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INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COALITION FOR ICANN TRANSPARENCY, INC.,

Plaintiff,

v.

VERISIGN, INC.; AND INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendants.

Case No. 05-4826 (RMW)

DEFENDANT ICANN'S NOTICE OF MOTION AND MOTION TO DISMISS CFIT'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Rules 12(b)(1), 12(b)(6)

[Filed Concurrely with Request for Judicial Notice and [Proposed] Order]

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

The Honorable Ronald M. Whyte

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

RULES

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on June 9, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 6 of the above entitled Court, Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") will and hereby does move this Court, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for dismissal of the Complaint in favor of ICANN and against Plaintiff. The parties met and conferred and reached agreement on this hearing date.

RELIEF SOUGHT

Plaintiff purports to assert claims against ICANN for: (i) Conspiracy to Monopolize Under Section 2 of the Sherman Act; (ii) Conspiracy in Restraint of Trade Under Section 1 of the Sherman Act; and (iii) Conspiracy in Restraint of Trade Under the Cartwright Act. This Motion is made on the grounds that none of these claims states a claim upon which relief may be granted, that plaintiff's claims are not ripe, and that plaintiff lacks standing to assert the claims.

This Motion is based on this Notice of Motion, Motion to Dismiss and the attached Memorandum of Points and Authorities; the concurrently filed Request for Judicial Notice; such further papers as ICANN may file in connection with the Motion; all other matters of which the Court may take judicial notice; such further evidence or argument as may be presented at or in connection with the hearing on the Motion; and all pleadings, files and records in this Action.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Complaint states a claim against ICANN upon which relief can be granted.

2. Whether Plaintiff's claims are ripe for review.

3. Whether Plaintiff has the requisite associational standing to sue ICANN on behalf of its members.

INTRODUCTION

ICANN coordinates various aspects of the Internet's Domain Name System ("DNS"). Among other things, ICANN designates the operator of the various domain name registries – essentially, databases that maintain Internet addresses. (Am. Compl. ¶ 25) There are 17 so-called "generic" domain name registries (called Top Level Domains or TLDs), and approximately 240

more country code TLDs, which are assigned to entities (frequently governments or their delegates) representing countries or other geographic areas. As Plaintiff CFIT concedes (Am. Compl. ¶ 35), each TLD can be operated by only one entity, and thus every such agreement designating an operator of a particular domain name registry is necessarily a sole-source agreement.

ICANN, a non-profit California corporation, is a private-sector organization. Thus, when it selects an operator for a TLD, it enters into an agreement with that entity setting forth various obligations of both parties. ICANN has recently entered into such an agreement with VeriSign, Inc., the current operator of the largest TLD, .COM, to extend VeriSign's right to operate that TLD for another 7 years. CFIT does not like the terms of this Extension and asserts that somehow the Extension violates the antitrust laws. Exactly how this is so is not terribly clear, even from CFIT's second attempt at a valid complaint, and none of the conduct alleged could possibly be a violation of either Section 1 or Section 2 of the Sherman Act or of the Cartwright Act.

VeriSign (or its predecessors) has been the sole operator of .COM since the commercialization of the Internet over a decade ago. VeriSign signed contracts with ICANN in 1999 and again in 2001, and CFIT does not challenge those contracts. Indeed, CFIT describes the results of those contracts as creating competitive conditions. (Am. Compl. ¶¶ 2, 71-79, 83) That will not change as a result of this Extension. And if the 2001 sole source contract does not violate the antitrust laws, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2003), which CFIT concedes it does not (Am. Compl. ¶ 2), an extension of the existing sole source contract cannot possibly be anticompetitive.

Under the 2001 .COM registry agreement, VeriSign is limited to a maximum price it can charge for access to the .COM registry. The Extension agreement maintains that feature, merely raising the price cap by a relatively small amount. If a price ceiling can be said to have any competitive effect in this context, it is procompetitive, because it places an absolute limit on the price for .COM access. *See, e.g., Atl. Richfield v. USA Petroleum Co.*, 495 U.S. 328, 344 n.13 (1990). And again, if the 2001 agreement between ICANN and VeriSign is not anticompetitive,

an extension of that agreement – albeit with a small change in a price structure that is, as a matter of law, pro-competitive – cannot violate the antitrust laws.

