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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COALITION FOR ICANN TRANSPARENCY INC.,

Plaintiff,

v.

VERISIGN, INC; AND INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

Case No. 05-4826 (RMW)

DEFENDANT ICANN'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Date: December 15, 2006
Time: 9:00 a.m.
Location: Courtroom 6

The Honorable Ronald M. Whyte

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules

I. INTRODUCTION

With its Motion for Leave to File a Second Amended Complaint ("Motion"), Plaintiff Coalition for ICANN Transparency ("CFIT") seeks a *third* opportunity to plead antitrust claims against Defendants Internet Corporation for Assigned Names and Numbers ("ICANN") and VeriSign, Inc. ("VeriSign"). This Court's prior rulings provided CFIT with a road map of how it might plead a viable claim, but CFIT has been either unwilling or unable to follow it. Instead, CFIT's proposed amendments are window dressing, and they fail to address—much less cure—the fatal deficiencies this Court previously identified.

On February 28, 2006, this Court granted defendants' Motions for Judgment on the Pleadings and dismissed CFIT's original complaint because CFIT had not adequately alleged associational standing. The Court gave CFIT leave to amend, and CFIT filed a First Amended Complaint ("FAC"). Again, defendants filed motions to dismiss, and on June 8, 2006, this Court issued a lengthy tentative order granting defendants' Motions to Dismiss, *inter alia*, on the grounds that CFIT lacked antitrust standing because it failed to allege facts showing that the 2006 .COM agreement amounted to anticompetitive conduct or would result in harm to competition.

Although the Court has not yet issued a final ruling on ICANN's motion to dismiss the FAC, the proposed Second Amended Complaint ("SAC") does not add any facts regarding specific unlawful conduct undertaken by ICANN or VeriSign, nor does it add any facts regarding antitrust injury or harm to consumers. Thus, the SAC does not cure the deficiencies in the FAC. In CFIT's own words, the SAC only "updates information concerning plaintiff"; "provides a more detailed statement of the factual basis of the claims"; "makes clear that the market for .com domain names is [] separate"; "provides more detail supporting . . . the expiring names registration services market [a]s a separate relevant market"; and "clarifies that the lawsuit is filed on behalf of registrants." (Mot. at 2:2-8.) As a consequence, CFIT *still* fails to allege facts sufficient to maintain antitrust claims against either defendant.

Additional delay would be unfairly prejudicial to ICANN. This case has been pending for a year, and CFIT still has not been able to state an antitrust claim sufficient to move its case beyond the pleading stage. CFIT seeks leave to file yet another complaint – even though none of

its proposed amendments address the crux of the Court's rulings in this case – and to start the pleading challenges anew. Although CFIT had four months to address this Court's concerns as identified in the Court's June 8 tentative, CFIT has simply tinkered with its alleged market definitions and added conclusory statements about predatory conduct, with no new alleged facts to support them. ICANN should not be required to go through a *third* round of motions to challenge this infirm amendment.

ICANN respectfully submits it is time for this case to come to a close. CFIT's Motion should be denied.

II. FACTUAL AND PROCEDURAL HISTORY

The factual background of this case has been comprehensively briefed for this Court twice before. (*See* June 8, 2006 Tentative Order ("Order") at 2:1-7:19 (a copy of the Order is attached hereto as Exhibit A).) This case has been pending since November 28, 2005, when CFIT filed its original complaint along with an Application for a Temporary Restraining Order ("TRO"), which it served on minimal notice. After defendants opposed the TRO, this Court denied the application and set the matter for hearing as a Motion for a Preliminary Injunction ("PI"). CFIT later withdrew the PI Motion.

Defendants then filed Motions for Judgment on the Pleadings, which this Court granted on February 28, 2006, holding that CFIT did not allege facts sufficient to show associational standing. In that order, this Court also provided CFIT with a "roadmap" of the type of allegations which might save its faulty relevant market definitions, and granted leave to amend. (February 28, 2006 Order.)

On March 14, 2006, CFIT filed its First Amended Complaint, and defendants responded with Motions to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On June 8, 2006, this Court issued a lengthy tentative order granting the Motions to Dismiss, and took the matter under submission on June 9. (*See* Ex. A, Order.) Although the Court has not yet issued a final ruling, the tentative order provided CFIT with another roadmap of what facts were necessary if CFIT's antitrust theories had any hope of surviving beyond the pleading stage. (*See generally* Ex. A, Order at 9:22-18:28.)

