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ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MANWIN LICENSING INTERNATIONAL S.A.R.L., a Luxembourg limited liability company (s.a.r.l.), and DIGITAL PLAYGROUND, INC., a California corporation,

Plaintiffs,

v.

ICM REGISTRY, LLC, d.b.a. .XXX, a Delaware limited liability corporation, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California non-profit public benefit corporation, and DOES 1-10,

Defendants.

Case No. CV11-9514 PSG (JCGx)

Assigned for all purposes to
The Honorable Philip S. Gutierrez

DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

[Response to Plaintiffs' Opposition to Request for Judicial Notice Filed Concurrently Herewith]

Date: July 30, 2012
Time: 1:30 p.m.
Courtroom: 880 Roybal Federal Bldg.

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	THE ANTITRUST LAWS DO NOT APPLY TO ICANN'S NON-COMMERCIAL ACTIVITIES	1
	A. The Sherman Act Only Applies to Competition-Reducing Conduct in Trade or Commerce	1
	B. Plaintiffs' Argument Based on ICANN's Non-Profit Status Is a Straw Man	3
	C. Plaintiffs' Contention That ICANN Engages in Commercial Activities Is Unsupported by Their Allegations and Authorities	4
	D. ICANN Cannot Be Liable Under the Antitrust Laws for ICM's Independent Conduct	5
III.	ICANN'S UNILATERAL CONDUCT IS NOT ACTIONABLE	6
IV.	PLAINTIFFS HAVE NOT ALLEGED PROPERLY DEFINED RELEVANT MARKETS	6
	A. Plaintiffs' "Defensive Registration" Market Is Not an Appropriately Defined Product Market	7
	B. Plaintiffs' Allegation of an "Incipient" Market for Affirmative Registrations Is Impermissibly Speculative	9
	1. Plaintiffs Fail to Allege Facts Supporting the Dissipation of Substitutable Products	10
	2. The Availability of Injunctive Relief Does Not Make Up For Plaintiffs' Failure to Allege a Significant Risk of Future Monopolization	11
V.	PLAINTIFFS' THIRD CAUSE OF ACTION MUST BE DISMISSED, REGARDLESS OF ITS LABEL	12
VI.	CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Allen Bradley Co. v. Local Union No 3,
325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945) 6

Am. Society of Mech. Eng'rs, Inc. v. Hydrolevel Corp.,
456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982) 5

Apex Hosiery Co. v. Leader,
310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940) 1, 2

Bell Atlantic v. Twombly,
550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) 6, 7, 9

Big Bear Lodging Ass'n v. Snow Summit, Inc.,
182 F.3d 1096 (9th Cir. 1999) 4

Bronx Legal Servs. v. Legal Servs. for New York City,
No. 02 Civ. 6199(GBD), 2003 WL 145558 (S.D.N.Y. Jan. 17, 2003) 2, 5

Cal. State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc.,
648 F.2d 527 (9th Cir. 1980) 6

Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.,
611 F.3d 495 (9th Cir. 2010) 7, 8

Dedication & Everlasting Love to Animals (DELTA) v. Humane Soc'y of United States, Inc.,
50 F.3d 710 (9th Cir. 1995) 2

DocMagic, Inc. v. Ellie Mae, Inc.,
745 F. Supp. 2d 1119 (N.D. Cal. 2010) 11

Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.,
123 F.3d 301 (5th Cir. 1997) 9, 12

Fraser v. Major League Soccer, L.L.C.,
284 F.3d 47 (1st Cir. 2002) 12

Freeman v. San Diego Ass'n of Realtors,
322 F.3d 1133 (9th Cir. 2003) 12

FTC v. Superior Court Trial Lawyers Assn.,
493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990) 3

Goldfarb v. Virginia State Bar,
421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975) 5

Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,
627 F.2d 919 (9th Cir. 1980) 12

Jacobs v. Tempur-Pedic Int'l, Inc.,
626 F.3d 1327 (11th Cir. 2010) 7

L.A. Meat & Provision Drivers Union v. United States,
371 U.S. 94, 102, 83 S. Ct. 162, 9 L. Ed. 2d 150 (1962) 6

LiveUniverse, Inc. v. MySpace, Inc.,
No. CV 06-6994 AHM (RZx), 2007 WL 6865852, at *8 (C.D. Cal. June 4, 2007). 11