Under the 2001 .COM registry agreement, VeriSign has the right to seek permission from ICANN to offer various services related to the operation of the .COM registry; the Extension agreement maintains and clarifies that right. Again, if the 2001 agreement itself does not violate the antitrust laws, an extension of that agreement cannot be illegal. CFIT does not admit this, but there can be no doubt that its real fear is that VeriSign will, at some point in the future, gain permission from ICANN to compete with CFIT members with respect to particular services. But the potential for increased competition at some undetermined point in the future (which is not ripe as a claim in any event) cannot possibly violate the antitrust laws: the antitrust laws protect competition, not competitors, and cannot be used to foreclose potential new competition, as courts addressing exactly this issue in the face of claims by registrars against ICANN already have ruled. *Dotster, Inc. v. Internet Corp. for Assigned Names and Numbers*, 296 F.Supp. 2d 1159, 1166 (C.D. Cal. 2003). *See also Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 509 (9th Cir. 1989); *Columbia River People's Util. Dist. v. Portland Gen. Elec. Co.*, 217 F.3d 1187, 1190 (9th Cir. 2000).

Finally, even if CFIT did state a valid claim under the antitrust laws,[1] none of its claims would be ripe because they allege only theoretical possibilities, which may or may not occur. The Extension agreement itself cannot take effect without the approval of the United States Department of Commerce, which has not occurred. And the possible entry of VeriSign into competition with CFIT members depends on a number of contingent events – beginning with VeriSign formally proposing a new service to ICANN – none of which has occurred.

HISTORY OF THIS LITIGATION

On November 28, 2005, CFIT filed its original complaint against VeriSign and ICANN for antitrust violations, unfair competition, cybersquatting, and intentional interference with prospective economic advantage. On February 28, 2006, this Court granted defendants' judgment

[1] CFIT's Amended Complaint fails to even mention the Clayton Act, the necessary statutory basis for its private party antitrust claim.

on the pleadings under Fed. R. Civ. P. 12(c). Finding that under California law an association cannot pursue an unfair competition claim on behalf of its members, the Court dismissed this claim with prejudice. As to CFIT's other claims, this Court dismissed them without prejudice, finding that CFIT failed to establish that it had associational standing and failed to define a relevant product market. CFIT filed an amended complaint on March 14, 2006, in which it claims that it is a membership corporation (Am. Compl. ¶ 6), whose membership includes "Internet domain name registrars, registrants, and back order service providers, including Pool.com, Inc. ('Pool.com') and R. Lee Chambers Company, LLC." (*Id.* ¶ 7). In its amended complaint, CFIT asserts only federal and state antitrust violations. ICANN now moves for dismissal of these claims pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

FACTUAL BACKGROUND

A. ICANN'S FUNCTIONS

ICANN, through a Memorandum of Understanding ("MOU") with the United States Department of Commerce ("DOC"), administers certain aspects of the Internet's Domain Name System. (Am. Compl. ¶¶ 58-59) Although it is a private, not for profit corporation, and not a governmental entity, ICANN provides these functions pursuant to the MOU. Thus, ICANN distributes Internet Protocol ("IP") addresses through various intermediaries to every computer connected directly to the Internet. (*Id.* ¶¶ 4, 19) An IP address is a unique and long numerical address that identifies a computer and allows it to "communicate" with other computers. (*Id.* ¶ 19) To save users the trouble of remembering these strings of numbers, the "domain name" system has been developed to correlate unique letters and/or words to specific IP addresses. (*Id.* ¶ 24) Persons or entities may acquire Internet "domain names," such as "cnn.COM" or "pbs.ORG," through companies known as "registrars." (*Id.* ¶ 27) ICANN established and operates the accreditation system that has produced a highly competitive registrar marketplace, with several hundred accredited registrars – including (apparently) some members of plaintiff CFIT. (*Id.* ¶ 27) Registrars acquire domain names from the sole registry operator for each TLD. Some of the "generic" TLDs are .COM, .NET, .ORG, .BIZ, .INFO, and .TRAVEL.