On October 13, 2006, four months after the hearing on the Motions to Dismiss, CFIT filed the instant Motion and proposed Second Amended Complaint. But the SAC includes only the most minor of amendments, primarily addressing its market definitions. CFIT admittedly adds no new causes of action to its SAC (Mot. at 2:1), and also does not even purport to provide any amendments regarding antitrust injury or predatory conduct. (*Id*. at 2:2-9 (stating that the SAC provides "updates" on the plaintiff, clarifies the separation of the .COM and .NET domain name markets, "provides more detail" on the expiring domain names market as a separate market, and clarifies that it seeks to represent registrants).) CFIT's amendments are so minor, they can be summed up in just a few lines. The SAC:

- Slightly alters the CFIT membership definition[1] (¶¶ 9-10);
- Adds a few factual allegations suggesting that .COM and .NET are distinct relevant markets; (¶¶ 18-20);
- Adds allegations to attempt to demonstrate circumstances when domain names may expire (¶¶ 57-63), and to support CFIT's claim that there is a separate relevant market for expiring domain names; (¶ 66); and
- Adds conclusory allegations that defendants have engaged in "exclusionary and predatory conduct" (¶¶ 147, 174**)** – *without* including any specific facts regarding ICANN's (or VeriSign's) conduct.

The remainder of CFIT's alterations splits single paragraphs into multiple paragraphs to make the breadth of amendments appear more substantial.[2] (*Compare* FAC ¶ 99 *with* SAC ¶¶ 117-121; FAC ¶ 102 *with* SAC ¶¶ 124-125; and FAC ¶ 103 *with* SAC ¶¶ 126-128.)

III. BECAUSE THE PROPOSED SAC DOES NOT CURE THE DEFICIENCIES IN THE EXISTING COMPLAINT, ALLOWING FURTHER AMENDMENTS WOULD BE FUTILE AND UNFAIRLY PREJUDICIAL TO ICANN

Although requests for leave to amend under Rule 15(a) of the Federal Rules of Civil Procedure are normally viewed liberally, the futility of an amendment provides sufficient grounds to deny amendment. *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 614 (9th Cir. 1993) (affirming denial of amendment as futile where challenged ordinance was patently valid and no

[1] ICANN does not concede that CFIT is a proper associational plaintiff with standing, and does not waive the ability to challenge CFIT's standing if CFIT is given leave to file the SAC.

[2] CFIT also adds allegations regarding governmental hearings over the .com agreement (SAC ¶ 4) and the recent amendment to ICANN's Memorandum of Understanding with the United States Department of Commerce (*id*., ¶ 80) which provide additional factual background but are otherwise irrelevant to CFIT's causes of action.

set of facts could render challenge colorable); *Roth v. Marquez*, 942 F.2d 617, 628 (9th Cir. 1991) (futility alone is sufficient to support denial of leave to amend, where court already considered and rejected plaintiff's claim, and amendment sought only to make same claim more specific); *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983) (affirming denial of leave to amend associational plaintiff's antitrust complaint on grounds of futility, where it merely sought to "clarify" a point).

Where the court has *already allowed* previous amendments, its discretion in denying a further request is "particularly broad." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (affirming denial of leave to file fourth amended complaint); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) ("repeated failure to cure deficiencies by amendment previously allowed" is reason to deny amendment). If the amendment is *not* futile, there are three additional factors that courts use in evaluating the propriety of a motion for leave to amend: (1) bad faith; (2) undue delay; and (3) prejudice to the opposing party. *Allen*, 911 F.3d at 373; *see also Foman*, 371 U.S. at 182.

CFIT's SAC is futile, as it cannot survive a Rule 12 motion to dismiss, and leave to amend should not be granted.[3] *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989) ("Leave to amend need not be given if a complaint, as amended, is subject to dismissal.").

A. <u>This Court Already Told CFIT How to Fix Its Complaint, and CFIT Has Not Done So.</u>

As CFIT admits, the SAC contains the same causes of action against ICANN as its FAC. ICANN, in its Motion to Dismiss the FAC, provided this Court with a detailed discussion of how CFIT's complaint failed to identify any conduct actionable under federal or state antitrust laws.