NCAA v. Bd. of Regents,
468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) 4

Newcal Indus., Inc. v. Ikon Office Solution,
513 F.3d 1038 (9th Cir. 2008) 11

Paladin Assocs., Inc. v. Montana Power Co.,
328 F.3d 1145 (9th Cir. 2003) 12

Salco Corp. v. General Motors Corp., Buick Motor Div.,
517 F.2d 567 (10th Cir. 1975) 12

Smith v. Network Solutions, Inc.,
135 F. Supp. 2d 1159 (N.D. Ala. 2001) 8

Spectrum Sports, Inc. v. McQuillan,
506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) 10, 11, 12

Tanaka v. Univ. of S. Cal.,
252 F.3d 1059 (9th Cir. 2001) 10

United States v. Brown Univ.,
5 F. 3d 658 (3d Cir. 1993) 5

Virginia Vermiculite, Ltd. v. W.R. Grace & Co.,
156 F.3d 535 (4th Cir. 1998) 5

Weber v. Nat'l Football League,
112 F. Supp. 2d 667 (N.D. Ohio 2000) 8

STATUTES

15 U.S.C. § 1 1

15 U.S.C. § 2 1

OTHER AUTHORITIES

IB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 262a 3

IIIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 809 12

I. INTRODUCTION

Plaintiffs are the registrants of domain names for some of the most popular adult content websites on the Internet. As registrants, Plaintiffs purchase from registrars (or their agents) the right to operate domain names. Registrars offer domain name registration services pursuant to agreements with the operators of various Internet registries such as .COM or .NET.

Co-defendant ICM is a registry operator that has been authorized by ICANN, the non-profit organization that administers portions of the DNS, to operate the .XXX TLD. Although Plaintiffs are three steps removed from ICANN, and although ICANN does not (and is not permitted by its bylaws to) sell domain name registrations, Plaintiffs contend that ICANN's unilateral decision to increase competition in the market for domain names by authorizing the introduction of the .XXX TLD restrains trade and will lead (one day) to ICM's monopolization of two relevant markets (although neither is a properly defined antitrust market). But in reality, Plaintiffs are seeking to employ the antitrust laws to preserve their dominant position in the "market" for adult content websites because their ultimate goal is revocation of the .XXX TLD, not modifications to its terms of operation.

In opposing ICANN's motion to dismiss, Plaintiffs dramatically misstate ICANN's arguments regarding the applicability of the Sherman Act to non-commercial activities, attempt to redefine their flawed relevant market allegations, and ask the Court to adopt an impermissibly broad interpretation of Section 2 conspiracy doctrine. Plaintiffs' FAC is fatally flawed and must be dismissed without leave to amend.

II. THE ANTITRUST LAWS DO NOT APPLY TO ICANN'S NON-COMMERCIAL ACTIVITIES.

A. The Sherman Act Only Applies to Competition-Reducing Conduct in Trade or Commerce.

Plaintiffs do not dispute that the Sherman Act only applies to "trade or commerce." 15 U.S.C. §§ 1, 2; *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469,

493, 60 S. Ct. 982, 84 L. Ed. 1311 (1940) (noting that the Sherman Act was enacted to address the "suppression of competition in the marketing of goods and services"). Yet, the FAC does not (and could not) allege that ICANN engages in trade or commerce by marketing or selling anything.[1] Rather, the FAC acknowledges that ICANN fulfills its "charitable and public purposes" by administering the DNS for the benefit of all Internet users. FAC ¶ 27. Although ICANN receives fees from registry operators, Plaintiffs acknowledge that those fees fund ICANN's mission, which is essential to the functioning of the Internet. *Id.* ¶¶ 27, 31. To the extent Plaintiffs contend ICANN provides services in its administration of the DNS, they do not allege those services differ based on the fees received from registry operators. *Id.* ¶¶ 31-32. All registry operators obtain the same benefits from ICANN's administration of the DNS—the right to operate as a registry operator subject to various terms and conditions—irrespective of the amount of fees they provide. The bargained-for exchange essential to a commercial transaction is absent.

