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E-FILED on 12/8/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

COALITION FOR ICANN TRANSPARENCY
INC., a Delaware corporation,

Plaintiff,

v.

VERISIGN, INC., a Delaware corporation;
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS, a
California corporation,

Defendants.

No. C-05-04826 RMW

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS

[Re Docket Nos. 152, 160]

Defendant VeriSign, Inc. ("VeriSign") and defendant Internet Corporation for Assigned Names and Numbers ("ICANN") both move to dismiss plaintiff's First Amended Complaint ("FAC") for failure to state a claim. Plaintiff Coalition For ICANN Transparency, Inc. ("CFIT") opposes both motions. The court has read the moving and responding papers and considered counsels' arguments. For the reasons set forth below, the court GRANTS defendants' motions to dismiss. Plaintiff has twenty (20) days from the date of this order to amend its complaint or it may elect to proceed on its proposed second amended complaint.

I. BACKGROUND

1
2 This action involves two types of services related to Internet domain names. The factual
3 allegations relevant to the present motions are set forth in this order. Additional factual background
4 is set forth in the court's February 28, 2006 Order Denying Verisign's Motion to Dismiss and
5 Granting Defendants' Motions for Judgment on the Pleadings ("Feb. 2006 Order").

A. The Parties

6
7 CFIT is a nonprofit membership organization whose members include certain Internet
8 domain registrars, registrants, back order service providers, including Pool.com, Inc. and R. Lee
9 Chambers Company, LLC. FAC ¶ 7. CFIT was formed for the purpose of challenging the allegedly
10 anticompetitive agreements and activities of defendants as set forth in the FAC. *Id.*

11 ICANN is a private not-for-profit corporation that coordinates the Internet domain name
12 system ("DNS") on behalf of the United States Department of Commerce ("DOC"). *Id.* ¶¶ 58-59.
13 ICANN's bylaws provide that it shall "[i]ntroduc[e] and promot[e] competition in the registration of
14 domain names where practicable and beneficial in the public interest." *Id.* ¶ 64. ICANN operates
15 under a Memorandum of Understanding ("MOU") with the DOC. *Id.* ¶¶ 59-63. The MOU "is
16 effectively ICANN's charter." *Id.* The MOU's purpose is to "promote[] the management of the
17 DNS in a manner that will permit market mechanisms to support competition and consumer choice
18 in the technical management of the DNS." *Id.* The MOU prohibits ICANN from "unjustifiably or
19 arbitrarily" injuring "particular persons or entities or particular categories of persons or entities." *Id.*
20 It requires ICANN to "act in a non-arbitrary and reasonable manner with respect to . . . any . . .
21 activity related to a DNS project." *Id.* The original MOU was scheduled to expire in September
22 2000. *Id.* ICANN and the DOC have amended it six times. *Id.* The most recent amendment
23 reiterates the DOC's "policy goal of privatizing the technical management of the DNS in a manner
24 that promotes stability and security, competition, coordination, and representation." *Id.* In this
25 amendment, ICANN also reaffirms its "commitment to maintaining security and stability in the
26 technical management of DNS, and to perform as an organization founded on the principles of
27 competition, bottom up coordination, and representation." *Id.*

1 **B. The Internet Domain Name System**

2 Every computer connected to the Internet has a unique Internet Protocol ("IP") address. *Id.*
3 ¶ 19. IP addresses are long strings of numbers, such as 64.233.161.147. *Id.* The Internet DNS
4 provides an alphanumeric shorthand for IP addresses. *Id.* ¶ 20. The hierarchy of each domain name
5 is divided by periods. Thus, reading a domain name from right to left, the portion of the domain
6 name to the right of the first period is the top-level domain ("TLD"). TLDs include .com, .gov, .net.,
7 and .biz. *Id.* ¶ 21. Each TLD is divided into second-level domains identified by the designation to
8 the left of the first period, such as "example" in "example.com" or "example.net." *Id.* SLDs can be
9 further divided in third-level domains, such as "another" in "another.example.com" and so on. *Id.*
10 Each domain name is unique and thus can only be registered to one entity. *Id.* ¶ 24. CFIT alleges
11 that the ".com" and ".net" TLDs have become the "definitive TLDs for all commercial and private
12 TLD registrants." *Id.* ¶ 13. One reason is purportedly that other TLDs are either restricted as to
13 accessibility (e.g., country code TLDs such as ".us") or restricted as to use or meaning (e.g., ".edu"
14 or ".gov"). *Id.* ¶¶ 12-13.

15 A domain name is created when it is registered with the appropriate registry operator. *Id.* ¶
16 25. A registry operator maintains the definitive database, or registry, that associates the registered
17 domain names with the proper IP numbers for the respective domain name servers. *Id.* The domain
18 name servers direct Internet queries to the related web resources. *Id.* A registrant can register a
19 domain name only through companies that serve as registrars for second level domain names.
20 Registrars accept registrations for new or expiring domain names, connect to the appropriate registry
21 operator's TLD servers to determine whether the name is available, and register available domain
22 names on behalf of registrants. *Id.* ¶ 48. As such, registrars necessarily need access to the registry
23 maintained by the registry operators. When a domain name is expiring (and not renewed by the
24 current registrant), the registry operator notifies the registrars. To register an expired domain name,
25 registrars send "add" commands to the registry database. *Id.* An "add" command is accepted
26 (thereby registering the name) only if the name is available. *Id.* Therefore, to increase the chances
27 of obtaining a popular expired domain name, a registrar may send a rapid series of "add" commands
28

1 for the expired name. *See* Feb. 2006 Order at 3. CFIT alleges that due to competition for
2 registration of expiring domain names, a registrant may use the services of "back order service
3 providers." FAC ¶ 49. Back order service providers further increase the chances of a registrant
4 obtaining a highly demanded expiring domain name by pooling the resources of several registrars.
5 In this way, the registrant's chances of an "add" command being accepted increases. *See* Feb. 2006
6 Order at 3-4.

