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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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| <p>Bad Apple L.L.C., a Utah limited liability company;</p> <p style="text-align: right;">Plaintiff,</p> <p>vs.</p> <p>Luke Heinecke, an individual; and David Gianvito, an individual; and Linear Magnitude, Inc., a Utah corporation;</p> <p style="text-align: right;">Defendant.</p> | <p style="text-align: center;">PLAINTIFF’S APPLICATION FOR TEMPORARY RESTRAINING ORDER</p> <p style="text-align: center;">Case No. 2:17-cv-76</p> <p style="text-align: center;">Magistrate Judge Dustin Pead</p> |
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COMES NOW Plaintiff Bad Apple L.L.C. (“Bad Apple”), by and through counsel undersigned, and petitions this Court for a Temporary Restraining Order (TRO) as follows:

INTRODUCTION

Plaintiff Bad Apple L.L.C. (“Bad Apple”) has been the registrant of the generic top-level domain name <badappleusa.com> (the “Disputed Domain”) since June 12, 2012 as manifest by the WhoIs detail report for the Disputed Domain attached hereto as **Exhibit A**. Plaintiff has used the Disputed Domain to market mobile phone and tablet computer repair services across the

Wasatch Front since the Disputed Domain's registration. (*See* Declaration of Trevor Shaw ("Shaw Decl.") attached hereto as **Exhibit B** ¶ 4.) Bad Apple has grown to maintain ten retail locations across the Wasatch Front, including in Salt Lake City, Orem, Draper, American Fork, South Jordan, Sugarhouse, Valley Fair Mall, West Valley City, Bountiful, and Riverdale. (*Id.*) Bad Apple has used the mark BAD APPLE and BAD APPLE USA to market computer repair services for nearly five years, accruing common law trademark rights in BAD APPLE and BAD APPLE USA. Additionally, Plaintiff maintains two valid and subsisting state trademark registrations for the Marks collectively attached hereto as **Exhibit C**.

On, or about December 23, 2016, Defendants to this action, acting in concert, deactivated, or shut down, Plaintiff's website at <badappleusa.com> using Plaintiff's hosting account at GoDaddy. Using login information Plaintiff had previously given to Defendants in connection with webdesign services, Defendants converted the Disputed Domain to their own name and have now locked Plaintiff out of it and redirected the Disputed Domain to resolve to a competitor's website. Defendants have taken down Plaintiff's website without legal justification, and Plaintiff is unable to restore any website to its domain name.

After accessing Plaintiff's GoDaddy registration account, Defendants changed the administrative settings on the account and/or transferred the Disputed Domain to account not controlled by the Plaintiff. (*Id.* ¶ 16.)

For several days thereafter, Plaintiff was confused as to why business was falling and customers began complaining Plaintiff's website was down. After inquiry by Plaintiff, Defendants informed Plaintiff they did not intend to return the Disputed Domain and that Plaintiff had transferred it to them by executing a hosting agreement.

Previously, on or about, December 1, 2014, Bad Apple entered into an agreement for hosting and maintenance of a website at Bad Apple's already existing domain name <badappleusa.com> (the "Hosting Agreement"). (Cmplt. ¶ 13.) The Hosting Agreement is attached hereto as **Exhibit D**. In refusing to return the Disputed Domain, Defendants maintain that paragraph 7 of the Hosting Agreement gives them ownership of Plaintiff's domain name <badappleusa.com> and trademarks, and justifies Defendants' conversion of the same. The plain language of the Hosting Agreement, however, gives Defendant Linear Magnitude, Inc. rights only the copy of any graphic design work Defendants produced and not Plaintiff's other personal property and intangibles, including its domain name and trademarks. Defendants now refuse to return the Disputed Domain to Plaintiff necessitating the present application. (Shaw Decl. ¶ 15.)

The Plaintiff has suffered more than \$100,000 in lost revenue since Defendants took down the Disputed Domain approximately one month ago. Defendants' actions threaten Plaintiff's only source of income and entire investment in the Disputed Domain and website. Defendants are not currently making use of the Disputed Domain and will suffer no harm if it is transferred back to Plaintiff preliminarily in this matter.