ICANN's reliance on fees to carry out its charitable operations is no different than the Humane Society's solicitation of contributions to fund its operations. *See Dedication & Everlasting Love to Animals (DELTA) v. Humane Soc'y of United States, Inc.*, 50 F.3d 710 (9th Cir. 1995); *see also Bronx Legal Servs. v. Legal Servs. for New York City*, No. 02 Civ. 6199(GBD), 2003 WL 145558, at *4 (S.D.N.Y. Jan. 17, 2003) (distribution of funds to charitable organization is not a "business or commercial exchange"). As the Ninth Circuit explained in *DELTA*, the critical inquiry in determining the nature of a non-profit's activities is not whether the non-profit receives funds, but whether its receipt of those funds involves trade or commerce. 50 F.3d at 714. Although the Humane Society undeniably provides services as part of its charitable operations, and a donor may even benefit from those services, the Humane Society's solicitation of a donor's contribution does not

[1] Although Plaintiffs' opposition brief repeatedly states that ICANN "sold" the right to operate the registry for the .XXX TLD, this characterization is contradicted by the FAC's allegations. *See infra* Part II.C.

constitute trade or commerce because there is no specific exchange of money for goods or services. The funds merely support the Humane Society's charitable operations. Likewise, because ICANN does not provide any goods or services specific to ICM in exchange for the fees it stands to collect in the future, does not commercially benefit from those funds, and merely uses the funds to carry out its mission, ICANN's actions do not constitute trade or commerce.

Further, a transaction is commercial only "when the antitrust defendants are likely to receive direct economic benefit as a result of any reduction in competition in the market in which the target firm or firms operate." IB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 262a, at 177 (emphasis added). Plaintiffs allege (correctly) that ICANN stands to collect fees on a per-registration basis. FAC ¶ 56(a). Thus, ICANN's collection of fees is tied to growth in domain name registrations in the .XXX TLD. The only way ICANN could benefit from its action is if competition among adult content website operators like Plaintiffs increases. Because any funds ICANN may derive from the operation of the .XXX TLD will not be based on a reduction in competition, ICANN's conduct is not commercial.

B. Plaintiffs' Argument Based on ICANN's Non-Profit Status Is a Straw Man.

Plaintiffs' lead argument in opposition to ICANN's motion to dismiss is that ICANN is not exempt from the antitrust laws on the basis of its status as a charitable, non-profit organization. Opp. at 6-9. But ICANN never claimed an organizational exemption. *See* Opening Br. at 13:9-10 (a "non-profit organization … may engage in commercial activity, and this activity will then be subject to the Sherman Act"). To the contrary, ICANN argued that the antitrust laws do not apply to "noncommercial conduct undertaken by a non-profit organization, which is what Plaintiffs' allegations describe about ICANN." *Id.* at 11:21-22 (emphasis added). Thus, Plaintiffs attack a position ICANN never advocated, which explains why most of their authorities on this point have no application here. *See, e.g.*, *FTC v.*

Superior Court Trial Lawyers Assn., 493 U.S. 411, 427, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990) (for-profit business motivation distinguished lawyers' illegal combination from collective boycotts to achieve noncommercial purposes); *NCAA v. Bd. of Regents*, 468 U.S. 85, 100 n.22, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (noting that NCAA did not rely on its nonprofit character as a basis for seeking reversal); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1103 n.5 (9th Cir. 1999) (addressing boycott by association of for-profit ski resorts).

C. Plaintiffs' Contention That ICANN Engages in Commercial Activities Is Unsupported by Their Allegations and Authorities.

Plaintiffs contend ICANN engaged in commercial activities by "creating the .XXX for-profit commercial market" and selling ICM a right to operate .XXX and issue domain names in that TLD in exchange for a portion of the proceeds from the sale of each domain name. Opp. at 9:13-19 (citing FAC ¶¶ 48-58, 71-86). But this misstates Plaintiffs' own pleadings (and the truth). The FAC repeatedly alleges that registry operators (including ICM) and registrars sell various services (*see* FAC ¶¶ 3(c), 3(e), 3(g), 22, 55, 56, 65, 73-75, 76(d), 78, 82, 84-86), but nowhere does it allege that ICANN sold anything, be it a "right" or any specific goods or services.[2]

In fact, ICANN does not sell anything. As ICANN's Bylaws make clear, the fees collected from registry operators are used solely to recover the costs of administering the DNS. Just as the accreditation process for registrars is funded through application and accreditation fees paid by registrars, the registry application process and administration of the DNS is funded through fees paid by registries. Absent such fees, ICANN would have little source of funds and could not accomplish its public, charitable purpose.

