

1 Jeffrey A. LeVee (State Bar No. 125863)
 jlevee@jonesday.com
 2 Eric P. Enson (State Bar No. 204447)
 eponson@jonesday.com
 3 Beong-Soo Kim (State Bar No. 212911)
 bkim@jonesday.com
 4 JONES DAY
 555 South Flower Street
 5 Fiftieth Floor
 Los Angeles, CA 90071.2300
 6 Telephone: 213.489.3939
 Facsimile: 213.243.2539

7 Attorneys for Defendant
 8 Internet Corporation for Assigned Names and
 Numbers
 9

10
 11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA**

13
 14 Manwin Licensing International
 S.A.R.I. and Digital Playground, Inc.,
 15 Plaintiffs,

16 v.

17 ICM Registry, Inc., and Internet
 Corporation for Assigned Names and
 18 Numbers,
 19 Defendants.

Case No. CV 11-9514 PSG (JCGx)

**FIRST AMENDED ANSWER OF
 DEFENDANT ICANN TO FIRST
 AMENDED COMPLAINT**

20
 21 Defendant Internet Corporation for Assigned Names and Numbers
 22 (“ICANN”) hereby answers and responds to plaintiffs’ First Amended Complaint
 23 (“FAC”), portions of which have been dismissed as a result of the Court’s order
 24 dated August 14, 2012.

25 1. ICANN lacks knowledge or information sufficient to form a belief as
 26 to the truth of the allegations of paragraph 1 and, on that basis, denies the
 27 allegations.

28 2. ICANN denies the allegations of paragraph 2.

1 3. ICANN denies the allegations of paragraph 3, including each of its
2 subparts, except admits that it is generally responsible for coordinating the
3 Internet's domain name system (DNS) and that it approved the .XXX TLD and
4 entered into a Registry Agreement with defendant ICM pursuant to which ICM
5 operates the .XXX TLD. As to the specific allegations of how ICM has operated
6 the .XXX TLD, ICANN lacks knowledge or information sufficient to form a belief
7 as to the truth of those allegations and, on that basis, denies them.

8 4. ICANN lacks knowledge or information sufficient to form a belief as
9 to the truth of the allegations of paragraph 4 and, on that basis, denies the
10 allegations.

11 5. ICANN lacks knowledge or information sufficient to form a belief as
12 to the truth of the allegations of paragraph 5 and, on that basis, denies the
13 allegations.

14 6. ICANN denies the allegations of paragraph 6 except admits that it is a
15 California non-profit public benefit corporation, was created in 1998, has authority
16 to decide which TLDs to approve and enters into agreements with TLD registry
17 operators. ICANN states further that it recently moved its principal place of
18 business to Los Angeles, California.

19 7. ICANN lacks knowledge or information sufficient to form a belief as
20 to the truth of the allegations of paragraph 7 and, on that basis, denies the
21 allegations. ICANN admits that it has an agreement with ICM to operate the .XXX
22 TLD.

23 8. ICANN denies the allegations of paragraph 8.

24 9. ICANN admits that the complaint asserts claims under the Sherman
25 Act, denies that any of those claims is legally viable, and denies the remaining
26 allegations of paragraph 9.

27 10. ICANN denies the allegations of paragraph 10 except admits that it is
28 subject to personal jurisdiction in the State of California and is organized under

1 California law. ICANN states further that it recently moved its principal place of
2 business to Los Angeles, California.

3 11. ICANN lacks knowledge or information sufficient to form a belief as
4 to the truth of the allegations of paragraph 11 and, on that basis, denies the
5 allegations.

6 12. ICANN denies the allegations of paragraphs 12 except admits that
7 venue is proper in this judicial district.

8 13. ICANN generally admits the allegations of paragraph 13 except notes
9 that the allegations are dramatically simplified in terms of how the Internet actually
10 functions.

11 14. ICANN generally admits the allegations of paragraph 14 except notes
12 that the allegations are dramatically simplified in terms of how the Internet actually
13 functions.

14 15. ICANN generally admits the allegations of paragraph 15 except notes
15 that the allegations are dramatically simplified in terms of how the Internet actually
16 functions.

