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INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

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 REPLY IN SUPPORT OF ICANN'S MOTION TO DISMISS CFIT'S FIRST AMENDED COMPLAINT

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

The Honorable Ronald M. Whyte

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INTRODUCTION

Plaintiff's Consolidated Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss CFIT's First Amended Complaint ("Opp.") is remarkable for the extent to which it fails to acknowledge, much less respond to, ICANN's arguments and authorities supporting its Motion to Dismiss. For example, CFIT nowhere explains:

- how VeriSign's designation as the .COM and .NET registry operator can offend the antitrust laws, given that it is of no consequence to the law which competitor supplies a commodity when, as here, there can be only one supplier at a time (*see* Defendant ICANN's Notice of Motion and Motion to Dismiss CFIT's First Amended Complaint; Memorandum of Points and Authorities in Support Thereof ("Mot.") at 10);

- how CFIT could (as a matter of law) enforce any alleged requirement of the Memorandum of Understanding ("MOU") between ICANN and the Department of Commerce ("DOC"), given that CFIT is neither a party nor third party beneficiary to that contract (Mot. at 13);

- how limitations placed on VeriSign's authority to raise prices could offend the antitrust laws when, in a single supplier market, price caps are, if anything, procompetitive (Mot. at 13-14);

- how the potential for *new* competition that VeriSign might bring to the "market" for registering expiring domain names could be anticompetitive (Mot. at 14-17);

- how ICANN's designation of a registry operator and assessment of fees to cover the cost of its operations could be improper where ICANN is necessarily granting an exclusive contract, much like a patent owner who licenses a patent (Mot. at 17-20);

- how CFIT's claims could be considered ripe given that the 2006 .COM Extension cannot go into effect without DOC approval, and even then do not require a change in conduct but merely create the possibility that VeriSign may, at some unknown time in the future, propose price and services changes (and a new service proposal could take effect only if ICANN and potentially other authorities consent) (Mot. at 20-22); or

- how CFIT could establish its standing to sue when it has not identified any harm suffered by its members or any antitrust injury (Mot. at 22-24).

Instead of answering these fundamental questions, CFIT attempts to focus the Court's attention on case law that simply does not apply to, much less refute, the arguments ICANN made in its motion. Thus, CFIT argues that any conduct that impairs the opportunity of rivals, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*, 472 U.S. 585 (1985) (Opp. at 13), eliminates any competitors, *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995) (Opp. at 7), or interferes in any way with price structures, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (Opp. at 7), is actionable under antitrust law. But CFIT's characterization of the "law" is dead wrong: refusals to deal are actionable only if rivals previously participated in a profitable cooperative venture, *Verizon Commc'ns, Inc. v. Law Offices of Curtis. V. Trinko, LLP*, 540 U.S. 398, 408 (2004); the elimination of a competitor is actionable only if it results in the elimination of competition, *see, e.g.*, *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504 (9th Cir. 1989); and *Socony's* broad language applies only if interference with price structures is undertaken by competitors. *See, e.g., NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998) (Mot. at 13-14). More importantly, none of this conduct is at issue here, rendering CFIT's cases irrelevant.

CFIT also attacks ICANN for bringing facts to the Court's attention via judicial notice. (Opp. 3-4.) But those facts, which CFIT concedes (by not opposing ICANN's request) are properly the subject of judicial notice, demonstrate the inaccuracy of CFIT's allegations. Where a complaint's factual allegations are demonstrated to be false through judicially noticed facts, repeated recitations of the complaint's allegations cannot save the complaint. But that is all that CFIT's opposition motion, at its core, really does.[1] CFIT has no valid claims based on the law and the facts properly before the Court; its Amended Complaint should be dismissed, this time with prejudice.

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[1] The utter unresponsiveness of CFIT's opposition could be deemed a waiver, *see Farnham v. Windle*, 918 F.2d 47, 51 (7th Cir. 1990) (failure to raise legal argument in opposition to motion to dismiss results in waiver), and is not surprising given that much of CFIT's opposition was essentially lifted from CFIT's previous filing opposing a challenge to the original complaint. *Compare* Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motions for Judgment on the Pleadings *with* Plaintiff's Consolidated Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss CFIT's First Amended Complaint.

I. CFIT CANNOT PROCEED ON THE BASIS OF UNTRUE FACTUAL ALLEGATIONS.

From the first page of its argument, CFIT concedes that it will make no attempt to respond to the bulk of defendants' arguments. (Opp. at 3.) CFIT claims this tactic is appropriate because defendants' briefs are "fact-intensive motions more appropriate for summary judgment or trial." *Id.* at 3, 4. Essentially, CFIT asks the Court to ignore that much of the "facts" alleged by CFIT in its complaint, and upon which it relies in its Opposition, are demonstrably false. But the Court need not assume such facts as true for purposes of a Rule 12 challenge.