7 The majority of domain name registrations for commercial purposes utilize the .com TLD.
8 FAC ¶ 43. CFIT alleges that demand for .com TLDs is not interchangeable with other TLDs and
9 consumers are willing to pay substantially more for .com domain name registrations. *Id.* ¶ 40. As
10 an example, CFIT alleges that no significant number of consumers switched from .com to .net as a
11 result of the more than thirty percent decrease in the registration fee for .net registrations in July
12 2005. *Id.* ¶ 44. Indeed, CFIT asserts that many .com domain name registrants consider the other
13 TLDs to be complements to, rather than substitutes for, the .com registration. *Id.* ¶ 41. Thus, a
14 registrant often seeks concurrent domain name registrations in a number of TLDs (e.g.,
15 verisign.com, verisign.net, verisign.info, verisign.biz). *Id.* On the other hand, .net domain names
16 have been the primary domain names used by registrants in the networking service, such as internet
17 service providers and e-mail service providers. *Id.* ¶ 45. CFIT contends that substitution among
18 TLDs is not feasible because many registrants' .com or .net domain names have become their
19 trademark or tradename, are associated with consumer goodwill, and represent their online brand
20 name and identity. *Id.* ¶¶ 42, 45.

21 C. VeriSign and ICANN's Relationship

22 In the past ICANN has selected the registry operator for the .com and .net TLDs through a
23 bidding process. *Id.* ¶ 34. Once a registry operator is selected, it serves as the sole registry operator
24 for the applicable TLD registry (.com or .net) until the expiration of the registry agreement. *Id.* ¶ 35.
25 Currently, VeriSign is the registry operator for the .com and .net domains pursuant to written
26 registry agreements between ICANN and VeriSign. *Id.* ¶¶ 16, 25.

27 In May 2001 VeriSign and ICANN entered into a .com registry agreement (the "2001 .com
28 Agreement") and a .net registry agreement (the "2001 .net Agreement") under which VeriSign was

1 designated the sole registry operator of the .com and .net TLD registries. *Id.* ¶¶ 67-68. The 2001
2 .com Agreement was to expire November 10, 2007. *Id.* ¶ 69. Under this agreement VeriSign was
3 permitted to make a written proposal sometime between November 10, 2005 and May 10, 2006 for a
4 four-year renewal term. ¶ 69. ICANN was then to consider the proposal and grant the extension
5 unless (1) ICANN determined that VeriSign was in material breach of the agreement, (2) the
6 proposal contained a maximum price that exceeded what was allowed under the existing 2001 .com
7 Agreement, or (3) "certain other conditions appl[ied]." *Id.*

8 The 2001 .net Agreement was set to expire June 30, 2005. Competitive bidding was solicited
9 prior to its expiration and VeriSign was again selected as the .net registry operator. *Id.* ¶ 34. Thus,
10 in 2005, VeriSign and ICANN entered into a .net registry agreement (the "2005 .net Agreement").

11 VeriSign and ICANN have negotiated and signed a proposed .com registry agreement (the
12 "2006 .com Agreement") that will replace the current 2001 .com Agreement. *Id.* ¶ 71. The 2006
13 .com Agreement effectively extends VeriSign's operation of the .com registry for an additional five
14 years beyond the original expiration date without any competitive bidding process. *Id.* ¶ 84. CFIT
15 alleges that by negotiating and agreeing to the 2006 .com Agreement ICANN and VeriSign are
16 "bypassing" the process in the 2001 .com Agreement that would trigger ICANN's solicitation of
17 competitive bids. *Id.* ¶ 71. Specifically, the proposed 2006 .com Agreement sets a maximum price
18 for domain name registrations which exceeds that allowed under the 2001 .com Agreement, which
19 CFIT contends would otherwise have triggered an obligation on ICANN's part to seek competitive
20 bids. *Id.* ¶ 89. According to ICANN, registry agreements, including renewals, must be approved by
21 ICANN's board of directors and by the DOC. ICANN's RJN Ex. E (MOU Am. 3)¹; *see also*
22 ICANN's Mot. at 5. ICANN notes that the 2006 .com Agreement was approved by the ICANN
23 board of directors on February 28, 2006, but has not yet been approved by the DOC.

24 CFIT alleges that the contractual relationships between VeriSign and ICANN present several
25 problems. First, pursuant to the 2001 .com Agreement ICANN has the right to seek competitive
26

27 ¹ Pursuant to ICANN's Request for Judicial Notice the court takes judicial notice of the
28 MOU and amendments available on ICANN's Internet site and to which several of CFIT's
allegations reference. *See In re Silicon Graphics Securities Litigation*, 183 F.3d 970, 986 (9th Cir.
1999) (a court may consider documents referred to within a complaint on a motion to dismiss).