Plaintiffs do not cite any authority for the proposition that the collection of

[2] Paragraph 53 of the FAC alleges that ICANN's basic administration of the DNS, functions that are essential to the functioning of the Internet and are provided to all registry operators, is conducted in exchange for fees from ICM. But this ignores that the same "services" are provided to all registry operators, regardless of whether any fees are collected from the operator or the amount of those fees.

fees by a non-profit entity, and the non-profit's use of those fees to carry out its mission, constitutes commercial activity under the Sherman Act. Instead, Plaintiffs rely on a handful of cases that concern restraints on commerce—the fixing of prices for certain legal services by attorneys, *see Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), a for-profit company's exploitation of its role in a standard-setting organization to harm a direct competitor, *see Am. Society of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982), and the role of universities in collectively determining the amount of financial aid a student would receive to offset the student's payment of tuition to a university in exchange for educational services, *see United States v. Brown Univ.*, 5 F. 3d 658 (3d Cir. 1993). In each of these cases, there was no question as to the existence of commerce or the restraint thereon.[3]

D. ICANN Cannot Be Liable Under the Antitrust Laws for ICM's Independent Conduct.

Plaintiffs contend that, even if ICANN's activities are noncommercial, it is subject to the antitrust laws because "'an organization that would otherwise be exempt from the labor [or antitrust] laws loses its exemption by conspiring with a nonexempt party.'" Opp. at 11:7-9 (quoting *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541 (4th Cir. 1998)). But, as explained above, ICANN does not claim an organizational exemption. Instead, it relies on the established principle that the antitrust laws do not apply to noncommercial activities.

Virginia Vermiculite is inapposite. In that case, the Fourth Circuit did not conclude that the non-profit at issue lost an "exemption" from the antitrust laws by conspiring with a non-exempt party. It concluded that the non-profit was "subject to the antitrust laws … because the transaction [at issue] was essentially commercial." *Virginia Vermiculite,* 156 F.3d at 541. Plaintiff's remaining

[3] Contrary to Plaintiffs' contention (Opp. at 14 n.10), courts may determine whether alleged transactions are "non-commercial" at the pleading stage. *See, e.g., Bronx Legal Servs.*, 2003 WL 145558, at *4.

authorities each address the labor exemption, which is not claimed here.[4] Because ICANN does not claim an organizational exemption, and because its conduct was noncommercial, it cannot be liable for ICM's independent conduct.

III. ICANN'S UNILATERAL CONDUCT IS NOT ACTIONABLE.

To the extent Plaintiffs address ICANN's argument that the FAC fails to allege concerted activity, they merely summarize their allegations regarding the contract establishing ICM's right to operate the .XXX TLD.[5] But Plaintiffs do not (and cannot) contest that ICANN unilaterally approved ICM as the registry operator for that TLD. FAC ¶ 25. Nor do Plaintiffs dispute that all of the allegedly anti-competitive conditions placed on the registration of names in the .XXX TLD were undertaken unilaterally by ICM. *See* FAC ¶¶ 56(a) & (b), 73-86. Indeed, the fact that ICANN decided not to impose certain restrictions on ICM's operations reflects an absence of agreement, not concerted activity.

IV. PLAINTIFFS HAVE NOT ALLEGED PROPERLY DEFINED RELEVANT MARKETS.

Plaintiffs imply that the standard for pleading a relevant market is lower than that established by *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Opp. at 15-16 (ignoring *Twombly* in reciting standards for pleading a relevant market). But a complaint must be dismissed if the factual

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[4] Further, in each of the labor cases relied upon by Plaintiffs, the party relying on the labor exemption sought to further its commercial goals, bringing its conduct squarely within the Sherman Act's reach. *See Allen Bradley Co. v. Local Union No 3*, 325 U.S. 797, 801, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945) (addressing whether "labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which that Act prohibits"); *L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 102, 83 S. Ct. 162, 9 L. Ed. 2d 150 (1962) (observing that the defendants "were sellers of commodities, who became 'members' of the union only for the purpose of bringing upon power to bear in the successful enforcement of the illegal combination in restraint of" trade); *Cal. State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc.*, 648 F.2d 527, 533 (9th Cir. 1980) (declining to apply exemption "to anticompetitive conduct involving groups of businessman").