ICANN is not asking the Court to "construe . . . contested facts in its favor." (Opp. at 4 n.3.) Rather, ICANN is asking the Court to take judicial notice of documents that CFIT cited in its own complaint and that are integral to its claims. The law is clear that, when evaluating the adequacy of plaintiff's factual allegations, courts can and should take into account facts that are plain from the face of these documents. This is the very purpose of judicial notice – to "provide[] a flexible procedure to take notice that certain information is true." 1-201 Weinstein's Federal Evidence § 201.02. In the context of a motion to dismiss, judicial notice serves to incorporate certain uncontested facts and documents into the record.

In *Arizona v. California*, 283 U.S. 423, 452 (1931), for example, the Supreme Court refused to accept as true plaintiff's allegation in its complaint that the Colorado River was not navigable because defendant submitted legislative reports, maps and other evidence to the contrary. Justice Brandeis explained:

> The bill alleges that 'the river has never been, and is not now, a navigable river.' The argument is that the question whether a stream is navigable is one of fact; and that hence the motion to dismiss admits the allegation that the river is not navigable. It is true that whether a stream is navigable in law depends upon whether it is navigable in fact; and that a motion to dismiss, like a demurrer, admits every well-pleaded allegation of fact. But a court may take judicial notice that a river within its jurisdiction is navigable.

283 U.S. at 452.

Numerous courts have recognized that a court need not accept as true allegations that contradict facts that may be judicially noticed. *See, e.g.*, *Greeson v. Imperial Irr. Dist.*, 59 F.2d

529, 530 (9th Cir. 1932); *Interstate Natural Gas Co. v. Southern Cal. Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953).[2] "While, broadly speaking, it is true that, in considering a motion to dismiss, all well-pleaded allegations in the bill of complaint must be taken as true, there is an important exception to this general rule. In the consideration of a pleading, the court will read it as if it contained a statement of all matters of which the court is required to take judicial notice, even when the pleading contains an express allegation to the contrary. Such an allegation is not admitted by demurrer, and may be treated as a nullity." *Nev-Cal Elec. Sec. Co. v. Imperial Irr. Dist.*, 85 F.2d 886, 904 (9th Cir. 1936). And courts routinely apply this principle to disregard factual allegations that are contradicted by contract provisions integral to plaintiff's claims. *See, e.g.*, *Westlands Water Dist.*, 805 F. Supp. at 1511; *Interstate Natural Gas*, 209 F.2d at 384; *Salvioli*, 1996 WL 507297, at *4.

This is, of course, the only sensible rule. To ask the Court to ignore facts properly before it – either in judicially noticed documents or exhibits attached to or relied upon in a complaint – would be to ask the Court to turn a blind eye to the truth and to allow a plaintiff to proceed to discovery based on unsupportable allegations. Here, judicial notice of the registry agreements and MOU between ICANN and the DOC is proper for all the reasons outlined in ICANN's Motion for Judicial Notice, a motion which CFIT has not opposed.

When CFIT's complaint is read in light of the facts plain from the face of these documents, the Court can determine that CFIT's allegations regarding VeriSign's permanent monopoly (Opp. at 8-9, 14), and alleged introduction of new prices and services (Opp. at 9-10, 15), are demonstrably false. As those documents delineate, VeriSign's operation of the .NET and .COM registries is contingent on its compliance with its registry agreements; it will have the authority to

[2] *See also VeriSign, Inc. v. ICANN*, No. CV 04-1292 AHM, 2004 U.S. Dist. LEXIS 17330, at *9 (C.D. Cal. Aug. 26, 2004); *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1045 n.4 (C.D. Cal. 2002), *rev'd on other grounds*, 349 F.3d 1191 (9th Cir. 2003); *United States v. Crisp*, 190 F.R.D. 546 (E.D. Cal. 1999); *Aaron v. La Moderna*, No. C 97-0233 FMS, 1997 WL 564064 (N.D. Cal. Aug. 27, 1997); *Salvioli v. Continental Ins. Co.*, No. C 96-0630 FMS, 1996 WL 507297 (N.D. Cal. Sept. 3, 1996); *Employers Ins. v. Musick, Peeler, & Garrett*, 871 F. Supp. 381, 385 (S.D. Cal. 1994); *Century 21 Real Estate Corp. v. RE/MAX South County*, 882 F. Supp. 915, 921 (C.D. Cal. 1994); *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 719-20 (E.D. Cal. 1993); *Westlands Water Dist. v. United States*, 805 F. Supp. 1503, 1506 (E.D. Cal. 1992).