This Court has previously ordered VeriSign to transfer domain names in similar situations, including in TROs, as shown by the sample orders collectively attached hereto as **Exhibit E**.

ARGUMENT

I. PLAINTIFF IS ENTITLED TO A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION RESTORING PLAINTIFF'S DOMAIN NAME.

Rule 65(b) allow this Court to issue a TRO without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Each of these requirements is met in this case. The attorney certification is below, a verified complaint has been filed (ECF No. 1), and Plaintiff will suffer irreparable harm in the absence of the TRO. The standards for TROs and preliminary injunctions are congruent as both are extraordinary remedies.

Preliminary injunctive relief is only appropriate if the moving party establishes: ‘(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest’. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). Certain types of injunctions are disfavored: ‘(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits’. *O Centro Espirita Beneficente Uniqo do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004)(en banc). When the court rules on a disfavored injunction, the preliminary injunction factors ‘must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course’. *Id. When considering whether an injunction alters the status quo, the court does not look to ‘the situation existing at the moment the law suit is filed, but the last peaceable uncontested status existing between the parties before the dispute developed’*. *Id.* at 1013 (McConnell, J. concurring) (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948 (2d ed.

1995)) (emphasis added). *QEP Services Co., v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 740 F.Supp.2d 1274, 1281 (10th Cir. 2010).

II. PLAINTIFF WILL SUFFER IRREPARABLE HARM IN THE FORM OF FINANCIAL RUIN IF THE DISPUTED DOMAIN IS NOT RETURNED.

Irreparable harm justifying an injunction “is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money”. *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 428 (Utah 1983). Importantly, this standard “does not limit injunctive relief to those harms which could never be assigned a dollar value”. *Hunsaker v. Kersh*, 1999 UT 106, ¶ 9, 991 P.2d 67. “Rather, it merely acknowledges that monetary compensation does not always make a party whole”. *Id.*

Injunctive relief is not purely limited to cases where no other possible remedy will be available. Its broader purpose is preventive in nature. *See* 43 C.J.S. Injunctions § 5 (1978); 42 Am. Jur. 2d Injunctions §§ 2, 4, 13 (1969). A preliminary injunction is ‘an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one’. *Dixon*, 669 P.2d at 428 (quoting *Anderson v. Granite Sch. Dist.*, 17 Utah 2d 405, 407, 413 P.2d 597, 599 (1966)). It further serves to ‘preserve the status quo pending the outcome of the case’. *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986).

“‘Irreparable injury’ justifying an injunction is that which cannot be adequately compensated in damages *or* for which damages cannot be compensable in money.” *Dixon*, 669 P.2d at 427-28 (emphasis added) (citing *Black's Law Dictionary* 707 (rev. 5th ed. 1979)).

The Utah Supreme Court has specifically recognized that threatened misappropriation of a company's goodwill qualifies as irreparable harm justifying preliminary injunctive relief. *System Concepts*, 669 P.2d at 427 - 28. In *System Concepts*, the Utah Supreme Court held

that the threatened misappropriation of the former employer's goodwill may result in damages that “could be estimated only by conjecture and not by any accurate standard,” and therefore constituted irreparable harm. *Id.* at 428.

Similar to the *System Concepts* case, Plaintiff faces an imminent threat of misappropriation of its domain name that satisfies the irreparable harm standard. The loss of Plaintiff’s domain presents potentially devastating consequences to Plaintiff’s goodwill. The damages associated with the loss of the domain can be estimated only by conjecture and cannot possibly make Plaintiff whole. Accordingly, the irreparable harm standard is met in this case.

Plaintiff Bad Apple L.L.C. will be ruined financially if the Disputed Domain is not returned immediately. Plaintiff’s sales are plummeting and Plaintiff’s customers are not certain if Plaintiff is still in business because its website is down. New customers searching for a business offering Plaintiff’s services cannot find Plaintiff online, and Plaintiff’s profitability is being destroyed. (Shaw Decl. ¶ 17.) It would be impossible for Plaintiff to recover its losses if it is out of business.