[5] Plaintiffs incorporate by reference their opposition to ICM's motion on this point. Opp. at 14:5-7. ICANN does the same with respect to ICM's reply brief.

allegations do not "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. This is no less true for relevant market allegations than any other aspect of an antitrust complaint. *See Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 509 (9th Cir. 2010) (remanding to take into account *Twombly*);[6] *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1336 (11th Cir. 2010) ("the complaint's relevant market allegations fall short of what *Twombly* requires"). Plaintiffs' alleged relevant markets fail to meet that test.

A. Plaintiffs' "Defensive Registration" Market Is Not an Appropriately Defined Product Market.

The implausibility of Plaintiffs' "defensive registration" market is apparent from their opposition. Plaintiffs argue that to "prevent misuse of its name in .XXX … Mercedes Benz must defensively register that name in .XXX." Opp. at 16:27-17:1. Likewise, the only way to block the "YouPorn" domain name in the .XXX TLD is to register that specific name in the .XXX TLD. *Id.* While Plaintiffs admit that a relevant product market is defined solely by "reasonable substitutes" (*id.* at 16:6), Plaintiffs fail to recognize that since mercedesbenz.xxx and youporn.xxx are not reasonably interchangeable for blocking purposes (according to their allegations), there can be no general market for defensive registration of domain names in the .XXX TLD that includes both names or any others in the same market (*e.g.*, bmw.xxx and mercedesbenz.xxx are not substitutes either).

[6] Plaintiffs argue that *VeriSign* is somehow "dispositive" here (Opp. at 4:17) but disregard the fundamental distinctions between that case and this one, including the critical fact that the *VeriSign* plaintiff dropped ICANN as a defendant. 611 F.3d at 501. Thus, the Ninth Circuit had no occasion to consider whether ICANN engaged in commercial activities. Further, the only properly pled conspiracy allegations in that case involved the renewal of a contract without bidding. *Id.* at 505 (affirming dismissal of .net allegations because bidding was not foreclosed). Here, Plaintiffs acknowledge that the .XXX TLD contract was entered after ICM alone sought to operate that TLD. FAC ¶ 49. Finally, the *VeriSign* plaintiff alleged relevant markets that were materially different from those Plaintiffs allege here. *See* 611 F.3d at 508-10. In short, the Ninth Circuit never passed upon the questions raised by this motion. Far from "studiously ignor[ing]" *VeriSign* (Opp. at 4:27), ICANN references that case where it has explanatory power. But it rejects Plaintiffs' suggestion that a different case with different parties and different facts is in any way dispositive of this motion or the propriety of the FAC.

As a result, Plaintiffs' allegations amount to a contention that each individual domain name in the .XXX TLD is itself a relevant antitrust market, a notion courts have repeatedly rejected. *See VeriSign*, 611 F.3D at 508 ("[A] market should not be defined in terms of a single domain name."); *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159, 1169 (N.D. Ala. 2001) ("Taken to its logical conclusion, Plaintiff[s'] argument [incorrectly] implies that each individual domain name is a relevant market unto itself"); *Weber v. Nat'l Football League*, 112 F. Supp. 2d 667, 673-74 (N.D. Ohio 2000) (alleged market comprised of "the demand for the domain names 'jets.com' and 'dolphins.com'" is not appropriately defined).[7]

Plaintiffs' reliance on *VeriSign* is accordingly misplaced. There, the Ninth Circuit acknowledged the possibility that expiring domain names could constitute a relevant market because, as a class, those names were valued differently from domain names that had never before been registered. *VeriSign*, 611 F.3d at 508. But unlike the defensive registration market alleged here, the value of an expiring domain name was not based on the specific name desired; rather, it was based on the general property of having been used previously, with the attendant history of established web traffic and advertising support. *Id.* at 509. Any domain name within the market of expiring domain names, however, was reasonably interchangeable with any other domain name in that market.

