Case No. 07-16151

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COALIATION FOR ICANN TRANSPARENCY, INC.,
a Delaware corporation,

Plaintiff – Appellant,

v.

VERISIGN, INC., a Delaware corporation,

Defendant – Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 05-CV-04826
Honorable Ronald M. Whyte, Presiding

RESPONSE TO PETITION FOR HEARING AND REHEARING EN BANC

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I. INTRODUCTION

Rehearing en banc is permitted only when a ruling presents issues of "exceptional importance" or conflicts either with decisions of the U.S. Supreme Court or those within the same circuit. *See*, Fed. R. App. P. 35(b). Here, Defendant-Appellee Verisign, Inc. ("Verisign") contends that the issue of "exceptional importance" is the purported involvement of the United States government in the issues raised by the Plaintiff-Appellant Coalition for ICANN Transparency ("CFIT") in its Second Amended Complaint ("SAC"). It also contends that the Panel's June 5, 2009 decision is at odds with existing precedent of the U.S. Supreme Court. Both of these propositions are wrong.

As this Opposition will make clear, the factual, policy, and legal issues raised by Verisign were briefed and argued fully before the Panel. The fact that the Panel's decision did not always track Verisign's brief or account, section by section, for each argument Verisign raised does not mean the Panel did not consider or fully appreciate Verisign's position. To the contrary, on the present briefing record and given the colloquy at oral argument, the only reasonable conclusion is that the Panel understood, but rejected, the arguments Verisign makes again in the present Petition.

Moreover, in arguing that this Court reached issues never raised below, Verisign seriously misreads and mischaracterizes the record. Finally, much of Verisign's Petition, and substantially all of the proposed amicus brief submitted by the Internet Corporation for Assigned Names and Numbers ("ICANN"), is grounded on fact-based arguments that belie the request for rehearing and underscore the need to resolve the present dispute in the trial court.

II. OPPOSITION

A. The Internet Is Not In Danger.

First and foremost, this Court should know that the Panel's June 5, 2009 decision did not break the Internet. The Internet's Domain Name System ("DNS") has remained functional and will continue to remain functional regardless of the outcome of this litigation. While this point may seem obvious, it is important to note because in seeking to show that the Panel's decision impacts issues of "exceptional importance," Verisign makes the unsubstantiated claim that the challenged decision "creates an immediate threat to the DNS." (Petition, at 3.) This claim is both wrong and irresponsible.

In its Rule 35 Statement, Verisign claims that "massive investments" are necessary to keep the Internet running "smoothly and secure[ly]" and to protect the Internet from "cyber attack." *Id*. At bottom, Verisign is saying that it cannot be counted on to make the requisite investment in Internet infrastructure unless it is

guaranteed a perpetual right to the .COM franchise. Verisign's point is clear: presented with a choice between its monopolistic profit margins and continued investment in the security and stability of the Internet, Verisign will choose its profit margins. Verisign's bottom line business choice, however, is not an "exceptionally important" reason to reward it a rehearing, much less a perpetual right to operate .COM. To the contrary, Verisign's implicit threat to hold the Internet hostage for the ransom of its protected profit is all the more reason to open .COM to competitive rebidding, where a better steward of this international resource can be found.

As both the SAC (ERR115-16) and the Panel's Opinion (at 6748) reference, twice ICANN has put other top-level domain registries out for competitive rebid (.NET and .ORG). Neither rebid negatively impacted either the top-level domains or the Internet as a whole. The Panel's June 5, 2009 decision will not negatively impact the DNS either.

B. Governmental Oversight Is Not At Issue

The heart of Verisign's Petition is the incredible claim that the Panel "ignores entirely" a "system of public oversight" that, Verisign believes, insulates its actions from legal scrutiny. Petition, at 7. This statement itself wholly ignores substantial briefing and extended colloquy at oral argument on this very point.

