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10  
11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION  
14

15 COALITION FOR ICANN )  
16 TRANSPARENCY INC., a Delaware )  
corporation, )

17 Plaintiff, )

18 v. )

19 VERISIGN, INC., a Delaware corporation; )  
20 INTERNET CORPORATION FOR )  
ASSIGNED NAMES AND NUMBERS, a )  
California corporation, )

21 Defendants. )  
22  
23  
24  
25  
26  
27  
28

Case No. 5:05-CV-04826 (RMW) PVT

DEFENDANT VERISIGN, INC.'S  
OPPOSITION TO PLAINTIFF'S MOTION  
FOR LEAVE TO FILE A SECOND  
AMENDED COMPLAINT

Date: December 15, 2006  
Time: 9:00 a.m.  
Ctrm: 6  
Judge: Ronald M. Whyte

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1 **I. INTRODUCTION**

2 This Court has twice provided the Coalition for ICANN Transparency (“CFIT” or  
3 “Plaintiff”) with explicit instructions as to how to replead its claims. Each time, however, CFIT has  
4 failed to follow these instructions or amend its pleadings to state a claim. Accordingly, this third  
5 attempt to state a claim demonstrates unequivocally that this action should be dismissed with  
6 prejudice.

7 On June 8, 2006, the Court tentatively granted the motions of Defendants VeriSign, Inc.  
8 (“VeriSign”) and the Internet Corporation for Assigned Names and Numbers (“ICANN”)  
9 (collectively, “Defendants”) to dismiss CFIT’s first amended complaint. The Court’s tentative  
10 order specifically identified two significant defects in CFIT’s pleading: (1) CFIT failed to plead  
11 facts establishing a relevant market for “Expiring Domain Names Registration Services;” and  
12 (2) CFIT failed to allege facts showing predatory or exclusionary conduct by Defendants in any  
13 relevant market. See Tentative Order Granting Defendants’ Motions to Dismiss (“June 8 Tentative  
14 Order”), attached as Exhibit 1 to the Declaration of Angel L. Tang (“Tang Decl.”), at 13, 14-18.  
15 Defendants’ motions remain pending before the Court.

16 Now, over four months after the Court’s tentative order, CFIT seeks leave to file yet another  
17 amended complaint. CFIT’s proposed third complaint, however, does not correct, or attempt to  
18 correct, the deficiencies identified in the Court’s June 8 Tentative Order.<sup>1</sup> The Proposed Second  
19 Amended Complaint (“Proposed SAC”) contains no new factual allegations of alleged predatory or  
20 exclusionary conduct. Second, the Proposed SAC’s new allegations with respect to the Expiring  
21 Domain Names Registration Services market consist of further assertions that certain domain names  
22 may be considered more or less valuable to potential registrants -- a “fact” the Court already has  
23

24 <sup>1</sup> For the convenience of the Court, VeriSign attaches as Exhibit 2 to the Tang Decl. a redlined  
25 document comparing the allegations of CFIT’s Proposed Second Amended Complaint to the  
26 allegations of the First Amended Complaint. While, at first glance, it appears as though CFIT  
27 amended its complaint to add 28 paragraphs, those additions are illusory. The bulk of CFIT’s  
28 additions result from the subdivision and renumbering of paragraphs that were already included in  
the previous complaint. (Compare, e.g., FAC ¶ 7 to Proposed SAC ¶¶ 8-9; FAC ¶ 99 to Proposed  
SAC ¶¶ 117-121; FAC ¶ 102 to Proposed SAC ¶¶ 124-125; and FAC ¶ 103 to Proposed SAC ¶¶  
126-128.) Where additional allegations exist, they are insufficient to cure the fatal deficiencies of  
CFIT’s claims, as will be discussed below.

1 determined does not establish the existence of a separate relevant market. Properly defined relevant  
2 markets and predatory or exclusionary conduct are essential elements of the antitrust claims CFIT is  
3 attempting to assert. Without any allegations addressing these elements, CFIT's proposed  
4 amendment is futile.

5 CFIT already has been provided two opportunities to correct the deficiencies in its pleading.  
6 Indeed, the Court provided CFIT a roadmap as to how CFIT could properly cure its pleading  
7 defects, if the facts existed to allow it to cure the deficiencies. Despite these opportunities and clear  
8 instructions, CFIT's proposed SAC fails to cure the deficiencies. Accordingly, at this juncture, it is  
9 apparent that CFIT cannot allege or prove the necessary elements of its claims, and this Court  
10 should deny CFIT's motion to amend on grounds of futility. Moreover, because CFIT repeatedly  
11 has failed to amend as instructed by the Court, Defendants' currently pending motions to dismiss  
12 should be granted with prejudice.