ICANN also designates "registry operators," which occurs primarily via contracts between

ICANN and the designated entity.[2] (*Id.* ¶ 62) A registry is like a phone book that lists the domain name addresses for each particular TLD. (*Id.* ¶ 25) Registry operators may also offer a variety of services that, for example, permit consumers to check to see if a particular domain name has already been registered and when the name is set to expire. (*Id.*)

VeriSign is the registry operator for the .COM and .NET TLDs (Am. Compl. ¶ 25), and it or its predecessors has been since they were first created. Both ICANN's Board of Directors and the DOC must approve renewals of the 2001 agreements. (MOU Amend. 3, §§ I(1), II) VeriSign maintains the .COM registry and provides registry services pursuant to a 2001 agreement approved both by ICANN's Board and the DOC ("2001 .COM Agreement"). VeriSign maintains the .NET registry and provides .NET registry services pursuant to an agreement approved by ICANN's Board and the DOC in 2005 ("2005 .NET Agreement"). (Am. Compl. ¶ 38) ICANN's Board approved an extension of the existing .COM agreement on February 28, 2006 ("2006 .COM Extension" or "Extension"), but that extension has not yet been approved by the DOC and therefore is not yet effective. *See* http://www.icann.org/announcements/announcement-28feb06.htm (last visited Apr. 2, 2006); *see also* MOU, Amend. 3, ¶ I(1).

B. THE 2005 .NET AGREEMENT AND 2006 .COM EXTENSION

Because neither CFIT nor any of its named members has ever applied to become the registry operator for either .NET or .COM (or any other registry), CFIT has to struggle to construct an antitrust complaint resting on ICANN's decision to enter into either agreement. Ultimately, CFIT's principal "concerns" relate to the renewal provisions in both the 2005 .NET Agreement and the 2006 .COM Extension, and to the ability of VeriSign to increase the price of these domain names and to propose new services for their registries. (Am. Compl. ¶¶ 88, 94)

[2] Since ICANN is a consensus building organization with no governmental power, its ability to designate registry operators depends entirely on the voluntary cooperation of multiple private and governmental actors. As a practical matter, ICANN is able to designate registry operators today only through a process that involves the United States Department of Commerce and VeriSign. The operators of all other root zone servers (the primary record-keepers for the DNS) have voluntarily accepted that process which is essential to the global interoperability of the Internet.

The facts, of which this Court may take judicial notice, are these. Under both the 2005 .NET Agreement and the 2006 .COM Extension, renewal may take place only if VeriSign is in full compliance with its agreement with ICANN. VeriSign must cure any material breach before any renewal could take place. "[Thus, if] an arbitrator or court has determined that [VeriSign] has been in fundamental and material breach of [its] obligations," the Agreement cannot be renewed. (2006 .COM Extension, Art. IV, § 4.2; 2005 .NET Agreement, Art. IV, § 4.2; Am. Compl. ¶ 86)

Under the 2005 .NET Agreement, the price of .NET domain names is set at $4.25 through December 31, 2006, after which any price increases are capped at no more than 10% a year. (2005 .NET Agreement, Art. VII, § 7.3(a)) Under the proposed 2006 .COM Extension, the maximum price for domain name registrations is $6.00 through December 31, 2006. After that time, annual price increases are allowed in no more than four of the remaining six years of the contract, limited to "the smaller of the preceding year's Maximum Price or the highest price charged during the previous year, multiplied by 1.07." (2006 .COM Extension, Art. VII, § 7.3(d); Am. Compl. ¶ 89)

With respect to new services, both the 2005 and 2006 Agreements create a "Process for Consideration of Proposed Registry Services." (Am. Compl. ¶ 93; 2006 .COM Extension, Art. III, § 3.1(d)(iv); 2005 .NET Agreement Art. III, § 3.1(d)(iv)) Before beginning a new service, VeriSign must first notify ICANN, which is required to review VeriSign's proposed service to determine whether it raises issues of either competition, or for the security and stability of the Internet. (*Id.*) If ICANN finds that any such issues exist, it must refer issues of competition to "the appropriate governmental competition authority or authorities" and issues of security and stability to a "Standing Panel of experts." (*Id.*; *see also* Am. Compl. ¶ 98) In addition, if the proposed service raises issues of security and stability, it is subject to the public notification and comment process set forth in the Extension.