At oral argument, the Panel pressed Verisign on a key provision of the U.S. Department of Commerce's ("DOC's") approval of the .COM agreement:

> ***"This approval is not intended to confer federal antitrust immunity on Verisign with respect to the Registry Agreement."***

ER133, at ¶322. The effect of this provision is abundantly clear. It means exactly what it says: whatever else the DOC may have done, it did *not* confer federal antitrust immunity on Verisign. And lo and behold, this is an antitrust case. In fact, the timing of events outlined in the SAC suggests that the DOC put the highlighted provision into its .COM approval precisely *because of* this antitrust case. This case was filed on November 28, 2005, and the DOC issued its approval, with the highlighted antitrust carve-out, one year later on November 30, 2006. Opening Brief, at 19; ERR133 at ¶319. The present litigation was both known, and thus accounted for, by the DOC.

A reasonable person would think that someone petitioning a United States Court of Appeals for an en banc hearing *in an antitrust case* on the ground that the "DOC expressly approved the .com Agreement as 'in the public interest'" (Petition, at 6) would at least mention *the antitrust carve-out* of the DOC's approval. Not Verisign. This provision is not mentioned a single time in Verisign's petition, even though it was a focal point of CFIT's SAC (ER133, at ¶322), CFIT's briefing (Opening Brief at 20; Reply Brief, at 5-6), and the December 8, 2008 oral argument. The fact that Verisign significantly relies on the DOC's alleged blessing

of the .COM agreement as the basis for its claim that a rehearing is required *without once mentioning the antitrust carve-out* is, frankly, astonishing.

That Verisign's head-in-the-sand "public oversight" argument was not mentioned in the Panel's decision does not mean that the Panel "ignored" it "entirely." Verisign's public oversight argument is facially specious, rendered false by a clearly worded, unambiguous provision in the very document Verisign cites as making rehearing a matter of "exceptional importance." Given the substantial record on this point, the better reading of the Panel's decision is that the public oversight policy argument was not mentioned because it did not bear mentioning. A Panel decision need not mention every argument raised by both parties in its opinion; non-persuasive arguments raised by a party are deemed rejected, even though they may not be mentioned expressly. This is especially true here, where the DOC's pronouncement unambiguously negates the argument put forward by Verisign: *"This approval is not intended to confer federal antitrust immunity on Verisign with respect to the Registry Agreement."*

C. The Section 1 Claim Was Raised and Briefed

Verisign's claim that the Section 1 analysis of the Panel's opinion "resurrected a claim that CFIT had abandoned" is demonstrably false. CFIT made clear at the outset that it was appealing the dismissal of all of its causes of action, specifically including its Fifth Cause of Action for "conspiracy in restraint of trade,

with regard to all markets defined in the SAC, under 15 U.S.C. §1." *See*, CFIT's Opening Brief, at 4.

CFIT's Opening Brief was replete with discussions of conspiracy, specifically highlighting, no fewer than four times, instances in which ICANN and Verisign acted in concert:

- "On March 1, 2001, only two months before the divestiture provision of the 1999 Registry Agreement was to be triggered, **ICANN and Verisign**….announced that the 1999 Registry Agreement had been scrapped and new agreements privately negotiated." Opening Brief, at 16 (emphasis added);
- "Once again, shortly before the time set by the 2001 Registry Agreements for entertaining proposals for extensions on rebids of the .COM registry, **ICANN and Verisign** announced that the 2001 .COM Registry Agreement had been scrapped in favor of a new one." *Id*., at 18 (emphasis added);
- "**Verisign and ICANN** agreed to eliminate the competitive constraints imposed by the competitive bidding process…." *Id*. at 19 (emphasis added);

- "The Agreements…divide[] between **Verisign and ICANN** the monopoly profits achieved by operation of their new agreement." *Id*. (emphasis added).

In its Answering Brief, Verisign chose not to address CFIT's Section 1 claims. This decision *by Verisign* is not a waiver, however, of *CFIT's* Fifth Cause of Action in the face of allegations both in the SAC and CFIT's Opening Brief, joined by citations to Section 1 case law, of joint action and conspiracy. Any fair reading of the briefing and the discussions at oral argument show that Section 1 liability was an important component of the case.

