

Case No. 07-16151

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COALITION FOR ICANN TRANSPARENCY INC.,

Plaintiff-Appellant,

v.

VERISIGN, INC.,

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

**BRIEF OF AMICUS CURIAE DOTMOBI
IN SUPPORT OF PETITION FOR REHEARING
AND REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), mTLD Top Level Domain, Ltd. (“dotMobi”) state that is has no parent corporation and that Vodafone Group Plc, Microsoft Corporation, and Nokia Corporation each own more than 10% of dotMobi’s stock.

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INTEREST OF AMICUS CURIAE

mTLD Top Level Domain, Ltd. (“dotMobi”) is an Internet services company and operates the .mobi top level domain (“TLD”), the first TLD dedicated to delivering Internet services to mobile communications devices. Like defendant-appellee VeriSign, Inc. (“VeriSign”), which operates the .com and .net TLDs, dotMobi operates pursuant to a registry agreement with Internet Corporation for Assigned Names and Numbers (“ICANN”). Each of these registry agreements contains a presumptive renewal provision.

The complaint in this case asserts (1) a claim under § 1 of the Sherman Act, challenging certain *terms* of the ICANN-VeriSign registry agreement for the .com top level domain (including the presumptive renewal provisions), and (2) a monopolization claim under § 2 of the Sherman Act, challenging VeriSign’s allegedly exclusionary and predatory *conduct* in procuring the registry agreement.

The Panel held that the presumptive renewal provision can support a § 1 claim. This holding is entirely independent of its holding that the allegations of exclusionary and predatory conduct suffice to state a § 2 monopolization claim. Thus, the Panel’s § 1 holding could be used as a basis to attack the validity of *any* registry operator’s agreement containing a presumptive renewal provision (including dotMobi’s), even in the absence of any allegation of conduct that could support a § 2 claim.

dotMobi believes the Panel's § 1 ruling is wrong as a matter of settled antitrust law and may be used improperly to subject dotMobi to meritless § 1 claims. It accordingly has a vital interest in VeriSign's rehearing petition. dotMobi believes its brief may also assist the Court in understanding the important role played by presumptive renewal provisions in registry agreements in terms of maintaining the security and stability of the Domain Name System ("DNS") and the Internet.

ARGUMENT

In erroneously allowing antitrust claims against VeriSign to go forward, the Panel's decision may be used improperly to subject other members of the Internet community, including other registry operators, to antitrust claims that could harm consumers and adversely implicate the security and stability of the DNS.

ICANN and Registry Operators Help to Safeguard The DNS

Plaintiff challenges contracts that are integral to the operation of the DNS. The DNS is the unique identifier system that enables computers to communicate with each other by matching domain names (such as espn.com) with particular computers. It is essential to the global interoperability of the Internet.

The DNS is overseen by the Internet Corporation for Assigned Names and Numbers ("ICANN") and the Department of Commerce ("DOC"). ICANN is a non-profit entity charged by the DOC with a "mission of public trust" in protecting

the stability, integrity and utility of the DNS. ICANN “Plan For Enhancing Internet Security, Stability and Resiliency,” June 2009 at 11, *available at* <http://www.icann.org/en/topics/ssr/ssr-final-plan-25jun09-en.pdf>; *see id.* at 1 (“[t]he secure, stable and resilient operation of the ... [DNS] is a core part of ICANN’s mission”). For each top-level domain (“TLD”), such as .com or .org, ICANN enters into a contract (a “Registry Agreement”) with an entity known as a registry operator, pursuant to which the registry operator maintains the definitive list of domain names for that TLD, collects registration fees, and provides a host of services necessary to the operation of the TLD. Registry Agreements “have increasingly become mechanisms for improving the security, stability and resiliency across the DNS” (*id.* at 10) and accordingly play a critical role in the Internet’s smooth functioning, given the increasing “frequency and sophistication of disruptive attacks and other malicious behavior.” *Id.* at 1.

Presumptive Renewal Provisions Are Important to Proper Investment in Internet Infrastructure and DNS Security and Stability

Like VeriSign, amicus dotMobi is a TLD registry operator whose Registry Agreement with ICANN contains a presumptive renewal provision allowing it to renew its agreement upon the expiration of the initial term and subsequent terms, provided it is not in breach of the agreement. *See .mobi Registry Agreement, July 10, 2005, § 4.2, available at* <http://www.icann.org/en/tlds/agreements/mobi/registry-agmt-mobi-01jan07.htm>. ICANN’s Registry Agreements with other

registry operators contain similar presumptive renewal provisions. *See* ICANN Registry Agreements, <http://www.icann.org/en/registries/agreements.htm>.

The presumptive renewal provisions of the Registry Agreements help ensure that registry operators will make the investments necessary create new opportunities and services for consumers and to keep the DNS operating and safe from cyber attack. As ICANN has noted, “there is little public benefit, and some significant potential for disruption, in regular changes of a registry operator. In addition, a significant chance of losing the right to operate the registry after a short period creates adverse incentives to favor short term gain over long term investment.” *Id.*; *see also ICANN Internet Governance: Is It Working?*, 21 Pac. McGeorge Global Bus. & Dev. L.J. 27, 38 (2008) (“An exclusive, renewable contract is therefore typical for infrastructure services that require single-vendor accountability and continuity. In addition, it provides incentives for investment.”).

**The Panel’s Erroneous Ruling Improperly Exposes Other
Registry Operators to Section One Claims and Jeopardizes
Presumptive Renewal Provisions Across the Board**

The Panel opinion held that ICANN’s decision to include a presumptive renewal provision in its Registry Agreement with VeriSign created an “anti-competitive restraint” that could give rise to liability under § 1 of the Sherman Act. Opinion at 6752. The Panel believed that because competitive bidding for successor contracts, rather than presumptive renewal, might have resulted in lower

registration prices, the absence of competitive bidding states a § 1 claim. *Id.*

Because plaintiff did not raise any specific § 1 issues on appeal, the Panel reached its conclusion without the benefit of any briefing as to whether § 1 actually does impose a duty of competitive bidding, or the significance of the presumptive renewal provision from a security and stability or consumer benefits standpoint.

Amici believe that the Panel opinion is inconsistent with settled law. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 694 (1978) (“The Sherman Act does not require competitive bidding”). Although the ruling applies by its terms only to VeriSign, in erroneously creating an antitrust duty of competitive bidding, the Panel’s decision has, perhaps unwittingly, created a basis for questioning the validity of ICANN’s agreements with other registry operators, including registries created since 2000, and registries to be created in the future. This introduces a degree of uncertainty that will increase the difficulty of new entrants to raise capital necessary to build strong competing registry operations.

More importantly, the decision implicates the security and stability of the DNS. ICANN’s and the DOC’s “mission of public trust” led them to include presumptive renewal provisions in their Registry Agreements. They have explicitly decided that these provisions are “in the public interest.” SER 10. The Panel’s decision negates without adequate consideration the considered policy

choices of an oversight body that is a key mechanism for ensuring the secure and reliable operation of the DNS and the Internet.

CONCLUSION

This Court should grant the petition for rehearing and rehearing en banc.

Dated: July 13, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 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 this case are not registered CM/ECF users. I have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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