propose new services only if the DOC approves the 2006 .COM Extension; any proposed service will not go into effect until approved by ICANN and possibly reviewing authorities and experts; and the agreement, if approved, gives VeriSign the authority to introduce new prices only at or below established caps. (Mot. at 9-12, 14-17, 20-22.) CFIT's false allegations to the contrary cannot provide a basis for these claims to escape a Rule 12 motion.

II. CFIT HAS NOT ESTABLISHED THE SUFFICIENCY OF ITS PLEADING.

CFIT's few attempts to defend its claims as a matter of law fail as well. Instead of responding to ICANN's motion, CFIT reviews a series of antitrust law principles which, in the end, do not support the viability of CFIT's claims. Both the cases CFIT cites and those CFIT omits make clear that CFIT's allegations, even if ripe, are not sufficient to demonstrate at the pleading state the requisite injury to competition.

A. CFIT's Section 1 Claim Fails Because It Does Not Identify Any Anticompetitive Conduct.

To state a Section 1 claim, 15 U.S.C. § 1 (Supp. 2004), CFIT must allege facts that establish, *inter alia*, that the agreement at issue "actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (*i.e.* antitrust injury)." *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 811 (9th Cir. 1988). Because CFIT has not demonstrated any antitrust injury (Mot. at 9-17, 22-24), CFIT fails to state a claim under Section 1 and fails to establish that it has standing to sue.[3]

In its Amended Complaint, CFIT alleges that "back order" services presently provided by at least one CFIT supporter (Pool.com) would be supplanted by a market-based auction system, with proceeds going not to ICANN or to VeriSign but rather to registrars. (Amend. Compl. ¶¶ 48-49, 95-96, 110.) Thus, CFIT alleges nothing more than the *possibility* that some of its

[3] CFIT also fails in its Opposition to explain how its Amended Complaint establishes that even one of its members has suffered harm, the third requirement of the *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977), test for associational standing. (Opp. at 5.) CFIT never explains how ICANN and VeriSign's alleged misconduct harms CFIT supporters. (Mot. at 23.) Given that no new prices or services have been proposed or implemented, and the fact that all domain name registrars will be able to participate in the new back order services market that CFIT envisions (Amend. Compl. ¶ 96), the basis of the CFIT Supporter's alleged injury remains unknown. Indeed, the CFIT Supporters themselves remain largely unknown as CFIT has put forward only the most cryptic references to its members. (Opp. at 5.)

members may lose business if VeriSign proposes (and ICANN then approves, at some point in the future) a new service for the registration of select expiring domain names. (Opp. at 13.)[4] As ICANN made clear in its Motion to Dismiss, this is not enough. (Mot. at 14-17, 20-22.) Antitrust laws do not protect competitors; rather, antitrust laws protect competition. "The alleged violation must cause injury to competition beyond the impact on the claimant under section 1." *McGlinchy*, 845 F.2d at 811. Allegations of harm to one particular competitor will not support a claim.

Significantly, while "convergence of injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discrete and the market participants are few," a court will not assume that injury to a competitor injures the marketplace. *Les Shockley,* 884 F.2d at 508-09. That is because "[e]very agreement concerning trade, every regulation of trade, restrains." *Id.* at 509. An agreement is actionable only if it results in "unreasonabl[e] disrupt[ion] of market functions such as price setting, resource allocation, market entry, or output designation." *Id.* at 508. As a result, if a complaint is silent on the effect that removal of competitors will have on companies still vying for business, dismissal is proper. *See, e.g.*, *Legal Economic Evaluations Inc. v. Metropolitan Life Ins. Co.*, 39 F.3d 951, 955 (9th Cir. 1994) (dismissal proper when, although plaintiff insurance brokers were eliminated from market for advice on structured settlements, other brokers remained and "are still writing that business").[5]

[4] CFIT does not and cannot allege that ICANN is a "rival" to CFIT or its members with respect to this back order service, which means that CFIT cannot assert a claim against ICANN in this respect. (Mot. at 17, citing Bylaws Art. II, § 2.) But even if ICANN was a rival, CFIT still fails to plead anticompetitive injury sufficient to maintain its claims against ICANN.