D. Disputed Issues of Fact Do Not Require Rehearing

Verisign's Petition (and the amicus brief submitted by would-be amicus ICANN) asks this Court to determine *as a matter of law* that ICANN is not an independent economic actor capable of conspiring for Section 1 liability. It asks the Court to make this finding in spite of the fact that ICANN has an annual budget now in excess of $60,000,000 and executive salaries on par with the largest technology companies, both made possible, in large part, by the deal coerced by Verisign. *See*, ICANN Budget, at http://www.icann.org/financials/budget-opplan.htm. The fact that ICANN is a non-profit public benefit corporation does not mean, as ICANN suggests (ICANN Brief, at 11-13), that it does not act in commerce. ICANN is an actor capable of conspiring under Section 1. ICANN has

the unique power to make or break markets for domain names and to determine the winners and losers in these multi-million dollar markets. That ICANN is an economic player capable of conspiring for Section 1 liability should not be a close call, but to the extent that Verisign wishes to raise this as a defense, it is a *factual* defense, inappropriate for resolution here.

Similarly, prospective amicus ICANN suggests that any conduct at issue was "unilateral conduct," as it is able to dictate the terms of registry contracts to registry providers such as ICANN. While this may, or may not, be true of ICANN's relationship to new registry providers, like those who have recently launched niche top-level domains like .TRAVEL, .JOBS, .CAT, and .MOBI, it is certainly not true of .COM. ICANN is on the record in sworn testimony before Congress that the .COM Agreement was reached after a hard-fought settlement with Verisign in adversary litigation. Again, even if ICANN's argument that it unilaterally dictates the terms of registry agreements would be a defense, it is a *factual* defense. On the present record and given the history of the .COM Agreement detailed in the SAC, the truth of ICANN's factual assertion that it unilaterally dictated the terms of the .COM Agreement to Verisign is highly suspect.

ICANN also suggests that it only recommends outcomes to the United States government, which is free to accept or disregard those recommendations. Again,

assuming this allegation has any legal import in the present context, the degree to which the ICANN forum is the proper forum for addressing these issues is a factual matter, which this Court cannot address on appeal or on a petition for rehearing. The world Internet community would be surprised to learn that ICANN is without the power to do the things described by CFIT in the SAC or effect changes to the competitive environment for domain names. The powers that ICANN disclaims in its prospective amicus filing are specifically listed in its bylaws (*See*, http://www.icann.org/en/general/bylaws.htm). Nevertheless, whether and to what degree ICANN has the power ascribed to it by CFIT's allegations are factual questions for resolution below. They cannot be addressed on rehearing.

Verisign also suggests that presumptive renewal is a preferred regulatory tool to competitive bidding *as a matter of law*; this is, at best, a factual issue for the trial court. More importantly though, Verisign misreads the Panel's decision as calling for a "duty of competitive bidding." There may, or may not, be such a duty, but the issue *here* is that the .COM Agreement once included competitive bidding as a consequence of any Verisign request to raise the price of .COM domain names. Verisign coerced ICANN into eliminating that competitive bidding provision.

CFIT's allegation is that Verisign violated the antitrust laws, both by its own conduct and through the joint conduct it coerced from ICANN, by *eliminating*

competitive rebidding. Verisign was able to eliminate competitive rebidding for .COM not because it convinced the world Internet community that presumptive renewal was the better policy choice but because it was able to strong-arm ICANN through a campaign of unlawful pressure and predatory conduct. In its Petition, Verisign seeks to make this a *de novo* academic argument about policy choices, but it cannot divorce those policy decisions from the unlawful conduct that paved the way for its important anti-consumer policy changes.

E. CFIT Met the Supreme Court's Pleading Standards

The other basis for Verisign's claim for a rehearing is the argument that CFIT failed to meet the Supreme Court's pleading standards as set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) (*Iqbal*, commented on, but did not change, the *Twombly* standards). First, this Court should remember that *Twombly* was decided *before* CFIT filed its Opening Brief in the present matter. *Twombly* was briefed by CFIT in its Opening Brief, argued extensively by Verisign in its Answering Brief, and addressed by CFIT again in its Reply Brief. The case also was addressed by both counsel at oral argument.