[3] CFIT relies on *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2003). (Mot. at 2:21-3:5.) But in *Eminence Capital*, "plaintiffs had not filed three substantially similar complaints alleging substantially similar theories. [*Eminence*] is not a case where plaintiffs took 'three bites at the apple' by alleging and re-alleging the same theories in an attempt to cure pre-existing deficiencies." *Eminence Capital*, 316 F.3d at 1053. Here, the SAC is CFIT's third attempt to file a substantially similar complaint. (Mot. at 2:1-9 (the SAC provides "updates," "more detail," and "clarfi[cation]" of CFIT's already existing causes of action).) CFIT's focus on the factors of prejudice, delay and bad faith fully ignore the fact that *futility alone* requires that leave to amend be denied. (*See* Mot. at 3:15-4:15.)

(ICANN MTD at 8:22-20:20.)

In order to have antitrust standing to bring any of these claims, CFIT must show that it has suffered antitrust injury. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999) ("A plaintiff may only pursue an antitrust action if it can show '*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'") (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (emphasis in original)); (*see also* Ex. A, Order at 10:6-19.) Thus, CFIT's first task is to identify specific unlawful conduct that violates the antitrust laws. *Am. Ad Mgmt.*, 190 F.3d at 1055-56. CFIT cannot rest its claim of antitrust injury on harm suffered by individual competitors – it must allege injury to *competition*. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the [Sherman] Act protects."); (*see also* cases cited at ICANN MTD at 16:5-20.)

This Court tentatively found that CFIT had not met this burden in its FAC. (Order at 9:22-18:28.) The SAC does not add amendments regarding any unlawful conduct undertaken by ICANN or VeriSign. Similarly, CFIT does not add any amendments regarding injury to competition or consumers. In CFIT's own words, the SAC only "updates information concerning plaintiff"; "provides a more detailed statement of the factual basis of the claims"; "makes clear that the market for .com domain names is [] separate"; "provides more detail supporting . . . the expiring names registration services market [a]s a separate relevant market"; and "clarifies that the lawsuit is filed on behalf of registrants." (Mot. at 2:2-9.) In short, the SAC does not cure the defects in the causes of action this Court tentatively dismissed. *Moore*, 885 F.2d at 538 ("Leave to amend need not be given if a complaint, as amended, is subject to dismissal.").

1. CFIT Fails to Amend any Allegations to Save Its Antitrust Claims Based Upon Registry Agreement Renewal Provisions.

CFIT's causes of action for antitrust violations arise out of ICANN and VeriSign's proposed .COM Registry renewal agreement, and the 2005 .NET Registry Agreement (collectively, the "Registry Agreements"). This Court already told CFIT that its claim that the renewal provisions of each of the agreements vest in VeriSign the right to serve as the registry

operator of each of the two top level domains ("TLD"s) "in perpetuity" is not supported by the agreements themselves. (Ex. A, Order at 14:21-16:2.) Further, the '[m]ere extension of VeriSign's lawful appointment as the registry operator ***does not constitute an antitrust violation***." (*Id*. at 15:7-8 (emphasis added).)

The SAC does not alter a single word of the allegations related to the functioning of the renewal provisions of the Registry Agreements. (*Compare* SAC ¶¶ 97-104 *with* FAC ¶¶ 80-87; SAC ¶¶ 126-130 *with* FAC ¶¶ 103-105.) Since CFIT's amendment adds nothing to this basis of CFIT's antitrust claim, the amendment is futile. *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 844 (N.D. Cal. 2005) (adding allegations unnecessary and unable to cure a complaint would be futile) (Whyte, J.).