A. The Threatened Injury to the Plaintiff Outweighs Whatever Damage, If Any, The Proposed Injunction May Cause Defendants.

As established above, the damage Plaintiff will suffer if Defendants are allowed to continue to deprive Plaintiff of use of its domain name is substantial and irreparable. This deprivation would damage the goodwill in addition to the monetary loss. In contrast, the injunctive relief sought by Plaintiff will result in very little, if any, possible damage to the Defendants. The Defendants are not using the Disputed Domain for any purpose, and will not be precluded from working and conducting their other affairs without it. Any possible damage associated with enjoining the Defendants from further use of the Disputed Domain is substantially outweighed by the immediate and irreparable injury threatened to Plaintiff.

B. The Requested Injunction Would Not Be Adverse to the Public Interest.

In requesting injunctive relief, Plaintiff merely seeks to enforce its legal property rights. The Defendants have no conflicting rights to the Disputed Domain. If granted, the requested injunction will not in any way restrict Defendants rights to do business and there is nothing that would be adverse to the public interest.

C. There Is a Substantial Likelihood That Plaintiff Will Prevail On the Merits of Its Claims in the Verified Complaint.

Plaintiff has annexed two registered trademarks from the State of Utah to the Complaint and numerous evidence of common law trademark rights in both BAD APPLE and BAD APPLE USA. (ECF No. 1.) The Hosting Agreement, by its plain language, does not give the Defendants the right to take Plaintiff's domain name, trademarks, or goodwill. There is nothing before the Court to suggest anything other than that Plaintiff has a substantial likelihood of prevailing on the merits.

D. The Temporary Restraining Order Should Issue Without Security.

Security for the temporary restraining order should not be required in this case because Defendants will not suffer any damages during the short period covered by the temporary restraining order. Indeed, Defendants will suffer no legally cognizable harm because Defendants are not using Plaintiff's domain name for any purpose. A bond is not necessary under present circumstances.

II. THIS COURT HAS THE POWER TO ORDER VERISIGN TO TRANSFER THE DISPUTED DOMAIN BACK TO PLAINTIFF.

In its proposed temporary restraining order to the Court, Plaintiff requests that the Court order VeriSign, Inc. of Virginia to transfer the domain name underlying this proceeding <badappleusa.com> into the protective possession of Plaintiff's counsel.

A. The ACPA Provides that the Court May Order VeriSign to Transfer the Disputed Domain to Plaintiff.

Plaintiff has claimed under Anticybersquatting Consumer Protection Act (ACPA). (Cmplt. ¶¶ 5 and 29 - 35.) The remedy expressly authorized by the ACPA is either (1) the forfeiture or cancellation of the domain names or (2) the transfer of the domain names to the owner of the mark. 15 U.S.C. § 1125(d)(2)(D)(i). The domain name registry for the Disputed Domain is maintained by VeriSign, which is located in Alexandria, Virginia. Therefore, this Court may properly enter a TRO and order that VeriSign as the .COM domain name registry, and any relevant domain name registrars, to transfer ownership of the Disputed Domain to the exclusive control and ownership of Plaintiff. *See Globalsantafe Corp.*, 250 F. Supp. 2d 610 (discussing the court's power to transfer, or cancel, a domain when the location of the registry is within that judicial district); *see also, e.g., United Press Int'l, Inc.*, 2013 U.S. Dist. LEXIS 189666; *CNM.COM, LLC*, 2015 U.S. Dist. LEXIS 165569; *Gong Zheng Jin*, 2015 U.S. Dist. LEXIS 70062; *Traffic Names, Ltd.*, 2015 U.S. Dist. LEXIS 62294; and *Acme Billing Co.*, 2015 U.S. Dist. LEXIS 65458.