In both the SAC and the Opening Brief of Appellant, CFIT described: the fundamentals of the Internet's Domain Name System ("DNS"); the importance of ICANN's role as the steward of the DNS; Verisign's role as a registry; the interplay

between ICANN, as regulator, and Verisign, as the regulated entity; the history of the regulatory relationship between ICANN and Verisign; the unlawful predatory conduct that Verisign used to extract anticompetitive benefits from ICANN; the actual anticompetitive steps taken by Verisign; the markets at issue; and the harmful effects of Verisign's anticompetitive actions in those markets upon consumers, including CFIT and its members. Opening Brief, at 6-25, 36-42.

The Plaintiff's fatal flaw in *Twombly* was that it pleaded conspiracy but alleged only parallel conduct, rendering its theories of liability implausible on their face. This is not the case here, where clear and specific allegations of predatory conduct, supra-competitive pricing, and unlawful pre-emption of existing competitive markets support theories of antitrust liability outlined in existing Supreme Court precedent. The best proof that CFIT has met the standards of *Twombly* is the Panel's June 5, 2009 decision itself. All of the facts cited by the Panel come directly from CFIT's SAC, the record on appeal, and CFIT's Brief. The opinion describes allegations of specific acts and courses of conduct that, taken together, state plausible theories of relief, both in fact and as matters of antitrust law.

As briefed to the Panel, ICANN and Verisign have publicly admitted, through their settlement agreement, that Verisign abused the ICANN process for

years. This is why the ICANN-Verisign settlement agreement contained this telling provision:

> VeriSign agrees that, effective immediately upon the execution of this Agreement, it will not participate in, contribute monies for, encourage or provide other support for any activities by or for third parties that seek to undermine ICANN's role [as the appropriate technical coordination body for the DNS], and it will immediately cease any such ongoing activities.

See, Settlement Agreement between ICANN and Verisign, ¶1.B, at http://www.icann.org/tlds/agreements/verisign/ICANN-VRSN-settlement-agreement-2005.pdf (last reviewed on October 14, 2007); ER126 at ¶276. If nothing else, this damning provision casts all of Verisign's academic arguments about policy choices into doubt. Policy choices aren't really "choices" if one party coerces the outcome by "undermining" the forum in which those policy choices are made.

The joint admission by ICANN and Verisign that Verisign had been "undermining" ICANN for years is assurance that CFIT's allegations state claims for relief, plausible on their face. If there were any doubt about whether CFIT's allegations met the *Twombly* standard, this provision, negotiated by ICANN and agreed by Verisign, ought to put them to rest.

F. .MOBI Issues Are Not Before This Court

Finally, in the event the Court accepts the amicus brief of mTLD Top Level Domain, Ltd., the organization that operates the .MOBI top-level domain, the

Court should know that nothing about .MOBI or its relationship to ICANN or its contractual arrangement with ICANN is at issue here. When this case was filed in 2005, .MOBI did not exist. It had zero registrations in 2005 and did not take its first registration live on the Internet until June, 2006. *See*, ICANN Registry Monthly Reports, at http://www.icann.org/en/tlds/monthly-reports/index.html. Even now, its registrations are a small fraction of the over 80,000,000 registrations within .COM. *Id*. This case is about the manner in which Verisign changed its contractual situation and ability to control the largest TLD in the world immune from the pressures of competition. .MOBI is a different case, with a different factual history, not relevant here.

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III. CONCLUSION

Verisign's Petition for Rehearing is without merit and should be summarily denied. After nearly four years of briefing, now is the time, to allow the issues to play out in the trial court. Verisign's strategy is a strategy of delay, hoping to increase its profits year over year, while hoping that the outrage that accompanied the 2006 .COM Agreement it procured by extortion somehow lessens over time. It will not.

Respectfully submitted,

Dated: July 28, 2009

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this response brief is in compliance with the type-volume limitation of Ninth Circuit Rule 40-1(a). This brief contains no more than 4,200 words, and was prepared in 14-point Times New Roman font using Microsoft Word 2007.

Dated: July 28, 2009

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that on July 28, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepared, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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Executed this 28th day of July 28, 2009 in Los Angeles, California.

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