## 13 **II. PROCEDURAL SUMMARY**

14 On November 28, 2005, CFIT commenced this action against Defendants, seeking to  
15 challenge under federal and state antitrust laws the terms of an existing contract between VeriSign  
16 and ICANN for the continued operation of the .net top-level domain ("TLD") and a proposed  
17 contract for the continued operation of the .com TLD registry (the "Registry Agreements"). CFIT's  
18 application for a Temporary Restraining Order was denied on November 30, 2005. On January 6,  
19 2006, both Defendants filed a motion for judgment on the pleadings challenging the sufficiency of  
20 CFIT's original complaint. On February 28, 2006, the Court granted Defendants' motions, holding  
21 that CFIT failed to allege facts sufficient to demonstrate associational standing and the existence of  
22 a relevant products market, namely the Expired Names Registration Services Market. (Order  
23 Granting Defendants' Motions for Judgment on the Pleadings, attached as Exhibit 3 to the Tang  
24 Decl., at 14 & 17.) The Court gave CFIT the opportunity to amend its claims, and provided CFIT  
25 with a clear roadmap of what allegations would be required to state sufficient claims for relief.  
26 Specifically, the Court admonished CFIT that it would need to plead "particularized allegations of  
27 fact" regarding its membership to demonstrate standing and "detailed allegations" showing that  
28

1 “registered and unregistered domain names are not reasonably interchangeable” to establish an  
2 Expired Names Registration Services Market. (*Id.* at 12 & 17.)

3 On March 14, 2006, CFIT filed its First Amended Complaint (“FAC”). In the FAC, CFIT  
4 dropped all but its federal antitrust claims. The FAC asserted that Defendants violated the antitrust  
5 laws based on the following allegations: (a) that VeriSign and ICANN have agreed to remove the  
6 price cap on domain name registration fees that may be charged by VeriSign; (b) that changes in the  
7 renewal provision of the Registry Agreements create a “perpetual” monopoly by VeriSign over the  
8 .com and .net registries; and (c) that VeriSign has or will engage in “monopoly leveraging” in  
9 connection with the alleged future introduction of the Central Listing Service, or other unidentified  
10 services.

11 On April 13, 2006, Defendants moved to dismiss the FAC. In their motions, Defendants  
12 argued that CFIT failed to heed any of the Court’s admonitions regarding the defects in its pleading  
13 and failed to amend its claims in any material manner. In particular, Defendants argued that CFIT  
14 failed to plead additional facts demonstrating either standing or the existence of an Expired Names  
15 Registration Services Market as directed by the Court. In addition, Defendants argued that the FAC  
16 failed to allege any predatory conduct or exclusionary conduct by Defendants, as required under the  
17 antitrust laws.

18 On or around June 8, 2006, the Court issued its tentative order to dismiss CFIT’s FAC. The  
19 Court specified two grounds for its tentative decision to dismiss the action. First, the Court found  
20 that CFIT failed to allege facts establishing “that there exists a relevant market for Expiring Domain  
21 Names Registration Services Market separate from the market for the registration of domain names  
22 in general.” (June 8 Tentative Order, at 13.) In connection with this finding, the Court noted that  
23 CFIT’s allegations regarding reasonable interchangeability of expired domain name registrations  
24 merely “suggest[ed] that some expired domain names may be in greater demand than others . . . .”  
25 (*Id.* at 12-13.) Second, and more significantly, the Court found that for each of CFIT’s antitrust  
26 claims, CFIT failed to allege facts showing predatory or exclusionary conduct by Defendants in any  
27 relevant products market. (*Id.* at 14-18.)  
28

1 On June 9, 2006, the Court heard oral argument on Defendants' motions to dismiss. During  
2 the hearing, CFIT, acknowledging the tentative order of dismissal, argued that it should be given  
3 another chance to amend its claims. At the conclusion of the hearing, the Court took the matter  
4 under submission. As of the date of the filing of this opposition, the Court had not yet issued its  
5 final order on Defendants' motions to dismiss.