Here, Plaintiffs attempt to differentiate defensive registrations from other registrations on the basis that particular names require unique protection. Plaintiffs allege that there is no substitute for the defensive registration of any single name in the .XXX TLD, even within that TLD. Plaintiffs' other response is to observe that there would be a very large number of these non-interchangeable defensive domain names in the market they posit. Opp. at 17-18. That is simply beside the point—

[7] Contrary to Plaintiffs' contention, *VeriSign* did not "reject" *Smith*. Opp. at 18. The Ninth Circuit distinguished *Smith* on the basis that the *VeriSign* plaintiffs' allegations were not based on a "particular" plaintiff's desires, but on a broad market of reasonably interchangeable names. 611 F.3d at 508. That is not what Plaintiffs allege here, and thus they fail to state a claim under *Verisign* or *Smith*.

whether there are ten or ten million (trademarked or not), none of the potential defensive domain names is a substitute for the others, which means there is no single "defensive registration" market in which they all exist. Plaintiffs' claims based on the "defensive registration" market must be dismissed.

B. Plaintiffs' Allegation of an "Incipient" Market for Affirmative Registrations Is Impermissibly Speculative.

"To establish Section 2 violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant market." *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 311 (5th Cir. 1997). In the FAC, Plaintiffs attempted to plead an "affirmative registration" market that does not exist. The FAC alleges ICM is "attempting to establish" such a market, the market's establishment is "likely," and there is a "possibility" the .XXX TLD could "become the exclusive permitted TLD for adult web content."[8] FAC ¶¶ 66-68. These allegations are inherently speculative and cannot possibly pass muster under *Twombly*. Plaintiffs do not cite any cases to the contrary in their opposition.

Further, Plaintiffs disregard their allegations that Plaintiff Manwin owns domain names in non-.XXX TLDs "for many of the most popular adult-oriented websites, including YouPorn.com, the single most popular free adult video website on the Internet" (FAC ¶ 1), and that Plaintiff Digital Playground makes "one of the world's largest high definition libraries of original adult content … available through its websites [in non-.XXX TLDs], including digitalplayground.com" (*id.* ¶ 5). These allegations are devastating to Plaintiffs' market definition because they acknowledge economic substitutes for "'affirmative registrations' of names … within TLDs connoting … adult content." *Id.* ¶ 66.

[8] Plaintiffs also allege that it is "unlikely that other potential TLDs with names that could similarly connote adult content, such as .sex or .porn, will be established." FAC ¶ 66. Notably, in ICANN's recent program soliciting new generic TLDs, a company named Internet Marketing Solutions Limited applied for the .SEX TLD. *See* http://newgtlds.icann.org/en/program-status/application-results/strings-1200utc-13jun12-en.

In fact, Plaintiffs now concede that their "affirmative registration" market definition "does not include all currently substitutable products." Opp. at 19:16-17. This concession is dispositive of the section 2 claims based on an affirmative registration market. *See, e.g.*, *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063-64 (9th Cir. 2001) (rejecting relevant market consisting solely of UCLA women's soccer program where plaintiff conceded she had been recruited by numerous other programs throughout the country). Plaintiffs' vague and conclusory allegations that there is a "threat" that these concededly substitutable products will no longer be available at some point in the future cannot salvage their claim.

1. Plaintiffs Fail to Allege Facts Supporting the Dissipation of Substitutable Products.

While acknowledging that the most popular adult content websites are registered in the .COM TLD, which ICM does not control, Plaintiffs contend they have sufficiently alleged a dangerous probability that ICM will monopolize a market "for affirmative registration services for adult content websites." Opp. at 20:5-6. Plaintiffs do not allege ICM's market power in this future relevant market, and thus their claims can be dismissed on this basis alone. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) ("[D]emonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market."). Plaintiffs' other arguments would not salvage their claim.