1 bids to replace VeriSign as registry operator upon the original expiration on November 10, 2007 (or
2 earlier because VeriSign has already allegedly breached the 2001 .com Agreement repeatedly). *Id.*
3 ¶ 70. CFIT suggests that ICANN is "required" to seek competitive bids because of the MOU's
4 mandate that ICANN support competition and ICANN has purportedly not sought such competitive
5 bids. *Id.* CFIT alleges that both the 2006 .com and 2005 .net Agreements include a renewal
6 provision that allows ICANN to solicit competitive bids upon expiration of the agreement "only if a
7 court or arbitrator issued a non-appealable final order finding VeriSign to be in breach of the
8 agreement, and VeriSign failed to cure the breach." *Id.* ¶ 38. CFIT asserts that this renewal
9 provision constitutes ICANN's "conspiratorial agreement to waive its right to impose competitive
10 bidding" for operation of the .com and .net registries. *Id.* ¶ 87. In comparison, the renewal
11 provisions in the 2001 .com and .net Agreements allowed ICANN to solicit competitive bids upon
12 expiration if ICANN deemed VeriSign to be in material breach. *Id.* ¶ 69.

13 Second, VeriSign has been freed from pricing constraints formerly in place in the 2001 .com
14 and .net Agreements. In particular, the maximum price in the 2006 .com Agreement excludes the
15 "registry-level transaction fee" (paid to ICANN), and the maximum price is set at \$6.00 through
16 December 31, 2006 but can be increased seven percent in four of the following six years. CFIT
17 asserts this is excessive. *Id.* ¶ 89. Additionally, registrars and Internet stakeholders have no input
18 into prices as the fee increases are allegedly automatic pursuant to the contractual provision. *Id.*
19 ¶ 90. Similarly, the 2005 .net Agreement sets the maximum price at \$4.25 until December 31, 2006
20 and then "[b]eginning in 2007, the price controls set forth in the 2005 .net Agreement will be
21 eliminated." *Id.* ¶ 91. CFIT contends that "VeriSign will be unconstrained in setting prices and will
22 charge the maximum cap allowed." *Id.* ¶ 88.

23 Third, CFIT alleges that under the 2006 .com Agreement ICANN may permit VeriSign to
24 provide additional registry services if ICANN determines that no competition concern exists. *Id.*
25 ¶ 93. CFIT concludes that VeriSign is therefore permitted to launch services, such as VeriSign's
26 proposed Central Listing Service ("CLS") and Wait List Service ("WLS"), that would "displace the
27 competitive back order services market . . . or similar services." *Id.* ¶ 94. Further, CFIT asserts that
28 because "nothing in the contracts or otherwise will prevent VeriSign from further increasing prices,"

1 consumers will pay more. *Id.* ¶ 111 The 2005 .net Agreement and the 2006 .com Agreement also
2 allegedly abandon certain "Consensus Policies" representing the interests of Internet stakeholders
3 and certain provisions and obligations set forth in the 2001 .com and .net Agreements designed to
4 avoid unreasonable restraints on trade and to promote fair competition. *Id.* ¶¶ 74-77, 80.

5 **C. CFIT's Claims for Relief**

6 CFIT alleges claims for relief against (1) VeriSign in the .com and .net registration markets
7 for monopolization under section 2 of the Sherman Act, (2) VeriSign in the .com and .net
8 registration markets for attempted monopolization under section 2 of the Sherman Act, (3) VeriSign
9 in the expiring names registration services market under section 2 of the Sherman Act, (4) VeriSign
10 and ICANN in "all relevant markets" for conspiracy to monopolize under section 2 of the Sherman
11 Act, (5) VeriSign and ICANN in "all relevant markets" for conspiracy in restraint of trade under
12 section 1 of the Sherman Act and (6) VeriSign and ICANN in "all relevant markets" for conspiracy
13 in restraint of trade under the Cartwright Act.

14 The Feb. 2006 Order granted defendants' motions for judgment on the pleadings because
15 CFIT's complaint did not adequately allege facts supporting CFIT's associational standing to file the
16 present action. Feb. 2006 Order at 14. The Feb. 2006 Order also clarified certain pleading issues
17 with respect to CFIT's antitrust allegations. In particular, the court noted that the amended
18 complaint should differentiate the alleged expiring names registration services market from domain
19 names in general and provide detailed allegations tending to show that registered and unregistered
20 domain names are not reasonably interchangeable. Feb. 2006 Order at 17.

21 **II. ANALYSIS**

22 **A. Legal Standard**

23 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.
24 Dismissal can be based on the "lack of a cognizable legal theory" or "the absence of sufficient facts
25 alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th
26 Cir. 1988). The issue is not whether the non-moving party will ultimately prevail but whether it is
27 entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d
28 246, 249 (9th Cir. 1997). The court's review is limited to the face of the complaint, documents

1 referenced in the complaint, and matters for which the court may take judicial notice. *Levine v.*
2 *Diamantheset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991). When evaluating a Rule 12(b)(6) motion,
3 the court must accept all material allegations in the complaint as true and construe them in the light
4 most favorable to the non-moving party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994). A
5 court must not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that
6 the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."
7 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also United States v. Redwood City*, 640 F.2d 963,
8 966 (9th Cir. 1981). However, the court is not required to accept conclusory legal allegations "cast
9 in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts
10 alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

11 **B. Associational Standing**

12 VeriSign and ICANN argue that CFIT's amended complaint still fails to allege adequate facts
13 to support that CFIT has associational standing to file the present action. An association may invoke
14 the doctrine of "associational standing" to bring a complaint "on behalf of its members." *See New*
15 *York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9 (1988). It may do so if "(a) its
16 members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect
17 are germane to [its] purpose; and (c) neither the claim asserted nor the relief requested requires the
18 participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432
19 U.S. 333, 343 (1977). When a defendant moves to dismiss on standing grounds, the court must
20 "accept as true all material allegations of the complaint, and . . . construe [it] in favor of the
21 complaining party." *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). At the same time, however,
22 "[i]t is a long-settled principle that standing cannot be inferred argumentatively from averments in
23 the pleadings, but rather must affirmatively appear in the record." *FW/PBS, Inc. v. City of Dallas*,
24 493 U.S. 215, 231 (1990) (plurality opinion) (citations and quotation marks omitted). Therefore,
25 "[i]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to
26 the complaint or by affidavits, further particularized allegations of fact deemed supportive of
27 plaintiff's standing." *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975).

