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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

10
11 COALITION FOR ICANN TRANSPARENCY,
INC., a Delaware Corporation,

12 Plaintiff,

13 v.

14 VERISIGN, INC., a Delaware Corporation;
15 INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS, a California
16 Corporation,

17 Defendants.

Case No. 05-4826 (RMW) PVT

**CFIT'S CONSOLIDATED REPLY TO
VERISIGN'S AND ICANN'S
SEPARATE OPPOSITIONS TO CFIT'S
MOTION FOR LEAVE TO FILE A
SECOND AMENDED COMPLAINT**

DATE: December 15, 2006
TIME: 9:00 a.m.
Courtroom: 6

Honorable Ronald M. Whyte

18
19 **I. INTRODUCTION**

20 This Reply will address not only the arguments raised by Defendants Verisign Inc.
21 (“Verisign”) and the Internet Corporation for Assigned Names and Numbers (“ICANN”) in
22 opposition to Coalition for ICANN Transparency’s (“CFIT’s”) Motion for Leave to File a Second
23 Amended Complaint, addressed *infra* at Section II. A, but it also will address an important new
24 factual development in the case. On November 30, 2006, the day prior to the submission of this
25 Reply, the United States Department of Commerce approved the .COM Registry Contract at issue
26 in this case, while retaining certain oversight authority over the 2012 renewal of that contract.

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1 The ramifications of this approval, and specific language in the approval relevant to this action,
2 are discussed in Section II. B.

3 **II. ARGUMENT**

4 **A. The Claims Made by Plaintiff CFIT Warrant Discovery and Trial**

5 This is a motion for leave to file a Second Amended Complaint, filed within the deadlines
6 set by the Court to amend the pleadings. As the Court knows well, the present motion follows
7 motions to dismiss, filed by the Defendants after CFIT filed and served it First Amended
8 Complaint, and a hearing on those motions, held on Friday, June 9, 2006. From CFIT's
9 perspective, the oral argument on the motions to dismiss served as an opportunity to address
10 certain misimpressions, apparent in the Court's Tentative Ruling of June 8, 2006 (hereafter,
11 "Tentative Ruling"), about the nature of CFIT's organization, the market definitions at issue, and
12 the harm to be suffered by the Plaintiff in this action. Similarly, the proposed amendments in the
13 proposed Second Amended Complaint directly address and answer questions raised by the Court,
14 both by way of its Tentative Ruling of June 8, 2006 and at oral argument on June 9, 2006.

15 Contrary to the claims made by Verisign and ICANN, the amendments make clear that this
16 is a case requiring discovery and trial.

17 **The Expiring Names Market.** Both in its Tentative Ruling (at pp. 11-13) and again at
18 oral argument, the Court expressed skepticism that the market for expiring, deleted names was
19 different than the market for new registrations. The Court asked:

20 *Why would anybody with a potentially valuable domain name abandon it as opposed to*
21 *abandoning the domain name if it was worthless?*

22 *In other words, why would the – why would the abandoned names as a group be any*
23 *different or more valuable than those that aren't abandoned?*

24 See, Transcript of Hearing, July 9, 2006, at 8:8-15 (copy attached to ICANN's Opposition, as
25 Exhibit "B") (hereafter, "Transcript"). While this question was addressed at oral argument (see,
26 Transcript at pp. 12:3-20), CFIT also has chosen to make the distinction explicit in the Second
27 Amended Complaint:
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57. Expired domain names become available for a variety of reasons.

58. As domain name registrations age, the likelihood that a registrant dies or becomes uninterested in maintaining an Internet presence increases. Over time, every individual who has registered a domain name will die. Those domain names eventually will fall into the market for expiring domain names.

59. For commercial registrations, most businesses started in the United States, and elsewhere, fail with a few years from the time they are created. Commercial registrations from failed businesses are not renewed and eventually will fall into the market for expiring domain names.

60. Many commercial registrations center on specific product lines or promotions. Oftentimes, these products or promotions have a limited lifetime, and the domain name registrant may decide not to renew the domain name once the immediate need for it has passed. Such domain names eventually will fall into the market for expiring domain names.

61. Both individuals and corporations commonly register domain names for time-specific events, such as meetings, conferences, concerts, picnics, etc. Once the event has passed, the registrant may decide not to renew the domain name. Such domain names eventually will fall into the market for expiring domain names.

62. Expiring domain names have more value than newly registered domain names in part because they have been advertised by the previous registrant and/or because websites associated with the domain name have been indexed by search engines. This means that expiring domain names typically have visitors to, links to, and traffic to the web sites and other Internet services associated with the domain name. Such Internet traffic makes it easier for a new domain name registrant to monetize the domain name registration by associating advertisements or other services with the domain name.

63. Expiring domain names also often have more value than newly registered domain names because they were registered at a time when good, short domain names were less scarce. For example, every dictionary word in English was registered many years in the past. Currently, the only way to register a common dictionary word in the .com TLD is to buy it directly from its current registrant or acquire the domain registration in the expiring domains market.

See, Proposed Second Amended Complaint, at ¶¶57-63. These additional allegations explain some of the many ways that domain names fall into the expired domain names market and why they have higher value than new registrations.

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1 **Domain Name Registrants as Plaintiff Members.** At the hearing on Defendants’
2 Motions to Dismiss, the Court was under the misimpression that CFIT’s members were composed
3 solely of back-order providers competing in the expired domain names market.