CFIT claims that pursuant to this authority to propose new services, VeriSign "intends" to offer a service called the "Central Listing Service" ("CLS") that will change the way some expiring domain names are sold. (Am. Compl. ¶ 95) Today, expiring domain names are sought

after by registrars, who send literally billions of automated, rapid fire "add" commands to VeriSign's registry database, requesting a particular domain name on behalf of a registrant. (*Id.* ¶ 48) Because a registrar's odds of registering a popular expired domain name increase with the number of "add" commands it sends, the current system functions, in essence, like a lottery. (*See* Order, Feb. 28, 2006, at 3:17-21) As a result, back order service companies came into being in order to pool the resources of several registrars. When one of the registrars receives an order for an expiring domain name, the back order service provider can arrange to have many registrars send multiple "add" commands to increase the likelihood of obtaining the particular domain name. (Am. Compl. ¶ 49) The impact on the registry infrastructure is obvious.

CFIT alleges that VeriSign will replace the current system "as soon as possible" with the CLS, an auction-based system. (*Id.* ¶¶ 95, 110) CFIT alleges that under this new system, VeriSign will hold a five-day auction on expiring domain names. (*Id.* ¶ 96) If no bids are received on a particular name, it can be registered under the current system. (*Id.*) Otherwise, the registrar placing the highest bid will receive and pay for the domain name. (*Id.*) Ten percent of the bid price will be paid to VeriSign; ninety percent will be paid to the registrar who released the domain name. (*Id.*)

CFIT does not allege that ICANN would benefit from the implementation of CLS and ICANN, in fact, would not. According to CFIT, the CLS, if implemented, would "displace the competitive back order services market." (*Id.* ¶ 94) But VeriSign has not yet proposed implementing the CLS to ICANN, and if it ever did, it would be required to go through the entirety of the process established by the Extension for consideration of such services, including (if appropriate) notification to the appropriate competition enforcement agency and review by the Standing Committee of Experts, and in all cases by completing the process of public notification and comment established by the Extension.

C. ICANN'S ROLE

According to CFIT, ICANN "unlawfully shar[es] monopoly profits" by collecting "fees borne by registrars and registrants for domain name registrations." (*Id.* ¶¶ 99, 103) The facts are that both the 2005 .NET Agreement and the 2006.COM Agreement provide for payment of fees

to ICANN, as did the 2001 .COM and .NET Agreements, as do all other registry agreements that ICANN has entered with TLD operators. ICANN is authorized by its bylaws to collect fees to cover its cost of operation (*see* ICANN By-laws, Art. XVI, § 5), and doing so is fully consistent with its MOU with the DOC. (MOU, ¶ VI) As a private sector entity with no public or governmental funding, ICANN depends on fees collected from registrars and registries for its operating budget. As discussed below, the notion that the collection of operating fees can itself support a claim of conspiring to violate the antitrust laws is nonsensical.

ARGUMENT

I. STANDARD OF REVIEW

Under Fed. R. Civ. P. 12(b)(6), a complaint must be dismissed if it is clear that a plaintiff can prove no facts that would entitle him to relief. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980). While the allegations in the complaint generally must be accepted as true, *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998), a court is not required to accept as true "allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); 5C Chas. A. Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ. 3d* § 1363 (3d ed. 2004). Thus, in ruling on a motion to dismiss, the court may consider "material which is properly submitted as part of the complaint," *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (internal quotation marks omitted), documents on which the complaint "necessarily relies" and whose "authenticity is not contested," *id.* (internal quotation marks omitted), and court records from related proceedings. *Kourtis v. Cameron*, 419 F.3d 989, 994 n.2 (9th Cir. 2005).

II. CFIT HAS FAILED TO STATE A CLAIM UNDER THE ANTITRUST LAWS.

CFIT's complaint must be dismissed because it fails to identify any conduct that is actionable under federal or state antitrust laws. CFIT does not like the 2005 .NET agreement or the as-yet unratified (by the DOC) 2006 .COM Extension, both of which are renewals (of the 2001.NET and 2001.COM Agreements respectively). But as much as it might want to, CFIT cannot challenge these agreements directly, because CFIT is neither a party to nor a third-party beneficiary of the agreements. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d

1206, 1211-12 (9th Cir. 2000), 2001.COM Agreement, Art. II, § 32; 2001.NET Agreement, Art. II, § 5:14, 2005.NET Agreement Art. VIII, § 8.7; 2006.COM Agreement, Art. VIII, § 8.5.