17 16. ICANN generally admits the allegations of paragraph 16 except notes
18 that the allegations are dramatically simplified in terms of how the Internet actually
19 functions.

20 17. ICANN generally admits the allegations of paragraph 17 except notes
21 that the allegations are dramatically simplified in terms of how the Internet actually
22 functions.

23 18. ICANN generally admits the allegations of paragraph 18 except notes
24 that the allegations are dramatically simplified in terms of how the Internet actually
25 functions.

26 19. ICANN generally admits the allegations of paragraph 19 except notes
27 that the allegations are dramatically simplified in terms of how the Internet actually
28 functions.

1 20. ICANN generally admits the allegations of paragraph 20 except notes
2 that the allegations are dramatically simplified in terms of how the Internet actually
3 functions.

4 21. ICANN admits the allegations of paragraph 21.

5 22. ICANN denies the allegations of paragraph 22 because they are over-
6 simplified. ICANN admits that registry operators are responsible for individual
7 TLDs, that consumers are frequently referred to as registrants, and that registrants
8 contract with registrars or resellers to obtain domain name subscriptions.

9 23. ICANN admits the allegations of paragraph 23.

10 24. ICANN lacks knowledge or information sufficient to form a belief as
11 to the truth of the allegations of paragraph 24 and, on that basis, denies the
12 allegations.

13 25. ICANN denies the allegations of paragraph 25 except admits that, in
14 1998, ICANN entered into a memorandum of understanding with the United States
15 Department of Commerce (DOC) related to the DNS. That memorandum of
16 understanding speaks for itself.

17 26. ICANN generally denies the allegations of paragraph 26 because the
18 materials quoted in the paragraph speak for themselves.

19 27. ICANN denies the allegations of paragraph 27 and states that
20 ICANN's Articles of Incorporation speak for themselves.

21 28. ICANN generally denies the allegations of paragraph 28 and states that
22 ICANN's Bylaws speak for themselves. ICANN admits that it receives input from
23 several Advisory Committees, including the GAC.

24 29. ICANN generally denies the allegations of paragraph 29 and states that
25 ICANN's agreements with the DOC would speak for themselves.

26 30. ICANN denies the allegations of paragraph 30.

27 31. ICANN denies the allegations of paragraph 31, except that part of
28 ICANN's general mission is to coordinate the Internet DNS and expand the number

1 of Internet TLDs.

2 32. ICANN denies the allegations of paragraph 32 except admits that it
3 receives fees from Internet registries and registrars.

4 33. ICANN denies the allegations of paragraph 33 except admits that it
5 does receive contributions.

6 34. ICANN denies the allegations of paragraph 34 except admits that ICM
7 applied for the .XXX TLD in 2000 and that ICANN did not accept the application.

8 35. ICANN denies the allegations of paragraph 35 except admits that, in
9 approximately 2004, ICM applied for a sponsored TLD.

10 36. ICANN lacks knowledge or information sufficient to form a belief as
11 to the truth of the allegations of paragraph 36 and, on that basis, denies the
12 allegations except admits that ICM proposed to have IFFOR be the sponsoring
13 organization for the .XXX TLD.

14 37. ICANN denies the allegations of paragraph 37 except admits that
15 ICANN did not initially accept ICM's 2004 application.

16 38. ICANN incorporates its responses to paragraphs 39-51.

17 39. ICANN lacks knowledge or information sufficient to form a belief as
18 to the truth of the allegations of paragraph 39, including each of its subparts, and,
19 on that basis, denies the allegations.

20 40. ICANN denies the allegations of paragraph 40 except admits that the
21 ICANN Board took certain preliminary steps in June 2005 with respect to the .XXX
22 TLD.

23 41. ICANN generally denies the allegations of paragraph 41 because they
24 are oversimplified, except admits that, in March 2006, the GAC issued the so-called
25 Wellington Communique, and admits that ICANN deferred a final decision on the
26 ICM application.

27 42. ICANN lacks knowledge or information sufficient to form a belief as
28 to the truth of the allegations of paragraph 42 and, on that basis, denies the

1 allegations. ICANN admits that ICM submitted materials to the ICANN
2 ombudsman.