2. CFIT's Antitrust Claims Based Upon Pricing Terms Still Fail as a Matter Of Law.

Another purported basis for CFIT's antitrust claims are the pricing terms contained within each of the Registry Agreements. (SAC ¶¶ 105-109, 132-133.) Although this Court already has ruled that CFIT's "assertion that the prices are supra-competitive is conclusory and does not represent a factual allegation giving rise to an inference of antitrust injury" (Order at 16, n.10), CFIT does not add a single allegation to buttress its conclusory statement of supra-competitive pricing. The only addition it makes as to the pricing terms is at paragraph 108: "VeriSign and ICANN each believe that VeriSign could raise prices to the maximum permitted by the caps under .com and to any price whatsoever under .net without running afoul of the antitrust laws." (*Compare* SAC ¶¶ 105-109 *with* FAC ¶¶ 88-91.) This amendment obviously does not address the Court's concern that "CFIT provides no argument to support why its allegations of the increases in price caps or removal of price controls support, as a matter of law, an antitrust violation."[4]

[4] As ICANN discussed in its Motion to Dismiss the FAC, the imposition of a price cap – as exists in the 2006 .COM Agreement – is often viewed as having *pro-competitive* effects. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 343 n.13 (1990) (vertical maximum price restraints can have pro-competitive effects); *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 753 (1st Cir. 1994) ("use of a maximum resale price agreement . . . . protects consumers from the exercise of a retailer's monopoly power"); (*see* ICANN MTD at 13:23-14:11.) To the extent CFIT is suggesting that ICANN has given VeriSign unlimited power to raise prices in the 2005 .NET Registry Agreement, and that "VeriSign *will* impose these higher

(Ex. A, Order at 16:12-14.) CFIT still "has not alleged facts supporting that the future prices contemplated in the agreements will serve as significant barriers to entry or are otherwise supra-competitive." (*Id*. at 16:15-16.)

Since the amendments CFIT proposes to make do not contain any substantive changes to the allegations within the FAC that failed to support an antitrust violation, allowing CFIT to file the SAC would be an exercise in futility. *See In re McKesson HBOC, Inc. ERISA Litig*, 391 F. Supp. 2d. at 844.

3. CFIT Does Not Add any Allegations That VeriSign's Potential Introduction of the CLS Will Cause Anticompetitive Injury.[5]

CFIT's third basis for its antitrust claims are that ICANN is conspiring with and/or assisting VeriSign in leveraging alleged monopoly power in the .COM and .NET domain name markets into downstream markets. Again, these allegations are nearly identical to those found within the FAC. (*Compare* SAC ¶¶ 110-116 *with* FAC ¶¶ 92-98; SAC ¶¶ 134-138 *with* FAC ¶¶ 108-112.) The "market" CFIT claims will be harmed is the "expiring domain names registration services market." (SAC ¶ 135.) CFIT's allegations focus on the potential that VeriSign will implement its Central Listing Service ("CLS") auction service into the .NET and .COM Registries. (SAC ¶ 136.) As this Court recognized, however, VeriSign must obtain ICANN's approval to implement the CLS, and ICANN maintains responsibility to review the competitive effects of its implementation. (Ex. A, Order at 17:14-18 (*citing* ICANN MTD at 15).) In addition, the Court "need not assume as true that [] elimination [of the back order pooling services industry through the implementation of CLS] suffices as predatory conduct

(continued…)

prices, [this suggestion is] conclusory and unsupported by factual allegations." (Ex. A, Order at 16-17, n.10) (emphasis in original.)

[5] This Court also tentatively ruled that CFIT's Expiring Domain Names Market was improper. (Ex. A, Order at 13:15-17.) The SAC attempts to add allegations to better define this market. (SAC ¶¶ 57-63.) Whether or not CFIT can plead the Expiring Domain Names Market, however, does not remedy the fact that CFIT cannot and has not alleged antitrust injury within that market. Similarly, whether the .COM and .NET Registries are independent markets – as CFIT attempts to plead (SAC ¶¶ 15, 18-20) – is irrelevant to a review of the failure of its other amendments.

actionable under the antitrust laws." (*Id*. at 17:23-24.)

Not only was the Court unwilling to assume predatory conduct; it also stated that CFIT did not sufficiently allege injury to consumers: "***CFIT does not allege how consumers, namely the registrants, would be harmed by CLS. CFIT makes no allegations that CLS would result in higher prices or lower quality of service to registrants.***" (*Id*. at 18:17-19) (emphasis added.) Based on the allegations in the FAC, the Court determined that the CLS auction system actually "would result in the registration of expired names at a price determined by market forces." (*Id*. at 18:20-21.) CFIT does not address this statement in its SAC, and it adds *no allegations* regarding the prices of expired domain names or quality of service to consumers.