Instead, CFIT attempts to convert these Agreements into antitrust violations. CFIT's main argument appears to be that both Agreements contemplate that the current registry operator will continue to operate those registries indefinitely unless certain circumstances arise. But since ICANN can designate registry operators – indeed, that is one of ICANN's main responsibilities pursuant to its MOU (*see, e.g.*, MOU, Amend. 1, ¶ 2) – and since ICANN has done so in a manner that CFIT concedes is competitive (Am. Compl ¶ 71-79, 83), the extension of its earlier agreements cannot amount to a violation of the antitrust laws. In essence, CFIT's complaint alleges "no more" than lawful exclusive dealing contracts, and thus the complaint may be dismissed for failure to state a claim. *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993).

A. VERISIGN'S OPERATION OF THE .NET AND .COM TLDS IS NOT CONDUCT THAT HARMS COMPETITION.

To state a claim for restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. 2004), CFIT must allege facts that establish, *inter alia*, "an agreement . . . which actually causes injury to competition." *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1296 (9th Cir. 1983). Indeed, an "allegation that 'competition has been injured rather than merely competitors' is essential to any § 1 Sherman Antitrust Act Claim." *Columbia River*, 217 F.3d at 1190 (internal citation omitted). The potential loss of business by individual competitors does not satisfy this requirement. *Id.* CFIT's claims under Section 1 of the Sherman Act thus fail because it has not identified any restraint on trade that injures competition. [3]

1. Neither the Exclusive Nature of the Contracts nor the Conditional Renewal Provisions Implicate the Antitrust Laws.

The theory CFIT puts forward in its Complaint is that, under the renewal provisions in the 2005 .NET Agreement and 2006 .COM Extension, VeriSign will continue in perpetuity as the

[3] The same analysis holds true for the Cartwright Act, "because the Cartwright Act . . . , was modeled after the Sherman Act." *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

sole operator of the .NET and .COM registries, thereby eliminating the potential for future competitive bidding for these registries. (Am. Compl. ¶¶ 1, 3, 38, 82, 83, 84, 87) CFIT alleges that under the 2001 .COM and .NET Agreements, a threat of competitive bidding for future agreements constrains VeriSign to offer its services now on a competitive basis (*id.* ¶ 37), and if this threat is eliminated, the price of .COM and .NET domain name registrations will increase "significantly." (*Id.* ¶ 88)

This is simply wrong. Stripped of its rhetoric, CFIT's claim is nothing more than an objection to the designation of VeriSign as operator of the .COM and .NET registries. Setting to one side for now that none of CFIT's members is or claims to seek to be a registry operator, that CFIT has not pleaded any injury to the "market" for registry operations (assuming such a market exists), and the significant ripeness problems with untethered speculation about future pricing and registry operations decisions, *see infra* at III.A., this is not a claim that in any way implicates the antitrust laws.

There is no dispute that ICANN has the ability pursuant to the MOU to designate registry operators, and that only ICANN possesses this ability. (*Id.* ¶ 62) CFIT concedes that there can be only one operator for each registry at any point in time. (*Id.* ¶ 35, 68) ICANN has designated VeriSign to operate the .COM and .NET registries. That designation cannot be an antitrust violation because it is a "matter of indifference" to the antitrust laws which particular competitor supplies a commodity where, as here, there can be only one supplier at a time. *See, e.g.*, *Fischer v. NWA, Inc.*, 883 F.2d 594, 600 (8th Cir. 1989) (rejecting commuter airline's antitrust claims based on major carrier's exclusive regional contract with another commuter airline as "only one was required"); *Brunswick Corp. v. Reigel Textile Corp.*, 752 F.2d 261, 264 (7th Cir. 1984) (claim of rival for patent applicant obtained by defendant denied as claim not addressed by antitrust laws); *Columbia River*, 217 F.3d at 1190 ("[Plaintiff] seeks to use the antitrust provisions to replace PGE in the monopoly market that sells electric power to Boise Cascade. This it cannot do.").