3 43. ICANN generally denies the allegations of paragraph 43 because they
4 are oversimplified, except admits that, in March 2007, ICANN's Board voted to
5 reject the .XXX TLD. ICANN also admits that ICM filed a request for
6 reconsideration that was later withdrawn.

7 44. ICANN admits the allegations of paragraph 44.

8 45. ICANN lacks knowledge or information sufficient to form a belief as
9 to the truth of the allegations of paragraph 45 and, on that basis, denies the
10 allegations. ICANN states further that the documents referenced in paragraph 45
11 speak for themselves.

12 46. ICANN denies the allegations of paragraph 46 and states that the IRP's
13 decision speaks for itself.

14 47. ICANN denies the allegations of paragraph 47 except admits that
15 ICANN publicly posted the IRP decision. The documents referenced in
16 paragraph 47 speak for themselves.

17 48. ICANN admits the allegations of paragraph 48.

18 49. ICANN lacks knowledge or information sufficient to form a belief as
19 to the truth of the allegations of paragraph 49 and, on that basis, denies the
20 allegations.

21 50. ICANN denies the allegations of paragraph 50.

22 51. ICANN denies the allegations of paragraph 51.

23 52. ICANN incorporates its responses to paragraphs 53-58.

24 53. ICANN denies the allegations of paragraph 53 and states that the
25 registry agreement between ICM and ICANN speaks for itself.

26 54. ICANN denies the allegations of paragraph 54 except admits that, on
27 one occasion, ICANN obtained bids for a TLD and admits that certain registry
28 agreements contains price caps.

1 55. ICANN denies the allegations of paragraph 55 and states further that
2 ICM was the only applicant for the .XXX sTLD.

3 56. ICANN denies the allegations of paragraph 56, including its subparts,
4 and states that the registry agreement between ICM and ICANN speaks for itself.

5 57. ICANN denies the allegations of paragraph 57.

6 58. ICANN denies the allegations of paragraph 58.

7 59. ICANN incorporates its responses to paragraphs 60-70.

8 60. ICANN denies the allegations of paragraph 60.

9 61. ICANN denies the allegations of paragraph 61.

10 62. ICANN lacks knowledge or information sufficient to form a belief as
11 to the truth of the allegations of paragraph 62 and, on that basis, denies the
12 allegations.

13 63. ICANN lacks knowledge or information sufficient to form a belief as
14 to the truth of the allegations of paragraph 63 and, on that basis, denies the
15 allegations.

16 64. ICANN denies the allegations of paragraph 64.

17 65. ICANN denies the allegations of paragraph 65.

18 66. ICANN denies the allegations of paragraph 66. Further, the Court's
19 order of August 14, 2012 dismissed claims based on an affirmative registration
20 market.

21 67. ICANN denies the allegations of paragraph 67.

22 68. ICANN lacks knowledge or information sufficient to form a belief as
23 to the truth of the allegations of paragraph 68 and, on that basis, denies the
24 allegations..

25 69. ICANN denies the allegations of paragraph 69.

26 70. ICANN denies the allegations of paragraph 70.

27 71. ICANN incorporates its responses to paragraphs 72-88.

28 72. ICANN denies the allegations of paragraph 72.

1 73. ICANN lacks knowledge or information sufficient to form a belief as
2 to the truth of the allegations of paragraph 73 and, on that basis, denies the
3 allegations.

4 74. ICANN lacks knowledge or information sufficient to form a belief as
5 to the truth of the allegations of paragraph 74 and, on that basis, denies the
6 allegations.

7 75. ICANN lacks knowledge or information sufficient to form a belief as
8 to the truth of the allegations of paragraph 75 and, on that basis, denies the
9 allegations.

10 76. ICANN lacks knowledge or information sufficient to form a belief as
11 to the truth of the allegations of paragraph 76, including its subparts, and, on that
12 basis, denies the allegations. ICANN denies that it was aware of any unreasonable
13 or anticompetitive restrictions imposed by ICM's policies.

14 77. ICANN lacks knowledge or information sufficient to form a belief as
15 to the truth of the allegations of paragraph 77 and, on that basis, denies the
16 allegations.

17 78. ICANN lacks knowledge or information sufficient to form a belief as
18 to the truth of the allegations of paragraph 78 and, on that basis, denies the
19 allegations.