4 The Court asked, with regard to Plaintiff’s claims about supra-competitive pricing of
5 .COM domain names:

6 With respect to that aspect of your claim, is there a standing problem given your
7 description of your plaintiff?....

8 The only specific pleading you’ve made, though, is of a back order individual, or a
9 company, is it not?

10 See, Transcript, at 24:20-22 and 25:6-8. While counsel attempted to clarify this misimpression at
11 the June 9, 2006 hearing (see, Transcript, at 43:6-44:4), the fact that CFIT is composed of and
12 representing domain name registrants is clear in the Second Amended Complaint:

13 10. CFIT’s members also include domain name registrants, including but not limited to
14 Pool.com, Inc. (“Pool.com”), Momentous, Inc. (“Momentous”) R. Lee Chambers
15 Company, LLC, and the World Association of Domain Name Developers (“WADND”)
16 (hereinafter referred to as “CFIT’s Supporters”) and other individuals and companies that,
collectively, *have registered tens of thousands of domain names in the .com and .net*
registries.

17 See, Proposed Second Amended Complaint, at ¶10 (emphasis added). In light of this clarification,
18 Verisign’s and ICANN’s arguments, both in their prior motions to dismiss and their present
19 oppositions, that CFIT is simply attempting to protect existing back-order providers from
20 competition with Verisign, fall away.

21 One of the serious practical ramifications to registrants was discussed in a colloquy with
22 counsel at the June 9, 2006 hearing:

23 THE COURT: What’s anticompetitive about a system that instead of having it handled that
24 way says, when a name expires, we’re going to notify the public that the name has expired
25 and anybody who wants to bid on it and sell it to the highest bidder? What’s – Why is that
an antitrust violation?

26 [MR. FAUSETT]: ...[R]ight now, there are some registrars that offer a flat fee model for
27 the chance to get a domain name.

28

1 So if you pay \$50 if you're the first one at Registrar X, they will put you in the [queue] and
2 they'll send an ADD request on your behalf.

3 Under the Verisign model that's going to come in, it's going to be an auction model. So the
4 high price may be well above what some consumers can afford. Right now, under the
5 status quo...if I can't afford what would be the highest auction model, with the highest
6 price, I can still pay my \$50, \$40, whatever the flat rate is from some registrars and have a
7 good chance, or a chance, of getting the domain name.

8 THE COURT: All right.

9 [MR. FAUSETT]: So we're completely eliminating the registrars who are offering flat fee
10 models from the market. We're completely taking away the opportunity for consumers
11 who would like to purchase one of these domain names at a flat fee at an affordable rate,
12 we're taking that opportunity away from them and we're telling them they have to be the
13 high bidder.

14 See, Transcript, at 17:22-19:12.

15 Read against this clarification of the Plaintiff and its members, all the specific allegations
16 of harm in the Second Amended Complaint necessarily now include allegations that domain name
17 *registrants* will be harmed by the Defendants' actions. As presented at the June 9, 2006 hearing,
18 each price rise by Verisign will extract tens of millions of dollars from domain name registrants
19 for fees charged above the fair market price. See, Transcript, at 23:7-24:19. The harm is real and
20 the claims deserve discovery and a full trial on the merits.

21 **B. U.S. Approval Does Not Confer Federal Antitrust Immunity**

22 To date, one of the proposed agreements at issue in this litigation, that between Verisign
23 and ICANN for the operation of the .COM registry, has never been executed. The United States
24 Department of Commerce ("USDOC") had final approval authority over any such contract, and
25 although ICANN sought the USDOC's approval of the contract beginning in March, 2006, it had
26 not been received. So long as that approval was withheld, CFIT and its members and supporters
27 were not in danger of immediate harm from the conduct described in the Complaint.

28 That immediate potential for harm arose again, however, on Thursday, November 30,
2006, when the USDOC approved the Verisign-ICANN Agreement in an announcement posted to
the USDOC's website. True and correct copies of the USDOC's Press Release and its
accompanying Fact Sheet are attached as Exhibits "A" and "B," respectively. The Agreement

1 was approved as submitted, with the USDOC retaining authority to approve any subsequent
2 renewal of the Agreement in 2012, via a new Amendment 30 to its Agreement with Verisign. A
3 true and correct copy of the USDOC's Amendment 30 is attached as Exhibit "C."¹ Now that the
4 Agreement has been approved, Verisign and ICANN can execute the proposed .COM Agreement,
5 Verisign then will take the specific harmful actions detailed by CFIT in its Complaint.

6 Importantly, for present purposes, the USDOC's approval expressly contemplates that
7 actions such as the present one are appropriate and may be necessary to correct abusive market
8 practices. Paragraph 5 of Amendment 30 reads:

9 The Department hereby approves the Registry Agreement. *This approval is not intended*
10 *to confer federal antitrust immunity on Verisign with respect to the Registry*
Agreement....

11 See, Exhibit "C," at p. 4 (emphasis added). Whatever this approval means for the three parties
12 involved – the USDOC, ICANN, and Verisign – it expressly does not mean that the agreement
13 will not harm consumers or other companies involved in the domain name registration markets at
14 issue.

15 **III. CONCLUSION**

16 CFIT has addressed all of the Court's concerns about its pleading. It has pleaded relevant
17 markets, Verisign's monopoly power in those markets, and the threatened harm consumers,
18 including CFIT. With the USDOC's approval of the agreement at issue and the imminent
19 execution of the agreement, CFIT should be permitted to move forward with discovery and
20 preliminary injunction motion practice to stop the threat of harm.

21 DATED: December 1, 2006

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26 _____
27 ¹ Exhibits A, B, and C are public, federal government records, available at <http://ntia.doc.gov>, of
28 which the Court can and should take judicial notice.

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