1 CFIT's initial complaint only alleged vague categories of members that might suffer harm.²
 2 Thus, the court found that associational standing had not been alleged because CFIT failed to name
 3 even one member. As amended to support standing CFIT's complaint now alleges that its purpose is
 4 "to promote the interests of its member businesses by seeking a competitive and fair market for
 5 domain name registry services":

6 CFIT was formed for the purpose of challenging the anticompetitive agreements and
 7 activities of defendants alleged herein, including the 2006 .com Agreement. CFIT's
 8 members include Internet domain name registrars, registrants, and back order service
 providers, including but not limited to Pool.com, Inc. and R. Lee Chambers
 Company, LLC.

9 FAC ¶ 7.³ CFIT alleges that Pool.com competes in the expiring names registration services market
 10 and introduced the "pay-for-performance" business model whereby customers paid only if the back
 11 order service provider obtained the domain name for the customer. CFIT contends this model,
 12 which has been largely adopted, encourages competition based on quality of service and price. *Id.*
 13 ¶¶ 49-50. Elsewhere in the complaint CFIT contends that the 2006 .com Agreement includes a
 14 provision that permits VeriSign to propose new services, including the CLS service, which CFIT
 15 alleges would displace "the competitive back order services market." *Id.* ¶ 94. Based on these
 16 allegations, the court finds that the FAC adequately identifies at least one member (Pool.com) who
 17 CFIT alleges will suffer threat of injury based on the 2005 .net and 2006 .com Agreements. Thus,
 18 the court finds these allegations sufficient to meet the first and second prongs of the requirements
 19 under *Hunt*, at least as to the alleged expiring names registration services market. *See Hunt*, 432
 20 U.S. at 342 ("The association must allege that its members, *or any one of them*, are suffering
 21 immediate or threatened injury as a result of the challenged action of the sort that would make out a
 22 justiciable case had the members themselves brought suit.") (emphasis added).

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26 ² ICANN argues that CFIT fails to establish that any member of CFIT could possibly
 27 have standing to sue in its own right because CFIT has failed to allege any antitrust violations or
 antitrust injuries. ICANN Mot. at 23.

28 ³ Other than naming R. Lee Chambers Company, LLC as a member and supporter,
 CFIT make no allegations as to the identity of R. Lee Chambers Company, LLC.

1 **C. Antitrust Standing**

2 In addition to identifying at least one member, however, plaintiff must allege facts sufficient
3 to establish that there is "immediate or threatened injury as a result of the challenged action[s]." *Id.*
4 CFIT's allegations of improper monopoly are twofold. First, ICANN and VeriSign's "agreements
5 and understandings" have the effect of making VeriSign the permanent operator of the .com and .net
6 registries. CFIT alleges that this shields VeriSign from competitive pressures of a re-bidding
7 process and is discordant with ICANN's obligation to maintain competition. FAC ¶ 3. Second,
8 ICANN and VeriSign's "agreements and understandings" improperly permit VeriSign to extend its
9 monopoly control to the downstream markets for back order and other services. *Id.* Moreover,
10 CFIT contends these agreements between ICANN and VeriSign constitute a conspiracy to
11 monopolize the operation of the .com and .net registries, to restrain trade in the downstream markets,
12 and to share in the resulting "monopoly overcharges."

13 The court must make a determination of whether plaintiff has alleged antitrust standing not
14 just the constitutional standing requirement of injury in fact:

15 [T]he focus of the doctrine of "antitrust standing" is somewhat different from that
16 of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient
17 to satisfy the constitutional standing requirement of injury in fact, but the court must
make a further determination whether the plaintiff is a proper party to bring a private
antitrust action.

18 *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983).

19 "A plaintiff may only pursue an antitrust action if it can show 'antitrust injury, which is to say injury
20 of the type the antitrust laws were intended to prevent and that flows from that which makes
21 defendants' acts unlawful.'" *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th
22 Cir. 1999) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). The Ninth
23 Circuit has articulated four requirements for establishing antitrust injury: "(1) unlawful conduct, (2)
24 causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4)
25 that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc.*, 190 F.3d at
26 1055.

27 One way to demonstrate antitrust injury for a § 2 claim of unlawful monopoly is through
28 direct evidence of the "injurious exercise of market power." *Rebel Oil Co., Inc. v. Atl. Richfield Co.*,

1 51 F.3d 1421, 1434 (9th Cir. 1995). Under this method, the plaintiff offers evidence of "restricted
2 output and supra[-]competitive prices that is direct proof of the injury to competition which a
3 competitor with market power may inflict" in the relevant market. *Id.* Accordingly, an act is
4 deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and
5 raises the prices of goods above competitive levels or diminishes their quality. *Id.* at 1433.
6 Alternatively, unlawful market power and antitrust injury may be demonstrated circumstantially by:
7 (1) defining the relevant market, (2) showing that the defendant owns a dominant share of that
8 market, and (3) showing that there are significant barriers to entry and that existing competitors lack
9 the capacity to increase their output in the short run. *Id.* at 1434.