20 79. ICANN lacks knowledge or information sufficient to form a belief as
21 to the truth of the allegations of paragraph 79 and, on that basis, denies the
22 allegations.

23 80. ICANN lacks knowledge or information sufficient to form a belief as
24 to the truth of the allegations of paragraph 80 and, on that basis, denies the
25 allegations.

26 81. ICANN denies the allegations of paragraph 81.

27 82. ICANN lacks knowledge or information sufficient to form a belief as
28 to the truth of the allegations of paragraph 82 and, on that basis, denies the

1 allegations.

2 83. ICANN lacks knowledge or information sufficient to form a belief as
3 to the truth of the allegations of paragraph 83, including its subparts, and, on that
4 basis, denies the allegations.

5 84. ICANN lacks knowledge or information sufficient to form a belief as
6 to the truth of the allegations of paragraph 84 and, on that basis, denies the
7 allegations.

8 85. ICANN lacks knowledge or information sufficient to form a belief as
9 to the truth of the allegations of paragraph 85 and, on that basis, denies the
10 allegations.

11 86. ICANN lacks knowledge or information sufficient to form a belief as
12 to the truth of the allegations of paragraph 86 and, on that basis, denies the
13 allegations.

14 87. ICANN denies the allegations of paragraph 87.

15 88. ICANN denies the allegations of paragraph 88.

16 89. ICANN denies the allegations of paragraph 89 except generally admits
17 that the conduct, as alleged, may implicate interstate commerce.

18 90. ICANN lacks knowledge or information sufficient to form a belief as
19 to the truth of the allegations of paragraph 90 and, on that basis, denies the
20 allegations.

21 91. ICANN lacks knowledge or information sufficient to form a belief as
22 to the truth of the allegations of paragraph 91 and, on that basis, denies the
23 allegations.

24 92. ICANN lacks knowledge or information sufficient to form a belief as
25 to the truth of the allegations of paragraph 92 and, on that basis, denies the
26 allegations.

27 93. ICANN incorporates its responses to paragraphs 1-92.

28 94. ICANN denies the allegations of paragraph 94 and further denies that

1 plaintiffs have identified a relevant market for antitrust purposes.

2 95. ICANN denies the allegations of paragraph 95.

3 96. ICANN denies the allegations of paragraph 96, including its subparts.

4 97. ICANN denies the allegations of paragraph 97, including its subparts.

5 98. ICANN denies the allegations of paragraph 98.

6 99. ICANN denies the allegations of paragraph 99, including its subparts.

7 100. ICANN denies the allegations of paragraph 100.

8 101. ICANN incorporates its responses to paragraphs 1-92.

9 102. ICANN denies the allegations of paragraph 102 and further denies that
10 plaintiffs have identified a relevant market for antitrust purposes.

11 103. ICANN denies the allegations of paragraph 103.

12 104. ICANN denies the allegations of paragraph 104.

13 105. ICANN denies the allegations of paragraph 105, including its subparts.

14 106. ICANN denies the allegations of paragraph 106.

15 107. ICANN denies the allegations of paragraph 107, including its subparts.

16 108. ICANN denies the allegations of paragraph 108.

17 109. ICANN denies the allegations of paragraph 109.

18 110. ICANN denies the allegations of paragraph 110.

19 110-121. In its order of August 14, 2012, the Court dismissed the third cause
20 of action.

21 122-130. The fourth cause of action does not assert a claim against ICANN.

22 131-139. In its order of August 14, 2012, the Court dismissed the fifth cause
23 of action, which does not assert a claim against ICANN in all events.

24 **AFFIRMATIVE DEFENSES**

25 First Affirmative Defense

26 (Failure To State A Claim)

27 140. The allegations of the FAC do not state a claim against ICANN.

28

1 Second Affirmative Defense

2 (Trade or Commerce)

3 141. As ICANN argued in its motion to dismiss, the allegations of the FAC
4 do not state antitrust claims against ICANN because ICANN’s decisions and
5 conduct did not involve trade or commerce, as required under the antitrust laws.