[5] This principle has been widely embraced in this Circuit and others. *See, e.g.*, *Heisen v. Pacific Coast Bldg. Products, Inc.*, 26 F.3d 130, No. 93-16213, 1994 WL 250029 at *2, (9th Cir. June 9, 1994) (affirming dismissal because plaintiff "does not allege a reduction of competition" in relevant market but rather "injury only to his own position as a competitor"); *Les Shockley*, 884 F.2d at 509 (no claim stated when plaintiffs – eight drag racing services companies – failed to identify the impact that their exclusion from defendant's racing events would have on "the price or availability of exhibition drag racing services in the United States"); *McGlinchy*, 845 F.2d at 812 (dismissal proper when claims are based only on the allegation that defendants actions "were taken for the purpose of eliminating" rivals and "for the financial benefit of [the defendants]" and not "an injury to the [competitive] market"); *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987) (dismissal appropriate when plaintiff alleges only termination of dealership agreement because "conclusion that competition has been harmed thereby does not follow"); *Beverly v. Network Solutions, Inc.*, No. C-98-0337-VRW, 1998 WL 917526, at *9 (N.D.Cal. Dec. 30, 1998) (CJ, Walker) ("economic uncertainty" and the loss of a domain name

Case law cited by CFIT is not to the contrary. CFIT's reliance on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*, 472 U.S. 585 (1985), for the proposition that any conduct that impairs a rival's opportunities is actionable, for example, could not be more misplaced. (Opp. at 13.) To begin with, whether *Aspen* remains good law is, at best, questionable since the Supreme Court itself recently said that *Aspen* is "at or near the outer boundary of § 2 liability." *Verizon Commc'ns, Inc. v. Law Offices of Curtis. V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Moreover, courts considering *Aspen*, including the Supreme Court in *Trinko*, have narrowly confined *Aspen* to its facts: situations (completely unlike those in the instant case) in which rivals have abandoned a "cooperative venture" that was "presumably profitable" and refused to sell to a competitor a product otherwise publicly available. *Trinko*, 540 U.S. at 409; *see MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131-32 (9th Cir. 2004). Those circumstances do not exist here: CFIT cannot allege that ICANN is a rival to it or its members (Mot. at 17), CFIT cannot purport to allege any facts suggesting that either ICANN or VeriSign have abandoned a cooperative, profitable course of dealing; and CFIT cannot allege that ICANN and VeriSign refuse to make a product available to it on the same terms provided to retail customers.

CFIT fares no better with its attempt to create the impression, with a string cite, that any conduct that eliminates competition is considered anticompetitive. (Opp. at 7.) Indeed, CFIT misstates the law by citing only selective language from the cases on which it relies. While *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995), for example, does say that "conduct that eliminates rivals reduces competition" (Opp. at 7), CFIT omitted the subsequent language in *Rebel* that makes clear that reduction of competition, in and of itself, is ***not*** a Sherman Act violation. *Id.* at 1433. *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1032 (9th Cir. 1989), which CFIT also cites (Opp. at 7), reaches the same conclusion: "To maintain a successful antitrust action, [plaintiff] must show that the alleged conspiracy among the [defendants] did

(continued…)

"does not constitute an injury to competition" because it does not show "decreased output, raised prices, diminished quality of goods, or any other effects on allocative efficiency in the relevant markets").

more than injure him; he must prove an injury to competition in the relevant market." And *Glen Holly Entm't Inc. v. Textronic, Inc.*, 352 F.3d 367 (9th Cir. 2003) (Opp. at 7), is completely distinguishable because the case involved the elimination of defendant's only rival in the market and thus the elimination of *all* competition. *Id.* at 377.

To the extent that CFIT is attempting to establish an injury to competition through its allegation that VeriSign may *some day* increase the prices charged for .COM domain names (Opp. at 7, 14-15), CFIT still cannot make out a Section 1 claim. CFIT misstates the law by selectively citing dicta in an attempt to create the misimpression that *any* conduct that affects prices is unlawful. (Opp. at 7.) For example, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), on which CFIT relies (Opp. at 7), stands for the narrow proposition that a particular form of conduct affecting prices is *per se* illegal. *See, e.g., NYNEX Corp.*, 525 U.S. at 133 (identifying *Socony-Vacuum* as a horizontal price fixing case). But that conduct – horizontal price fixing by competitors in the same market – obviously is not at issue here.[6]

Nowhere does CFIT address the fact that, at this point in time, all that ICANN and VeriSign have done is propose future price ***limits*** for .COM domain names, which cannot be implemented until the DOC approves the .COM Extension. (Mot. at 20-22.) And, as ICANN explained in its opening brief, price caps in a single supplier market are considered pro-competitive. (Mot. at 13-14.)