10 **1. The Expiring Names Registration Services Market**

11 As the court noted in its Feb. 2006 Order, a plaintiff must allege a relevant product and
12 geographic market to state a claim under sections 1 and 2 of the Sherman Act. A market consists of
13 all "commodities reasonably interchangeable by consumers for the same purposes[.]" *United States*
14 *v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). "If consumers view the products as
15 substitutes, the products are part of the same market." *Rebel Oil Co.*, 51 F.3d at 1435. "In
16 economists' terms, two products or services are reasonably interchangeable where there is sufficient
17 cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight
18 increase in the price of one product by switching to another product." *Todd v. Exxon Corp.*, 275
19 F.3d 191, 201-02 (2d Cir. 2001). "Congress prescribed a pragmatic, factual approach to the
20 definition of the relevant market and not a formal, legalistic one." *Brown Shoe Co. v. United States*,
21 370 U.S. 294, 336 (1962).

22 CFIT alleges that the market for back order services used by end users in the purchase and
23 sale of expiring domain name registrations (the "expiring domain names registration services
24 market") is a separate relevant market. *Id.* In the Feb. 2006 Order, the court noted that *Weber v.*
25 *Nat'l Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000) and *Smith v. Network Solutions, Inc.*,
26 135 F. Supp. 2d 1159 (N.D. Ala. 2001) have rejected the market definition of expiring names
27 registration services as a matter of law. Feb. 2006 Order at 16-17. The *Weber* court reasoned that
28 the infinite number of potential domain names made the proper market "domain names in general."

1 112 F. Supp. 2d at 673-74. Similarly, the *Smith* court held that domain names were reasonably
2 interchangeable whether expired or not:

3 [T]here is no inherent difference in character, for purposes of interchangeability
4 and cross-elasticity of demand, between domain names that are 'expired' and held
5 by NSI and those that are not. It is true in a literal sense that each domain name is
6 unique. And one given individual domain name may be far more valuable on the
7 open market than others. But products need not be entirely fungible to be
8 considered part of the same relevant market [T]he *Weber* court did more
9 than decide that the two names did not constitute the relevant market; the court
reasoned that the relevant market was all domain names generally as a result of
cross-elasticity of demand. Because the number of domain names, unlike
traditional commodities, is essentially unlimited, there will always be reasonable
substitute names available for any given name kept out of circulation, whether by
a registrar or by the registrant, regardless of whether we are talking about two
names or a hundred and sixty thousand.

10 135 F. Supp. 2d at 1169-70. Nevertheless, in the Feb. 2006 Order the court declined to hold that
11 CFIT's market definition necessarily fails as a matter of law. Feb. 2006 Order at 16-17. Instead, the
12 court found that it was at least theoretically possible that CFIT could allege facts tending to show
13 that registered and unregistered domain names are not reasonably interchangeable, and granted leave
14 to amend. *Id.* On the one hand "products need not be entirely fungible to be considered part of the
15 same relevant market." *Smith*, 135 F. Supp. 2d at 1169. On the other hand, price disparities are
16 relevant for grouping commodities into relevant markets. *See E.I. du Pont de Nemours & Co.*, 351
17 U.S. at 404. CFIT's new allegations must be reviewed to see if they differentiate the alleged
18 expiring names registration services market from domain names in general and, thus properly allege
19 a relevant market.

20 VeriSign argues that CFIT has failed to allege a lack of interchangeability between expired
21 domain names and domain names of different statuses (i.e., never before registered or registered).
22 The court agrees. While CFIT alleges that there exists a "competitive marketplace" for obtaining
23 expired domain names comprised of back order service providers competing on the basis of price
24 and service, these allegations do not give rise to an inference of a lack of interchangeability. In
25 particular, CFIT alleges that back order service providers, of which Pool.com is one, provide
26 services assisting customers in the procurement of recently-expired domain names. FAC ¶¶ 48-50.
27 CFIT alleges that at one time SnapNames, a back order service provider, charged \$60 to a customer
28 seeking an expired domain name, whether or not it succeeded in obtaining the name. *Id.* ¶ 49. CFIT

1 also alleges that Pool.com introduced a pay-for-performance model where customer pay only if the
2 domain name is procured. *Id.* ¶ 50.

3 These allegations, however, do not indicate that domain names are not reasonably
4 interchangeable by virtue of their "expired" status or otherwise raise an inference that the alleged
5 expiring domain names registration services market is a separate relevant market. At most, these
6 allegations suggest that some expired domain names may be in greater demand than others such that
7 a registrant might be willing to pay an additional fee in order to increase its chances of procuring
8 that domain name. Registration of a domain name, whether new or expired, are completed through
9 the same process with a registrar. As CFIT alleges, "to register a new or expiring domain name, a
10 registrar sends an 'add' command to VeriSign's registry computer for that domain name." *Id.* ¶ 48. It
11 appears that registrants register expired names with or without the use of a back order service
12 provider. There is no indication that an expired domain name necessarily commands a higher price
13 or that there are any price differentials charged by the registrars for an expired domain name versus
14 a new domain name. Even if "price disparities are relevant for grouping commodities into relevant
15 markets," *see* Feb. 2006 Order at 17 (citing *E.I. du Pont de Nemours & Co.*, 351 U.S. at 404), no
16 such disparity is alleged here. Rather, similar to the *Smith* court's analysis, here, CFIT has not
17 alleged any "inherent difference in character, for purposes of interchangeability and cross-elasticity
18 of demand, between domain names that are 'expired' and held . . . and those that are not."⁴
19 Essentially, the only distinction alleged is that there is an additional service available for the
20 registration of expiring domain names, which customers may choose to use for some expired domain
21 names. Therefore, CFIT has not alleged, for purposes of assessing alleged antitrust injury, that there
22 exists a relevant market for expiring domain names registration services separate from the market for
23 the registration of domain names in general.

