Domains to Namecheap to be
3 performed. (Dam Decl., ¶¶22, 66-68; Yoak Decl., ¶¶16-19, 25-28).

4 Absent an immediate bulk transfer, Namecheap will have to launch marketing campaigns
5 to drive and accomplish the transfer of the VeriSign Domains to the Namecheap platform.
6 (Kirkendall Decl., ¶¶31-32). Transferring domains upon renewal is more disruptive to the
7 customer experience than a bulk transfer, and is likely to injure Namecheap's goodwill with such
8 customers. (Kirkendall Decl., ¶¶29-30; Dam Decl., ¶53-63; Yoak Decl., ¶¶18, 25-28). Moreover,
9 given the long tail of domains that Namecheap would be chasing, it is impossible to realistically
10 estimate the additional real dollars and manpower Namecheap would be required to invest in order
11 to bring the VeriSign Domains under its own direct sponsorship, and Namecheap would invariably
12 lose a significant percentage of such customers. (Kirkendall Decl., ¶32; Yoak Decl., ¶¶18, 25-28).
13 Furthermore, if Namecheap were to miss one renewal cycle in these efforts, it would have to wait
14 at least one or two years more until the next renewal cycle in order to attempt to bring these
15 domains onto the Namecheap platform. Some of those domains (such as "premium" domains)
16 have even longer renewal cycles of up to 10 years that would place them outside of Defendants'
17 transfer obligations altogether under Section 7(a) of the Master Agreement, which expire on
18 December 31, 2020. (Kirkendall Decl., ¶32; Yoak Decl., ¶27).

19 In the meantime, each of the VeriSign Domains would remain on the eNom platform under
20 the sponsorship of Namecheap's direct competitors, thereby giving Defendants an unfair
21 competitive advantage with respect to these Namecheap customers. (Kirkendall Decl., ¶33).
22 Finally, recurring issues of instability and insecurity associated with the eNom platform are also
23 likely to have a negative impact on the experience of Namecheap's customers absent a bulk
24 transfer, which will further harm Namecheap's goodwill with these customers. (Kirkendall Decl.,
25 ¶¶34-41 [detailed discussion of instability and insecurity issues with eNom platform]). Given these
26 facts, there is no adequate compensatory or other corrective relief that will be available at a later
27 date, in the ordinary course of litigation, in the event this Court denies the preliminary injunction

1 and allows Defendants to avoid their clear-cut obligation to complete the bulk transfer by signing
2 the BTAPPA transfer request.

3 **C. The Equities Weigh Decidedly In Namecheap's Favor**

4 Defendants will not suffer any prejudice by this Court's granting the preliminary
5 injunction. Defendants expressly concede their contractual obligation to transfer the VeriSign
6 Domains to Namecheap in any manner that complies with ICANN and VeriSign rules, regulations
7 and processes. (See **Exhibits L and O** to Kirkendall Decl.). The evidence advanced in support of
8 this motion demonstrates that the requested transfer fully complies with ICANN policy and
9 BTAPPA requirements, and that Defendants' arguments to the contrary are frivolous. (Dam Decl.,
10 ¶¶64-68; Yoak Decl., ¶¶24-28). Thus, Defendants will suffer no prejudice from the injunction
11 being granted. Defendants need only sign the BTAPPA transfer request, and VeriSign will
12 complete the bulk transfer of the VeriSign Domains to Namecheap. (Dam Decl., ¶¶50-51; Yoak
13 Decl., ¶¶22-24).

14 On the other hand, allowing Defendants to avoid their legal obligation to complete the bulk
15 transfer of the VeriSign Domains would deprive Namecheap of the benefit of the bargain it has
16 already fully performed, and unjustly enrich Defendants at Namecheap's expense. It will also
17 create an extraordinary level of confusion for Namecheap's customers, who may suddenly and
18 involuntarily find themselves dealing with eNom/Tucows (with whom they have had no
19 relationship) rather than Namecheap (with whom they contracted and deal with), being told to
20 perform several tasks in order to be moved from eNom to Namecheap at the time of renewal. (Dam
21 Decl., ¶57). The alternative solutions proposed by Defendants are neither credible nor viable
22 solutions. (Kirkendall Decl., ¶¶31-32, Dam Decl., ¶¶52, 64-68; Yoak Decl., ¶¶18, 25-28).
23 Accordingly, the equities weigh decidedly in favor of granting the preliminary injunction and
24 compelling Defendants to sign the BTAPPA transfer request for the VeriSign Domains.