CFIT's own words confirm that the CLS-related allegations cannot support an antitrust claim against ICANN (and VeriSign). At oral argument on June 9, CFIT's counsel told the Court that it believes its claims relating to the "expiring domain names registration market" should be allowed so that market forces can be *avoided,* and those who cannot afford to pay the market price under the CLS auction should still be able to register a domain name at a set, lower price. (Exhibit B, Transcript of Proceedings, June 9, 2006 (applicable pages only) ("MTD Transcript") at 7:14-16; 9:7-12; 18:18-19:3.) Counsel stated further: "We're completely taking away the opportunity for consumers who would like to purchase one of these domain names at a flat fee at an affordable rate, we're taking that opportunity away from them and now we're telling them they have to be the high bidder." (Ex. B, MTD Transcript at 19:7-12.) CFIT is essentially arguing for price stabilization or restraint – which is an antitrust violation in and of itself. *See United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969) ("the limitation or reduction of price competition brings the case within the [Sherman Act] . . . . [A] lower price does not mean a larger share of the available business but a sharing of the existing business at a lower return. Stabilizing prices . . . is within the ban . . . of the Sherman Act.") (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940).) CFIT's theory of the harm regarding the possible introduction of CLS is simply not cognizable as an injury of the type the antitrust laws were designed to prevent.

In sum, CFIT's proffered amendments do not cure the infirmities that existed in CFIT's FAC. Except for minor 'clarifications,' 'explanations,' and added detail, the SAC duplicates the

pleading already before this Court – a pleading this Court has indicated it will likely dismiss. The SAC – four months in the making – demonstrates that CFIT simply cannot allege the facts necessary to bring a viable claim against ICANN. ICANN therefore requests that this Court deny CFIT leave to file the SAC. *See Klamath-Lake Pharm. Ass'n*, 701 F.2d at 1293 (affirming denial of leave to amend associational plaintiff's antitrust complaint on grounds of futility, where it merely sought to "clarify" a point).

B. Granting CFIT Leave to Amend Would Be Prejudicial to ICANN.

Prejudice to the opposing party in granting leave to amend is traditionally measured in terms of the need to re-open discovery, or having to face new causes of action late in the game. *See, e.g., Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989) (denying leave to amend where defendant has already faced substantial litigation costs in filing successful motions to dismiss to two prior complaints, and the third complaint would require the litigation to proceed on a new theory, potentially requiring new discovery). While much discovery in this action still needs to be taken, ICANN still would be prejudiced if this Court grants CFIT's Motion.

Like the defendant in *Ascon*, ICANN, a not-for-profit, public benefit corporation, has already faced a heavy burden in this case. It successfully fought a TRO. It had to respond to expedited discovery – even after CFIT withdrew its preliminary injunction motion. It successfully challenged the original complaint in this case, and still remains hopeful that this Court will stand on its Order granting ICANN's Motion to Dismiss a *second* complaint in this action. It has engaged in discovery battles – and will likely have to endure more – all to defend against this meritless case. ICANN's litigation costs have been substantial, and it would be prejudicial to allow those costs to continue to grow in view of the fact that CFIT cannot state a viable claim. *See Ascon*, 866 F.2d at 1161.

CFIT has twice been given a roadmap by this Court as to how it could amend its complaint to survive past the pleading stage. And twice now, it has failed to follow it. The conclusion that follows is ineluctable: CFIT cannot state a viable antitrust case against ICANN because *the facts do not exist*. ICANN has complied with its obligations as a litigant in this

matter. Allowing CFIT to file its SAC would simply prolong the inevitable and compound ICANN's burden in this matter.

IV. CONCLUSION

The SAC is CFIT's *third* attempt to put the same complaint before this Court. Although CFIT had months to create it, CFIT was unable to allege any facts that would state an antitrust claim against ICANN. Allowing CFIT to file its SAC would be futile, as it cannot survive a motion to dismiss. Further, perpetuating this litigation unnecessarily would greatly prejudice ICANN. ICANN therefore requests that CFIT's Motion for Leave to File a Second Amended Complaint be denied.

Dated: November 21, 2006

Respectfully submitted,

Jones Day

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