24
25
26 ⁴ CFIT does allege that the other TLDs are not substitutes for the .com and .net TLDs
27 and that there is low demand cross-elasticities between the .com domain name and domain names
28 for TLDs such as .net, .biz, and .info. FAC ¶¶ 39-45. However, this does not give rise to an
inference of low demand elasticity as between domain names of particular TLDs as would be
required to indicate that the expiring domain names registration services market constitutes a
separate relevant market.

1 and "the acquisition or perpetuation of this power by illegitimate 'predatory' practices." *Alaska*
2 *Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991). To establish a § 2 violation
3 for attempted monopolization, the plaintiff must show "specific intent to control prices or destroy
4 competition, predatory or anticompetitive conduct directed at accomplishing that purpose, dangerous
5 probability of achieving monopoly power, and causal antitrust injury." *McGlinchy v. Shell Chem.*
6 *Co.*, 845 F.2d 802, 811 (9th Cir.1988). To properly allege a conspiracy to monopolize in violation
7 of § 2, a plaintiff must establish: "(1) the existence of a combination or conspiracy to monopolize;
8 (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal
9 antitrust injury." *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003)
10 (citing *United States v. Yellow Cab Co.*, 332 U.S. 218, 224-225 (1947)). Finally, to establish a
11 conspiracy in restraint of trade under § 1 of the Sherman Act, there must be a showing of specific
12 intent or awareness as to one or more of the alleged co-conspirators. *Syufy Enters. v. Am.*
13 *Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986). Under § 1, CFIT must plead facts
14 establishing injury to competition in the market for the registration of domain names in general. 15
15 U.S.C. § 1. Here, CFIT's allegations of antitrust violations, attempted antitrust violations, and
16 conspiracy to monopolize and in restraint of trade stem from VeriSign and ICANN's agreement to
17 certain revisions to the 2005 .net and 2006 .com Agreements.

18 First, CFIT alleges that the renewal provisions in the Agreements permit VeriSign to serve as
19 the sole registry operator of the .net and .com registries "in perpetuity." Opp. at 8. The renewal
20 provision under both Agreements "virtually guarantee that VeriSign will not have to periodically bid
21 for control over the registries." *Id.* CFIT complains that by agreeing to replace the 2001 .com
22 Agreement with the proposed 2006 .com Agreement ICANN effectively waived its right to impose
23 competitive bidding with respect to operation of the .com registry. FAC ¶ 87. These allegations
24 merely show, however, that the proposed 2006 .com Agreement extends the term of VeriSign's
25 designation as the registry operator for the .com registry under the 2001 .com Agreement. CFIT's
26 contention that the proposed 2006 .com Agreement results in VeriSign having a "perpetual"
27 monopoly of the .com registry is unpersuasive. As in the 2001 .com Agreement, the proposed 2006
28 .com Agreement permits ICANN to terminate the agreement under certain circumstances including,

1 *inter alia*, VeriSign's breach of the maximum allowable prices and price increases. *Id.*, Ex. 2 at 18
2 (Section VI.2). The parties do not dispute that VeriSign was lawfully selected to be the registry
3 operator for the .com registry, and that there can only be one registry operator at a time. Mere
4 extension of VeriSign's lawful appointment as the sole registry operator does not constitute an
5 antitrust violation.

6 Under the 2001 .com Agreement, VeriSign may propose a four year extension which ICANN
7 must consider "before deciding whether to call for competing proposals from potential successor
8 registry operators." *Id.* ¶ 69. ICANN must then consider the proposal and grant the extension unless
9 (1) ICANN determines that VeriSign is in material breach of the agreement, (2) the proposal
10 contains a maximum price that exceeds what is allowed under the existing 2001 .com Agreement, or
11 (3) "certain other conditions apply." *Id.* Under the proposed 2006 .com Agreement, ICANN may
12 solicit competitive bids upon expiration of the agreement "only if a court or arbitrator issued a non-
13 appealable final order finding VeriSign to be in breach of the agreement, and VeriSign failed to cure
14 the breach." *Id.* ¶ 86. Thus, under either the 2001 or 2006 versions, as alleged by CFIT, ICANN
15 may solicit competing bids upon expiration of the agreement. The only difference is that under the
16 2001 provision ICANN makes the decision whether VeriSign is in material breach while under the
17 2006 provision ICANN defers the decision of whether VeriSign is in material breach (and thus
18 whether competitive bids could be solicited) to a court or arbitrator.⁸ The court fails to see how this
19 modified provision results in VeriSign as the registry operator of the .com and .net registries "in
20 perpetuity." While the methodology differs, both provisions contemplate that competitive bids can
21 be solicited in the event VeriSign is deemed to be in material breach of the registry agreement.⁹

23 ⁸ Notably, under the 2001 .com Agreement VeriSign has the right to challenge a non-
24 renewal under section 15 of the agreement, which provides for resolution of disputes in court or
through arbitration. FAC, Ex. 1 ¶¶ 15, 25.