25 **D. The Public Interest Weighs In Favor Of The Injunction Being Granted**

26 The public interest also clearly supports this Court's granting the requested injunction.
27 Namecheap manages the VeriSign Domains under its own brand using eNom's platform as a

1 reseller affiliate of eNom. Thus, even though eNom sponsors the VeriSign Domains, Namecheap
2 is the contracting service provider, and the end users are all Namecheap customers. Instead of a
3 bulk transfer, Defendants propose transferring the domains to Namecheap individually at the time
4 of renewal using the Authorized-Holder method pursuant to ICANN Inter-Registrar Transfer
5 Policy. As discussed above, that approach would create an extraordinary level of confusion for
6 Namecheap's customers. Those customers would also be required to extend the domain
7 registrations for an additional one-year term beyond the renewal, and pay additional fees, to
8 comply with ICANN requirements. (Dam Decl., ¶¶58; Yoak Decl., ¶¶18, 25-27). Some of those
9 customers are also likely to encounter situations where the domain name expires before the transfer
10 is completed, which may lead some domains to end-up being stuck in mandatory grace periods
11 (with large fees for reinstatement), or even being deleted and thus available for someone else to
12 register. (Dam Decl., ¶61).

13 Finally, the evidence demonstrates recurring issues of instability and insecurity associated
14 with the eNom platform, which pose a separate and ongoing risk of harm to the actual registrants
15 of the VeriSign Domains (all of them Namecheap customers) for so long as they remain under
16 eNom's sponsorship. For example, the *Register* recently reported a security lapse at eNom
17 whereby anyone with an eNom account was able to transfer another eNom customer's domain to
18 their control without consent or authorization. It took eNom at least five months to address after
19 being notified of the problem. (See **Exhibit P** to Kirkendall Decl.). Other examples of insecurity
20 include a July 2016 incident where the domain registrar-servers.com from Namecheap's additional
21 account was deleted without proper verification, which affected private name servers and caused
22 downtime for many domain names; in May 2016, eNom accidentally put the domain <foc.us> on
23 hold status by mistake when it confused it with the domain <viral.us>; and, in June 2016, an eNom
24 staff member mistakenly changed the production password on Namecheap's eNom account, which
25 made it impossible to process purchases through eNom. These are all in addition to a host of
26 instability issues, which negatively impact the Namecheap customer experience and put such
27 customers at risk of losing control of their domains. (Kirkendall Decl., ¶¶34-41).

1 **E. The Court Should Not Require Any Bond**

2 Rule 65(c) requires the Court to set bond before issuing preliminary relief. Fed. R. Civ.
3 Proc. 65(c). But the Court has wide discretion in determining “the amount of security required, *if*
4 *any*”, and “may dispense with the filing of a bond” entirely if “there is no realistic likelihood of
5 harm to the defendant from enjoining [its] conduct.” *Jorgensen v. Cassidy*, 320 F.3d 906, 919
6 (9th Cir. 2003) (internal quotation marks omitted); *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725,
7 733 (9th Cir. 1999); *see also Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000) (bond may be
8 set at zero where there is no evidence that a party will suffer damages from the issuance of an
9 injunction).

10 Given that Defendants already concede their contractual obligation to transfer the VeriSign
11 Domains to Namecheap, and the strength of the evidence demonstrating that the requested
12 BTAPPA transfer fully complies with all ICANN and VeriSign rules, regulations and processes,
13 and is the **only** effective method for transferring the VeriSign Domains to Namecheap, Defendants
14 will not suffer any risk of harm as a result of the requested injunction being granted. Accordingly,
15 Namecheap respectfully submits that no bond is required or appropriate to secure the injunctive
16 relief it seeks.

17 **V. CONCLUSION**

18 As the foregoing demonstrates, the facts and law clearly favor Namecheap’s success on the
19 merits of its breach of contract claim against Defendants, and overwhelmingly demonstrate that
20 Namecheap will suffer immediate and irreparable harm absent this Court’s granting of the
21 requested injunction. The balance of the equities and the public interest alike also weigh decidedly
22 in Namecheap’s favor. Accordingly, Namecheap respectfully submits that it is entitled to a
23 mandatory preliminary injunction compelling Defendants’ specific performance of their
24 contractual obligation to facilitate and complete the bulk transfer of the VeriSign Domains to
25 Namecheap by signing the BTAPPA transfer request, without the requirement of any bond.

1 DATED: September 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record.

DATED: September 21, 2017

s/ Venkat Balasubramani
Venkat Balasubramani, WSBA #28269

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