6 Despite its argument for leave to amend at the June 9 hearing, CFIT failed to take any action  
7 to amend its pleading for a full four (4) months following the hearing. It was not until CFIT was  
8 pressed against the deadline for the filing of amendments that it finally moved for leave to amend.  
9 When CFIT finally attempted amendment, it did not allege any allegations that had not already been  
10 presented to the Court at the June 9 hearing. In fact, the arguments CFIT makes in the instant  
11 motion to amend are nearly identical to those made at the hearing. Thus, despite having four  
12 months to correct the errors of its pleadings, CFIT's proposed SAC does not amend CFIT's  
13 allegations in any material manner, even though it was given ample time and opportunity to digest  
14 the Court's admonitions regarding its claims. In particular, the SAC contains no new factual  
15 allegations of purported predatory or exclusionary conduct and fails to correct the deficiencies in  
16 CFIT's "Expiring Domain Name Registration Services" market allegations.

### 17 **III. ARGUMENT**

#### 18 **A. Leave To Amend Should Be Denied When Amendments Would Be Futile Or** 19 **When Movant Has Repeatedly Failed To Cure The Deficiencies Of Its Claims**

20 A court may properly deny a motion for leave to amend when the proposed amendments  
21 would be futile because they would not cure the defects of the complaint. *Deveraturda v. Globe*  
22 *Aviation Sec. Servs.*, 454 F.3d 1043, 1049-50 (9th Cir. 2006) ("[T]he proffered amendment would  
23 be futile. Accordingly, the district court did not err in denying leave to amend.") (citations  
24 omitted); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004)  
25 ("A district court does not err in denying leave to amend where the amendment would be futile.")  
26 (citations and quotations omitted). There is no need for the district court repeatedly to indulge a  
27 plaintiff by allowing an unending cycle of dismissal and amendment that serves only to squander  
28 judicial resources. *See Michaels of Or. v. Clean Gun, LLC*, 2002 WL 31496403, 01-CV-1158 (D.

1 Or. June 13, 2002) (citing *Perrian v. O'Grady*, 958 F.2d 192, 194-95 (7th Cir. 1992))

2 (“Preservation of judicial economy is further cause to deny a motion to amend.”).

3 Denial of a motion to amend is particularly appropriate when a plaintiff has repeatedly failed  
4 to correct the deficiencies of its complaint through previous amendments. In such circumstances,  
5 the court may infer that leave to amend would be futile based upon the plaintiff’s previous inability  
6 to plead a viable claim. In *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729 (9th Cir. 1987),  
7 the Ninth Circuit held that denial of leave to amend was not an abuse of discretion in a case in  
8 which the plaintiff had been given a previous opportunity to amend and detailed guidance from the  
9 court. The *Rutman* opinion noted that the “district court’s written order identified the defects in the  
10 First Amended Complaint and then permitted [the plaintiff] to amend its complaint once again. The  
11 Second Amended Complaint did not cure the deficiencies.” *Id.* at 738. From this failure to cure,  
12 the Ninth Circuit held that the district court could “reasonably conclude that further amendment  
13 would be futile and therefore did not abuse its discretion in denying leave to amend a second time.”  
14 *Id.*; see also *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1084 (9th Cir. 2000)  
15 (“Although it is theoretically possible for [the plaintiff] to allege more specific facts, his failure to  
16 do so [--] after the district court had given him three opportunities to amend his original complaint  
17 and had discussed with him the substantive problems with his claims [--] suggests the futility of  
18 further amendment.”). CFIT’s repeated failures demonstrate its inability to amend. Accordingly, the  
19 complaint should be dismissed without leave to attempt to state a claim for a third time.

20 **B. CFIT’s Proposed Amendments Would Be Futile**

21 **1. CFIT Fails to Allege Any New Facts Demonstrating Predatory Conduct**

22 The primary basis for the Court’s tentative decision to dismiss this action was the lack of  
23 any factual allegations showing that Defendants engaged in conduct that caused or will cause injury  
24 to competition, *i.e.*, predatory conduct. In concluding that CFIT’s claims should be dismissed, the  
25 Court engaged in a detailed analysis of each of CFIT’s antitrust claims, and specifically discussed  
26 how the omission of facts regarding predatory conduct destroyed each claim. The Court’s analysis  
27 is summarized below.