This Court has previously ordered VeriSign to transfer domain names, including in TROs, as shown by the sample orders collectively shown in Exhibit D.

B. The All Writs Act Provides that the Court May Order VeriSign to Transfer the Disputed Domain to Plaintiff.

Additionally, despite the fact that VeriSign is a nonparty to this action who has not been served and no wrongdoing on the part of VeriSign is alleged, the Plaintiff submits that this Court has the power to order a nonparty to the present suit to comply with a TRO under the All Writs Act, 28 U.S.C. § 1651. The All Writs Act authorizes the federal courts of the United States to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to

the usages and principles of law.” *Id.* This provision of the All Writs Act was interpreted by attorneys and various federal circuits in decades past to vest in US district courts the power to enjoin nonparties to a suit in TROs and preliminary injunctions. In 1972 the Tenth Circuit interpreted the All Writs Act as precluding injunctive requests for relief against targets of injunctions not served over whom jurisdiction had not been established¹, but this ruling was overturned the US Supreme Court in 1977 in the decision of *United States v. New York Telephone Co.*, 434 U.S. 159, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977), which served to cure some split in authority among the federal circuits.

The Supreme Court has upheld the power of a district court to issue an injunction against a nonparty to a civil action. The district court in that action had ordered a telephone company to assist a party to the civil action in gathering information. The Supreme Court held that “[t]he power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action ..., are in a position to frustrate the implementation of a court order or the proper administration of justice.” *Id.* at 174, 98 S.Ct. 364.

1. Recent Tenth Circuit Authority Confirms the Power of this Court to Enjoin Nonparties in TROs Under the All Writs Act.

The Tenth Circuit has defined the circumstances in which a district court may direct injunctions to nonparties who have not been served. In 2005, in *Andrews v. Andrews*, 2005 WL 3551173, at *1 (10th Cir.Dc.29, 2005), the Tenth Circuit began its analysis by reciting much of the history given above:

. . .the Supreme Court [in] *United States v. New York Telephone Co.*, 434 U.S. 159, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) . . . upheld a non-party injunction (compelling a telephone company to assist the government's use of investigative pen registers) and stated that “[t]he power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action ..., are in a position to frustrate [or facilitate] the implementation of a court order or the proper administration of justice.”*Id.* at 174,

98 S.Ct. 364.

The district court also emphasized that the officials plaintiffs sought to enjoin had not been named or served in the proceeding. In its discussion of that facts, it is important to take note that the Tenth Circuit emphasized in this holding that the All Writs Act extends to nonparties who are in a position not just to frustrate the administration of justice, but also to “facilitate” it (as VeriSign is in the present case). The Tenth Circuit prepended the words “or facilitate” to its citation of the Supreme Court holding.

CONCLUSION

Given the showing by the Plaintiff and the complete loss that Plaintiff’s business that would sustain without use of the Disputed Domain, the imposition of the attached TRO upon the Defendant is warranted in the case to prevent irreparable harm to the Plaintiff. Should the Court have questions in this regard, Plaintiff’s counsel request the opportunity to confer with the Court in person or telephonically. This Application is supported by an affidavit of the Plaintiff attached hereto and the written representations of Plaintiff’s counsel in the Verified Complaint (ECF No. 1) and hereinabove.

CERTIFICATION OF COUNSEL

Counsel for Plaintiff, by his signature undersigned, affirms that he has attempted to contact Defendants’ counsel telephonically on January 30, 2017 at 801-799-5882. Plaintiff’s counsel did reach Eric Maxfield of Holland & Hart at about 3:25 pm on January 30, 2017. Plaintiff’s counsel was informed that Mr. Maxfield would likely, but not certainly, be representing Defendants. Mr. Maxfield has been sent copies of this Application for TRO via email as well as the Verified Complaint. (ECF No. 1.) Mr. Maxfield otherwise had no response to the TRO.

DATED AND SIGNED this 30th day of January, 2017.

/s/ 

STEVEN L. RINEHART
Attorney for Plaintiff