25 ⁹ CFIT's suggestion that ICANN's deferral of the decision of whether a breach by
26 VeriSign is material to the courts or to an arbitrator constitutes a waiver of ICANN's right to solicit
27 competitive bids is unpersuasive. *See* FAC ¶ 87. CFIT's suggestion necessarily assumes that
28 ICANN would not pursue its contractual right to have VeriSign's conduct adjudicated as a material
breach, but CFIT's allegations do not support such an assumption. Moreover, CFIT's contention that
ICANN is in breach of the requirements of ICANN's MOU with the DOC is conclusory as CFIT has
alleged no facts to support that the DOC finds ICANN's proposed 2006 .com Agreement to be a
violation of any MOU obligations. In any event, the proposed 2006 .com Agreement is subject to

1 Second, CFIT contends that 2005 .net and 2006 .com Agreements increase the prices that
 2 VeriSign may charge for registrations by increasing the maximum permissible price and permitting
 3 significant price increases in future years. Specifically, the 2005 .net Agreement removes price
 4 controls after 2007 and the 2006 .com Agreement permits future price increases of up to seven
 5 percent in four of the next six years. "Antitrust injury does not arise . . . until a private party is
 6 adversely affected by an anticompetitive aspect of the defendant's conduct; in the context of pricing
 7 practices, only predatory pricing has the requisite anticompetitive effect." *Atl. Richfield Co.*, 495
 8 U.S. at 339 (internal citations omitted). As VeriSign argues, increases in prices by a lawful
 9 monopolist, without more, are not subject to antitrust scrutiny. *See Alaska Airlines, Inc.*, 948 F.2d at
 10 548-49. As ICANN argues, the setting of maximum prices is not precluded by antitrust laws and has
 11 been found to be pro-competitive in some instances. *See, e.g., Atl. Richfield*, 495 U.S. at 344 n.13.
 12 It also does not appear disputed that the revisions to the 2005 .net and 2006 .com set a maximum
 13 price that VeriSign may charge registrars and that the new price ceilings may result in higher future
 14 prices. However, CFIT provides no argument to support why its allegations of the increases in price
 15 caps or removal of price controls support, as a matter of law, a showing of predatory conduct or
 16 anticompetitive effects causing its alleged injuries in violation of the antitrust laws. Specifically,
 17 CFIT has not alleged facts supporting that the future prices contemplated in the agreements will
 18 serve as significant barriers to entry or are otherwise supra-competitive.¹⁰ Indeed, CFIT alleges that
 19 the 2005 .net Agreement was the result of competitive bidding. FAC ¶ 34.¹¹

20 _____
 21 express review and approval by the DOC.

22 ¹⁰ CFIT's assertion that the prices are supra-competitive is conclusory and does not
 23 represent a factual allegation giving rise to an inference of antitrust injury. Moreover, since these
 24 increases in price levels are "permissible" under the agreement, there can be no factual allegations at
 25 this juncture that the prices have created barriers to entry. CFIT argues that the issue of whether the
 26 price increases or removal of price controls constitute required price increases or permissive price
 increases is a question of fact not before the court on these motions. However, CFIT has not
 articulated sufficient facts to infer that these provisions are anything other than provisions that
 permit VeriSign the ability to raise prices. *See* FAC ¶¶ 88-91. CFIT's assertion that VeriSign *will*
 impose these higher prices are conclusory and unsupported by factual allegations. *Id.*

27 ¹¹ Specifically, CFIT alleges that pricing in the 2005 .net Agreement is wrongful and
 28 reflect "supra-competitive" pricing, yet elsewhere CFIT alleges that the 2005 .net Agreement was a
 product of competitive bidding. *See* Opp. at 14; FAC ¶ 34. *See also* Opp. at 8 ("For example,
 because the 2001 .net Agreement did not have the renewal provisions that VeriSign now seeks for

1 CFIT appears to contend that these price increases are "monopoly overcharges" when viewed
 2 in light of its allegations that ICANN and VeriSign have negotiated VeriSign's allegedly perpetual
 3 monopoly in the operation of the .com registry.¹² Notably, CFIT contends that the negotiation of a
 4 price increase above the maximum price permitted under the 2001 .com Agreement effectively
 5 bypasses ICANN's "obligation" under the 2001 .com Agreement to seek competitive bids before
 6 raising prices. As CFIT's argument goes, ICANN and VeriSign conspired to implement the new
 7 agreement terms so they can unlawfully share in these monopoly overcharges. However, the sharing
 8 of fees between ICANN and VeriSign is not new to the 2006 .com Agreement. Under both the 2001
 9 .com Agreement and the proposed 2006 .com Agreement, the registry operator must pay ICANN a
 10 "Registry-Level Fee" on a quarterly basis as "financial support of ICANN." *Id.*, Ex. 1 at 9 (Section
 11 7); *id.*, Ex. 2 at 20-22 (Section VII.2). In addition, as noted above, the proposed 2006 .com
 12 Agreement does not represent an agreement to confer the monopoly of the .com registry to VeriSign
 13 in perpetuity. CFIT's contention that VeriSign and ICANN colluded to avoid competitive bidding is
 14 likewise unpersuasive. The 2001 .com Agreement does not obligate ICANN to seek competitive
 15 bidding. Rather, ICANN "may" seek competitive bids in the event that, when the time came for
 16 renewal, VeriSign proposes prices higher than the maximum price set in the agreement. *Id.*, Ex. 1 at
 17 22 (Section 25). Moreover, a request for competitive bids is not necessarily a prerequisite to an
 18 agreement between ICANN and VeriSign to increase prices under the 2001 .com Agreement:

19 These prices [for registry services] shall be increased through an amendment to this
 20 Agreement as approved by ICANN and Registry Operator, such approval not to be
 21 unreasonably withheld, to reflect reasonably demonstrated increases in the net costs
 of providing Registry Services . . . to ensure that Registry Operator recovers such
 costs and a reasonable profit thereon.