B. CFIT's Section 2 Claim is Unsupported and Unsupportable.

CFIT fares no better with its defense of its Section 2 claim. (Opp. at 10.) To state a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2 (2004) (Mot. at 17), plaintiffs must allege, *inter alia*, that the defendant acted with specific intent to monopolize. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). Proof of that specific intent can be demonstrated either directly or inferentially. *See, e.g., Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1174 (9th Cir. 1988). Where, as here, a plaintiff relies on inferential conduct

[6] Likewise, the cases CFIT cites (Opp. At 7) involving predatory pricing, *Amarel v. Connell*, 102 F.3d 1494 (9th Cir. 1997), and supra-competitive pricing, *Thompson v. Metropolitan Multi-List Inc.*, 934 F.2d 1566 (11th Cir. 1991), *In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1466 (C.D. Cal. 1988), are irrelevant to CFIT's claims.

1 to display specific intent, that "conduct must [] amount to an unreasonable restraint of trade under
2 Sherman Act, section 1 standards." *Id.*
3 As previously demonstrated (Mot. at 17-20), CFIT has not alleged facts sufficient to state
4 a claim for specific intent to monopolize, and therefore, CFIT's citation solely to the Amended
5 Complaint (Opp. at 10) cannot cure these defects. By designating VeriSign as a registry operator,
6 which CFIT points to in order to establish the requisite specific intent, ICANN was simply doing
7 its job under the MOU between ICANN and the DOC. Stated differently, ICANN is *supposed* to
8 designate a single company as the registry for .COM; CFIT itself recognizes that there can be
9 only one registry operator. (Amend. Compl. ¶ 35.) Nor is ICANN's receipt of a fee from
10 VeriSign, to cover its costs of doing business, of any consequence. "The mere possession of
11 monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is
12 an important element of the free market system." *Trinko,* 540 U.S. at 407. The fact that ICANN
13 and VeriSign negotiated the .COM Extension that contains this fee provision as part of a
14 settlement of litigation cannot be used as the basis for an antitrust violation in the absence of
15 evidence that the suit being settled was a mere "sham," and CFIT does not – and clearly could not
16 in good faith – allege that ICANN's settlement with VeriSign was a sham. *See, e.g., Empress*
17 *LLC v. City & County of San Franscisco*, 419 F.3d 1052, 1057 (9th Cir. 2005).

18 **III. EVEN IF THEY WERE ACTIONABLE, CFIT'S CLAIMS ARE NOT RIPE.**

19 Finally, dismissal remains appropriate because CFIT's claims are not ripe. (Mot. at 20-22.)
20 Contrary to what CFIT claims (Opp. at 9) – without support – ICANN has not agreed that
21 VeriSign can implement a new service ("CLS") for the registration of expiring domain names.
22 Indeed, the 2006 .COM Extension has not yet been approved by the DOC, and thus VeriSign has
23 not even proposed the new service. In the absence of such a proposal – or VeriSign's actual
24 introduction of new prices – the agreements CFIT challenges at most create the *possibility* of
25 future changes in services and prices. But this possibility does not make CFIT's claims ripe.
26 *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733-36 (1998) (where forestry plan grants
27 authority to act but does not authorize specific conduct challenge to plan is unripe); *Volvo N. Am.*
28 *Corp. v. Men's Int'l. Prof. Tennis Council*, 857 F.2d 55, 64-65 (2d Cir. 1988) (proposed rules that

1 would grant authority that could be exercised in the future but do not burden present-day business
2 decisions not ripe for review).

3 **CONCLUSION**

4 For the most part, CFIT has basically ignored ICANN's motion to dismiss and argued that
5 the allegations of its First Amended Complaint state claims against ICANN. But the Court can
6 determine as a matter of law that the allegations that support those claims are false and that the
7 law CFIT cites does not support its claims. For all of the foregoing reasons, ICANN urges the
8 Court to dismiss Plaintiffs' First Amended Complaint with prejudice pursuant to Federal Rules of
9 Civil Procedure 12(b)(1) and 12(b)(6) for lack of standing and ripeness and for a failure to state a
10 claim.
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12 Dated: May 26, 2006 Respectfully submitted,
13 Jones Day
14
15 By: /s/ Jeffrey A. LeVee
16 Jeffrey A. LeVee

17 Counsel for Defendant
INTERNET CORPORATION FOR
18 ASSIGNED NAMES AND NUMBERS

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