1 CFIT's first antitrust claim against Defendants alleges that the renewal provisions in the  
2 Registry Agreements permit VeriSign to serve as the sole registry operator of the .net and .com  
3 registries "in perpetuity" because they "virtually guarantee that VeriSign will not have to  
4 periodically bid for control over the registries." In response to this claim, Defendants asserted that  
5 the renewal provisions do not allow VeriSign to maintain its position as registry operator "in  
6 perpetuity," as both the new and old provisions contemplate that competitive bids will be solicited  
7 in the event VeriSign is deemed to be in material breach of the Registry Agreements. The Court  
8 agreed with Defendants, and found that CFIT's "allegations merely show [] that the [renewal  
9 terms] extend[] the term of VeriSign's designation as the registry operator for the .com registry  
10 under the 2001 .com Agreement," and that such "mere extension" of VeriSign's lawful role as  
11 registry operator "does not constitute an antitrust violation." (June 8 Tentative Order, at 15.)

12 CFIT's second antitrust claim alleges that the Registry Agreements remove price caps on  
13 the amount VeriSign may charge for domain name registrations. Defendants argued that CFIT's  
14 mere allegations of price increases, without more, are not sufficient to demonstrate predatory  
15 conduct. The Court again agreed, and stated that "CFIT provides no argument to support why its  
16 allegations of the increases in price caps or removal of price controls, as a matter of law, is an  
17 antitrust violation. Specifically, CFIT has not alleged facts supporting that the future prices  
18 contemplated in the agreements will serve as significant barriers to entry or are otherwise supra-  
19 competitive." (*Id.* at 16.)

20 CFIT's third and last antitrust claim against Defendants alleges that VeriSign, in collusion  
21 with ICANN, has leveraged its purported monopolies in the registry operator market to adjacent  
22 and downstream markets through its intention to implement its proposed Central Listing Service  
23 ("CLS"), which, according to CFIT, will "eliminate the current competitive marketplace for back  
24 order services." In response, Defendants argued that CLS would be pro-competitive because it  
25 would create the potential for new competition. Defendants also pointed out that VeriSign may  
26 only propose the service to ICANN, who has ultimate authority to approve the service after a  
27 thorough review of its competitive effects. The Court found Defendants' arguments "well taken"  
28 (*id.* at 17) and, relying on established authority, stated, "It is well established that the antitrust

1 laws are only intended to preserve competition for the benefit of consumers” (*id.* at 18 (quoting  
 2 *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999)). The Court  
 3 concluded by stating, “CFIT has failed to allege that VeriSign’s rights under the 2006 .com  
 4 Agreement to propose new registry services for ICANN’s approval violates antitrust laws or  
 5 constitutes specific intent to violate antitrust laws.” (*Id.* at 18.)

6 Despite the Court’s lengthy and thorough analysis regarding the necessity of facts showing  
 7 predatory conduct, CFIT continues to ignore that essential element of an antitrust claim in its  
 8 proposed amendment. Aside from two conclusory sentences alleging that VeriSign has engaged in  
 9 “predatory and exclusionary conduct” (Proposed SAC at ¶¶ 147 & 174), CFIT does not even  
 10 attempt to provide a single fact to support its predatory conduct allegations.<sup>2</sup> Without such critical  
 11 facts, CFIT cannot establish an essential element of its antitrust claims and no amendments will  
 12 save CFIT’s claims from that fatal defect.

13 **2. CFIT Fails to Allege Any New Facts Demonstrating the Existence of a**  
 14 **Separate “Expiring Domain Names Registration Services Market”**

15 Unlike predatory conduct, the SAC does purport to allege additional facts regarding the  
 16 relevant product markets, particularly the Expiring Domain Names Registration Services Market.  
 17 (*See id.* at ¶¶ 57-63.) These new market allegations, however, fail to cure the problems twice  
 18 identified by the Court.

19 In its Tentative Order, the Court found that CFIT failed to allege facts demonstrating a lack  
 20 of interchangeability between expired and existing domain names. (June 8 Tentative Order, at 12.)  
 21 The Court further stated “[a]t most, these allegations suggest that some expired domain names may  
 22 be in greater demand than others such that a registrant might be willing to pay an additional fee in  
 23 order to increase its chance of procuring that domain name.” (*Id.* at 12-13.) The market allegations  
 24 proposed by CFIT, aside from being wholly conclusory, fall squarely within the Court’s criticism  
 25 described above. For example, CFIT proposes to add the allegation that “Expiring domain names

26 \_\_\_\_\_  
 27 <sup>2</sup> VeriSign’s discussion of CFIT’s new allegations is not intended to address the substantive defects  
 28 of CFIT’s claims in a comprehensive manner. If CFIT’s proposed amendment were permitted,  
 VeriSign intends, and hereby respectfully reserves it right, to further challenge the legal sufficiency  
 of CFIT’s Second Amended Complaint under Rule 12 of the Federal Rules of Civil Procedure.

