

# Antitrust Advisory: VeriSign Still On the Hook for Antitrust Allegations

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The sole operator of the .com and .net domain name registries, VeriSign, remains potentially liable for antitrust violations relating to its contracts with ICANN (Internet Corporation for Assigned Names and Numbers) for those registries. On June 5, 2009, the U.S. Court of Appeals for the Ninth Circuit reversed the dismissal of an antitrust lawsuit against VeriSign in *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, No.05-04826 (9th Cir. Jun. 5, 2009). This decision comes at a time when VeriSign continues to endure ongoing public scrutiny regarding its relationship with ICANN.

In the interim between the district court's dismissal of the Complaint in 2006 and the Ninth Circuit's present reversal of that dismissal, the Supreme Court imposed a more rigorous pleading standard on civil plaintiffs, particularly for complex antitrust claims, holding that a complaint must allege sufficient facts such that the claims are plausible on their face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).<sup>1</sup> *Twombly* reversed the 50-year standard of *Conley v. Gibson*, 355 U.S. 41 (1957), that merely required a complaint to make conclusory assertions that the elements of a claim had been met.

Without specifically citing *Twombly*, the Ninth Circuit preserved the Plaintiff's claims relating to the .com contract for which the Complaint alleged sufficient facts, but found that the Complaint contained no factual allegations to support its claims relating to the .net contract.

## Background

In 1998, ICANN was established by the U.S. Department of Commerce to oversee several Internet-related tasks previously performed by (or on behalf of) the government, including the administration of the domain name system (DNS). Since 2001, through a contractual relationship with ICANN, VeriSign has been the sole operator of the .com and .net domain name registries. The original contracts imposed on VeriSign a price cap of \$6 per year for registration of any domain name and contained renewal provisions that allowed ICANN to open the contracts for competitive bidding.

In 2005, when the .net contract expired, the competitive bidding process resulted in VeriSign again winning the contract. However, before the .com contract expired, the parties negotiated an extension without opening the process to competitive bidding. At the time, VeriSign and ICANN were in a dispute which they ultimately resolved by entering into a settlement agreement in 2006 which extended the original .com agreement for another six years. The new .com contract allowed VeriSign to increase the maximum price it could charge for domain name registrations by 7% each year in four of the next six years. Both of the new contracts included a presumptive right of renewal for VeriSign.

## CFIT's Complaint

The Plaintiff, Coalition for ICANN Transparency (CFIT), is an organization composed of participants in the Internet DNS, including website owners. CFIT alleged antitrust violations under Section 1 of the Sherman Act for conspiracy in restraint of trade in connection with the terms of the new contracts' pricing and renewal provisions. CFIT claimed that VeriSign and ICANN conspired to set artificially high prices for the domain name registry services, and to ensure that VeriSign would receive successor contracts without participating in a competitive bidding process. To support its claim, based on public statements made by potential VeriSign competitors, CFIT stated that had the contracts been open for competitive bidding, "the cost of domain name registrations would have fallen to at least as low as \$3.00 per domain name..."

CFIT also alleged antitrust violations under Section 2 of the Sherman Act, claiming that VeriSign's conduct in obtaining the new contracts constituted monopolization or attempted monopolization of the .com and .net registration markets through predatory action. In support of its claim, CFIT asserted that VeriSign paid lobbyists to support its position, "stacked" ICANN's public meetings with VeriSign supporters, hired purportedly independent organizations and individuals to advocate VeriSign's position, paid bloggers to attack ICANN's reputation, planted news stories critical of ICANN, and followed through on a threat of litigation. Additionally, CFIT alleged that VeriSign offered to settle its dispute by paying ICANN a multi-million-dollar fee in exchange for the favorable terms in the new contracts. CFIT further alleged that VeriSign planned to "leverage" its monopoly in the .com and .net markets into a separate market for expiring domain names.

The district court dismissed the Complaint for failure to state claims. CFIT appealed.

## Ninth Circuit Decision

On appeal, the Ninth Circuit reversed and remanded.

### CFIT's Claims Regarding the .com Contract

The Ninth Circuit held that CFIT's allegation of a conspiracy between VeriSign and ICANN to restrain competition by imposing higher prices than a competitive market rate, and an allegation of harm to competition by eliminating the competitive bidding process, were sufficient to state a claim under Section 1. The Ninth Circuit also held that CFIT met the Section 2 requirements for stating an attempted monopolization claim with its allegation that VeriSign's predatory activities were aimed at coercing ICANN to perpetuate VeriSign's position as the exclusive operator of the .com domain name registry.

Regarding the claim of attempted monopolization of expiring domain names, at issue was whether CFIT had sufficiently alleged a separate market for expiring domain names. Based on information provided in an amicus brief, the Ninth Circuit reversed and remanded the matter, noting that expiring domain names have a distinct value, based on their history of established

Web traffic and advertising support, as compared to domain names that have never been registered.

## CFIT's Claims Regarding the .net Contract

The Ninth Circuit held that CFIT had not adequately stated claims under Section 1 or Section 2 with regard to the new .net contract. The Ninth Circuit noted that the Complaint, in light of the competitive bidding process that had occurred, contained no allegations that conspiratorial or predatory conduct was involved in reaching the new .net contract. The Ninth Circuit remanded the claims to allow CFIT an opportunity to amend the Complaint's "conclusory allegations" with respect to the .net contract.

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### Endnotes

<sup>1</sup> Just last month, the Supreme Court augmented its holding in *Twombly*, stating that "threadbare" recitations of the elements of a cause of action supported only by conclusory statements are not enough to survive a motion to dismiss. *Ashcroft v. Iqbal*, No. 07-1015., 556 U.S. \_\_\_, slip op. at 14 (May 18, 2009).

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*For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.*

**Bruce D. Sokler**

(202) 434-7303

[BDSokler@mintz.com](mailto:BDSokler@mintz.com)

**Harvey Saferstein**

(310) 586-3203

[HSaferstein@mintz.com](mailto:HSaferstein@mintz.com)

**Robert P. Taylor**

(650) 251-7740

[RPTaylor@mintz.com](mailto:RPTaylor@mintz.com)

**Robert G. Kidwell**

(202) 661-8752

[RGKidwell@mintz.com](mailto:RGKidwell@mintz.com)

**Farrah Short**

(202) 585-3518

[FShort@mintz.com](mailto:FShort@mintz.com)