22 *Id.*, Ex. 1 at 19 (Section 22.A). Based on these terms, the proposal in the 2006 .com Agreement to
 23 increase prices above the current maximum price or to share fees with ICANN, without more, does
 24 not constitute a conspiracy to avoid an obligation to obtain competitive bidding or to impose supra-

25
 26 the 2006 .com Agreement, VeriSign faced competitive bidding upon renewal of the 2001 .net
 27 Agreement, and had to lower its fees.") (citing FAC ¶¶ 69-70).

28 ¹² It remains unclear whether CFIT also contends that the conspiracy extends to the .net
 registry since the 2005 .net Agreement was the product of competitive bidding. CFIT does allege
 that the 2005 .net Agreement removes price controls after 2007.

1 competitive prices. In sum, CFIT has not adequately alleged predatory conduct or specific intent to
2 monopolize to support its section 2 claims.

3 Finally, CFIT asserts that VeriSign (and ICANN in collusion) has leveraged and threatens to
4 leverage its monopolies in the registry operator market (for .com and .net domain names,
5 presumably) to adjacent and downstream markets in restraint of trade. CFIT alleges that the
6 unlawful conduct stems from VeriSign's intention to implement CLS which will eliminate the
7 current competitive marketplace for back order services. *Id.* ¶¶ 108-112. In particular, CFIT
8 contends that VeriSign's launch of such services would eliminate competition because of VeriSign's
9 exclusive access, as registry operator, to the traffic data of Internet users' attempts to visit
10 unregistered domain names. *Id.* ¶ 94. Currently, when a domain name expires, VeriSign releases
11 the name and customers may register the expired domain name through a registrar, with or without
12 the assistance of a back order service provider. *See id.* ¶ 110. With CLS, VeriSign will offer
13 expired domain names for auction. Registrants may bid for the expired domain names through
14 registrars and the domain name goes to the highest bidder. CFIT alleges "[r]egistrants will continue
15 to order domain names through registrars, but registrars must deal directly with VeriSign in order to
16 receive expiring names to offer to prospective clients." *Id.*

17 VeriSign and ICANN both argue that CLS would be pro-competitive because it creates the
18 potential for new competition. Further, VeriSign may only propose such new services to
19 ICANN—ICANN must still approve the services. To the extent CFIT's allegations assumes that
20 CLS will be anticompetitive, it improperly presupposes that ICANN will abdicate its regulatory
21 obligation to review the competitive effects of proposed services. ICANN's Mot. at 15.¹³
22 Defendants' arguments are well taken. Even if the court assumes, as it must, that CLS will eliminate
23 the demand for back order services, the court need not assume as true that such elimination
24 constitutes predatory conduct actionable under antitrust laws. "It is well established that the antitrust
25 laws are only intended to preserve competition for the benefit of consumers." *Am. Ad Mgmt., Inc.*,

26
27 ¹³ In opposition, CFIT argues that whether CLS will be a competitive service is
28 "irrelevant" and "the Complaint's allegations that CLS threatens to harm competition by eliminating
a highly competitive back order services pooling industry . . . and other adjacent markets, must be
accepted as true." *Opp.* at 15.

1 190 F.3d at 1055 (citing *Associated Gen.*, 459 U.S. 519, 538 (1983)). "A plaintiff has the burden to
2 plead and prove that the defendant's actions harmed competition, not that the actions harmed
3 plaintiff in its capacity as a competitor." *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*,
4 783 F.2d 1347, 1350 (9th Cir. 1986). At issue here is the market for the registration of .com and .net
5 domain names by registrants. As ICANN notes, what is to be protected are the "competitive
6 conditions that foster the development of cost-effective and high quality products" to registrants.
7 Here, CFIT has alleged that the back order services market is highly competitive and participants
8 compete on the basis of price and service. As alleged, currently expired domain names are made
9 available and registrars randomly send "add" commands in attempts to secure the domain name for a
10 registrant. A registrant seeking to increase the number of "add" commands made on its behalf could
11 procure the services of a back order service provider to pool together resources of several registrars.
12 As alleged, VeriSign's CLS product proposes to notify participating registrars of expiring domain
13 names and hold a five-day auction for such names during which registrars may bid for the names on
14 behalf of registrants. FAC ¶ 96. The registration goes to the successful bidder and the proceeds are
15 divided ten percent to VeriSign (as registry operator) and ninety percent to the registrar. *Id.*

16 Other than arguing that back order service providers will be displaced by CLS, CFIT does
17 not allege how consumers, namely the registrants, would be harmed by CLS. CFIT makes no
18 allegations that CLS would result in higher prices or lower quality of service to registrants. Indeed,
19 the inference is that an auction, open to all registrars and registrants, would result in the registration
20 of expired names at a price determined by market forces. Moreover, the allegations give rise to an
21 inference that there might be increased competition among registrars under an auction system as
22 compared to the present lottery-like system. CFIT's assertion that there will be "predictable adverse
23 price effects for consumers" is conclusory. In any event, under the 2006 .com Agreement, ICANN
24 is to refer any proposed services that it believes raises significant competition issues to the
25 appropriate government authority. *Id.* ¶ 93. In sum, CFIT has failed to allege that VeriSign's rights
26 under the 2006 .com Agreement to propose new registry services for ICANN's approval violates
27 antitrust laws or constitutes specific intent to violate antitrust laws.

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