1 also often have more value than newly registered domain names because they were registered at a  
2 time when good, short domain names were less scarce.” (See Proposed SAC, ¶ 63.) Similarly,  
3 CFIT contends that “Expiring domain names have more value than newly registered domain names  
4 in part because they have been advertised by the previous registrant and/or because websites  
5 associated with the domain name have been indexed by search engines.” (*Id.* at ¶ 62.) These  
6 allegations merely suggest that some “expiring” domain names -- to the extent they are “short,”  
7 were previously advertised, and/or possess other characteristics, such as being common “dictionary  
8 words” -- may be more valuable to a prospective registrant than other “expiring” domain names or  
9 registered domain names.

10 In fact, each and every one of CFIT’s additional market allegations does nothing more than  
11 merely confirm precisely what this Court identified as insufficient -- that “some expired domain  
12 names may be in greater demand than others.” (*Id.* at ¶¶ 57-63.) Accordingly, these allegations fail  
13 for the same reasons they failed in the prior complaint, rendering CFIT’s proposed amendment  
14 futile.<sup>3</sup>

15 **C. Plaintiff Has Repeatedly Failed To Cure The Deficiencies Of Its Pleadings**

16 Plaintiff has had three opportunities to state a claim. Moreover, like the plaintiff in *Rutman*,  
17 CFIT has even been provided twice with explicit instructions by the Court as to how re-plead its  
18 claims. Each time, however, CFIT has failed to heed the Court’s admonitions, and has failed to  
19 make those amendments necessary to state a claim.

20 Following the Court’s order granting Defendants’ motions for judgment on the pleadings,  
21 CFIT was given a clear roadmap showing how it could correct its pleadings. CFIT failed to amend  
22 as instructed. After the Court’s tentative order granting Defendants’ motions to dismiss, CFIT was  
23 provided with yet another opportunity to amend. This time, CFIT was given a 19-page manual  
24 providing step-by-step instructions as to how to state an actionable claim. CFIT again failed to  
25

26 <sup>3</sup> The other main issue to which CFIT’s amendments are directed is standing. CFIT adds  
27 allegations regarding its membership. (Proposed SAC at ¶¶ 9-10.) While these allegations slightly  
28 bolster CFIT’s standing claims, they are irrelevant to the instant motion to amend. Standing was  
not a basis upon which the Court formed its tentative decision to dismiss CFIT’s claims. Therefore,  
CFIT’s additional standing allegations add nothing to the viability of its complaint.

1 amend as instructed. Instead, CFIT has proposed an amended complaint that neither cures the  
2 issues identified by the Court, nor attempts to cure the identified deficiencies. CFIT's continued  
3 and repeated omission of critical facts confirms that it cannot plead or prove facts demonstrating the  
4 existence of predatory conduct by Defendants or a relevant market for "Expiring Domain Name  
5 Registration Services." Accordingly, leave to amend again should be denied.

6 **D. Defendants' Pending Motions To Dismiss Should Be Granted Without Further**  
7 **Leave To Amend**

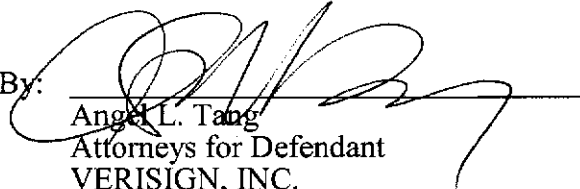
8 At this juncture, there is no longer any question as to whether CFIT could sufficiently  
9 amend its complaint if provided the opportunity. CFIT, by virtue of the instant motion, has  
10 presented the Court with its proposed amendments, and the Court has had the opportunity to  
11 examine those amendments. None of the proposed amendments, however, cure the fundamental  
12 defects that plague CFIT's claims. CFIT has not, because it cannot, state facts sufficient to support  
13 the critical element of predatory conduct. Accordingly, because any further amendment in this  
14 action would result in a waste of both the Court and the parties' time and resources, the Court  
15 should enter its final order granting Defendants' currently pending motions to dismiss with  
16 prejudice.

17 **IV. CONCLUSION**

18 For all of the foregoing reasons, VeriSign respectfully requests that the Court deny CFIT's  
19 motion for leave to file a second amended complaint and grant Defendants' currently pending  
20 motions to dismiss without further leave to amend. CFIT has had three opportunities to state a  
21 claim, two with specific instructions on necessary allegations. It has failed to state a claim each  
22 time. Respectfully, it should not be provided another opportunity.

23 DATED: November 22, 2006

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