6 Third Affirmative Defense

7 (Waiver and Laches)

8 142. Plaintiffs’ claims are barred by the doctrines of waiver and laches.
9 Plaintiffs allege that in 2004, ICM “embarked on a predatory campaign of
10 misinformation and other misconduct” in an effort to persuade and pressure ICANN
11 into approving the .XXX TLD and ICM as the registry operator of that TLD. (FAC
12 ¶¶ 39, 40.) In addition, Plaintiffs allege that, in 2005, ICM applied improper
13 pressure in an effort to coerce ICANN’s approval of .XXX. (*Id.* at ¶ 42.) Plaintiffs
14 further claim that this alleged conduct, in part, caused ICANN to approve ICM as
15 the registry operator of the .XXX TLD. (*Id.* at ¶ 3(e).) Plaintiff, however,
16 neglected to, and delayed in, bringing the instant action to remedy these alleged
17 wrongs until November of 2011, thereby intentionally abandoning, relinquishing
18 and waiving its alleged rights for the conduct alleged in the FAC. This delay has
19 caused prejudice to ICANN and operates as an equitable bar to Plaintiffs’ claims
20 under the doctrines of waiver and laches.

21 Fourth Affirmative Defense

22 (No Antitrust Injury)

23 143. Plaintiffs have not suffered an antitrust injury sufficient to assert their
24 claims against ICANN. Plaintiffs allege a speculative and future injury that has not
25 yet occurred, has not harmed the overall competitive process, and is, at best, the
26 result of increased, rather than decreased, competition. Accordingly, Plaintiffs have
27 failed to allege, and cannot prove, that they have suffered an antitrust injury; that is,
28 an injury of the type the antitrust laws were intended to prevent and that flows from

1 that which makes ICANN's alleged acts unlawful.

2 Fifth Affirmative Defense

3 (Lack of Standing)

4 144. Plaintiffs lack standing to assert their antitrust claims. First, Plaintiffs
5 have not suffered an antitrust injury, as required to have standing to bring the
6 antitrust claims alleged in the FAC. Second, Plaintiffs have not suffered an injury-
7 in-fact because they have not defensively registered domain names within the
8 .XXX TLD and none of Plaintiffs' claimed domain names have been registered in
9 the .XXX TLD. Third, any alleged future harm is speculative and would be
10 indirectly caused by ICANN's alleged conduct. Accordingly, Plaintiffs lack
11 standing to assert the antitrust claims alleged in the FAC.

12 Sixth Affirmative Defense

13 (Lack of Cognizable Relevant Market)

14 145. As ICANN argued in its motion to dismiss, Plaintiffs have failed to
15 define a relevant antitrust market that supports their claims because the alleged
16 relevant market does not encompass the relevant product at issue as well as all
17 economic substitutes for the product.

18 Seventh Affirmative Defense

19 (Legitimate Business Conduct)

20 146. Plaintiff's claims are barred because all of ICANN's actions, as
21 alleged, to the extent they occurred, were lawful, undertaken in good faith, with the
22 absence of malicious intent, did not wrongfully interfere with Plaintiffs' business,
23 and were the result of lawful, pro-competitive, independent conduct carried out in
24 the furtherance of ICANN's legitimate business interests.

25 Eighth Affirmative Defense

26 (Additional Defenses)

27 147. ICANN has not knowingly or intentionally waived any applicable
28 defenses and reserves the right to assert and rely on such other applicable defenses

1 as may become available or apparent during discovery proceedings. ICANN
2 further reserves the right to amend its First Amended Answer and/or defenses
3 accordingly and/or to delete defenses that it determines during the course of
4 subsequent discovery are not applicable.

5 Ninth Affirmative Defense

6 (Other Defenses Incorporated by Reference)

7 148. ICANN hereby adopts and incorporates by this reference any and all
8 other defenses asserted, or eventually asserted, by any other defendant in this
9 proceeding.

10
11 WHEREFORE, ICANN prays that the Court enter judgment in ICANN’s
12 favor, and against plaintiffs, that the Court award ICANN its costs, and that the
13 Court issue such other and further relief as the Court deems just and proper.

14
15 Dated: November 5, 2012

JONES DAY

16
17
18 By: _____ /s/ _____

19 Jeffrey A. LeVee
20 Attorneys for Defendant
21 INTERNET CORPORATION FOR
22 ASSIGNED NAMES AND
23 NUMBERS

24 LAI-3179016v1