First, Plaintiffs' "network effects" argument is entirely speculative. They do not allege facts suggesting that successful adult websites have been registered in the .XXX TLD, that viewers of adult content have begun to substantially gravitate to the .XXX TLD, or that the .COM TLD has lost substantial (or any) adult content. Bald assertions that these things "will" happen is not enough. Indeed, in the two cases Plaintiffs cite, the courts addressed network effects that functioned as a

barrier to entry into a market. *See DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1138-39 (N.D. Cal. 2010); *LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06-6994 AHM (RZx), 2007 WL 6865852, at *8 (C.D. Cal. June 4, 2007). Here, Plaintiffs allege that their own .com websites are "the most popular" on the "the Internet", FAC ¶ 1; they cannot plausibly allege that network effects will function as a barrier to entry in registering adult websites in the .COM TLD.[9]

Second, Plaintiffs allege that failed legislation from 2002 and 2006 seeking to mandate that adult content reside exclusively on adult content-specific TLDs would reduce substitutes for registration in the .XXX TLD. But failed legislative efforts cannot be used to support speculation that a future Congress will even introduce similar legislation, let alone a probability that legislation would pass.

Finally, Plaintiffs' conclusory allegations that ICANN and ICM have agreed that ICANN will not approve competing adult-oriented TLDs are contradicted by the ICANN-ICM contract, which includes no such provision, *see* RJN Ex. C, and the fact that other generic TLDs are still available sources for domain names.

2. The Availability of Injunctive Relief Does Not Make Up For Plaintiffs' Failure to Allege a Significant Risk of Future Monopolization.

Plaintiffs argue that injunctive relief is an appropriate remedy for attempt or conspiracy to monopolize. That is true, but it does not excuse Plaintiffs' failure to allege a properly-defined relevant market that is in danger of being monopolized. In *Spectrum Sports*, the Supreme Court made clear that attempted monopolization requires allegations and proof of an existing relevant market. The Ninth Circuit has specifically held that the relevant market requirement "appl[ies] identically under the two different sections of the [Sherman] Act," including to attempted monopolization and conspiracy to monopolize claims. *Newcal Indus., Inc. v. Ikon*

[9] Indeed, the FAC nowhere plausibly explains how a start-up TLD launched at the end of 2011 will overcome the massive existing network effects favoring .COM to become a monopoly in hosting adult websites, especially when, according to the FAC, the adult content community is against using .XXX and hosting on other TLDs is far less expensive. *See* FAC ¶¶ 43, 49, 66.

Office Solution, 513 F.3d 1038, 1044 n.3, 1052 (9th Cir. 2008) (holding that "the requirements apply identically to all six of Newcal's claims"); *see also Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 67-68 (1st Cir. 2002); *Doctor's Hosp. of Jefferson*, 123 F.3d at 311; *see also* IIIB Areeda & Hovenkamp, *supra*, ¶ 809.[10]

Further, assuming that a conspiracy to monopolize could properly be pleaded on the basis of specific intent to monopolize alone (*see* Opp. at 23:1-13), Plaintiffs have not alleged any factual allegations that plausibly demonstrate such intent since Plaintiffs concede that affirmative registration of adult content websites in other TLDs (like .COM) is an economic substitute for registration in the .XXX TLD (and have no plausible allegation that they will not remain so). Opp. at 19:17-20:1. That is fatal to their argument.

V. PLAINTIFFS' THIRD CAUSE OF ACTION MUST BE DISMISSED, REGARDLESS OF ITS LABEL.

Plaintiffs concede that their cause of action for "conspiracy to attempt to monopolize" an "affirmative registrations" market is not actionable, but contend that this is simply a matter of mislabeling. Opp. at 24:7-10. They argue that they intended to plead conspiracy to monopolize, and that their allegations support that cause of action. Regardless of its label, Plaintiffs' third cause of action does not identify a properly-defined relevant market. *See supra* Part IV.B. Accordingly, Plaintiffs have not stated a claim for conspiracy to monopolize.

VI. CONCLUSION

For the foregoing reasons, the FAC should be dismissed with prejudice.

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[10] For the contrary position, Plaintiffs rely on authorities that either (a) pre-date *Spectrum Sports* and thus fail to address the Supreme Court's repudiation of prior Ninth Circuit precedent addressing inchoate monopolization claims, *see Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980); *Salco Corp. v. General Motors Corp., Buick Motor Div.*, 517 F.2d 567, 576 (10th Cir. 1975), or (b) did not expressly consider whether a relevant market must be pleaded, *see Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003) (rejecting conspiracy claim for failure to show antitrust injury); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1155-56 (9th Cir. 2003) (rejecting conspiracy claim for failure to show specific intent to monopolize).

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