In this way, ICANN's selection of VeriSign as the .NET and .COM TLD operator is no different from a patent holder's grant of an exclusive license. It is firmly established that a patent

holder's "right to select its licensees [and] the decision to grant exclusive or non-exclusive licenses . . . are not of themselves acts in restraint of trade." *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 949 (Fed. Cir. 1993), *abrogated on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). In the *Genentech* case, plaintiff Genentech alleged that patent holder University of California conspired with Lilly to exclude Genentech from the market for the patented human growth hormone. The Circuit Court rejected that claim, concluding that "Genentech's pleading does not allege more substance than the University's grant of an exclusive license to Lilly." *Genentech*, 998 F.2d at 949. So, too, here CFIT's pleading alleges no more substance than ICANN's entering into an exclusive agreement with VeriSign. But contracting with a company to provide registry services cannot possibly amount to an antitrust claim.

Nor does CFIT's inflammatory references to "a permanent monopoly" on the part of VeriSign (Am. Compl. ¶ 1) and to VeriSign as the "permanent operator" (*id.* at ¶ 3) change this conclusion. To begin with, those allegations are false, as the documents which CFIT itself references and relies upon demonstrate. The 2005 and 2006 Agreements – by their explicit terms – impose various conditions on the parties' ability to renew. In the 2006 .COM Extension, for example, Section 4.2 requires that VeriSign have complied with the Agreement's terms, or have cured any material breach of those terms, in order for renewal to occur. Thus, VeriSign must comply with, *inter alia*, Section 7.3's limits on VeriSign's ability to raise prices or tie any offered service to another, precisely the conduct that CFIT claims the agreements fail to address. (*See* 2006 .COM Extension, Art. IV, § 4.2)

Indeed, when the renewal provisions of the 2006 .COM Extension, which CFIT alleges are anticompetitive, are viewed side-by-side with the renewal provisions under the 2001 .COM Agreement, which CFIT concedes were competitive (Am. Compl. ¶¶ 38, 71-79, 83), it is clear that whatever the changes in form, the new provisions create no change in substance (and certainly none that would support an antitrust claim). While the terms are not identical, in both agreements, material breach precludes renewal. (*Compare* 2001 .COM Agreement, Art. II, § 25(B) *with* 2006 .COM Extension, Art. IV, § 4.2 *and* 2005 .NET Agreement, Art. IV, § 4.2; Am. Compl. ¶ 86) The 2006 .COM Extension, like the 2005 .NET Agreement, defers to an arbitrator

or judge the determination of compliance with essential terms. While the 2001 Agreements left this determination to ICANN, surely the fact that an independent third party — rather than ICANN itself — makes this judgment does not render the Agreements anticompetitive.

Under the old and new, what constitutes breach encompasses essentially the same conduct. For example, under the 2001 .COM Agreement, breach is defined to include a failure to provide "substantial service to the Internet community;" a lack of a "qualifi[cation] to operate the Registry TLD during the renewal term;" and a proposal for an initial and renewal registration price "[that] exceeds the price permitted under Section 22 of [the] Registry Agreement." (*See* 2001 .COM Agreement Art. II, § 25(B). Likewise, the 2006 .COM Extension speaks of breach in terms of particular sections of the Agreement (Sections 3.1(a), (b), (c), (d) or (e), 5.2, or 7.3). Those sections impose the same requirements on VeriSign that fall within the 2001 Agreement. They require that VeriSign preserve Internet security and stability; comply with and implement all Consensus Policies; handle all registry data as specified in the agreement; observe all registry restrictions and specifications, and set the price for Registry Services at an amount "not to exceed the Maximum Amount." (*See* 2006 .COM Extension, Art. III, § 3.1(a), (b), (c), (d), (e); Art. V, § 5.2; Art. VII, § 7.3; *see also* 2001 .COM Agreement, Art. II, §§ 3, 7(c), 9)

Thus, in all ways relevant and material, the 2001 .COM Agreement and 2006 .COM Extension are effectively the same. There has been no change in competitive conditions, and there is no need for competition to be "restore[d]." (Am. Compl. ¶ 2)

2. The Memorandum of Understanding Cannot Provide a Basis for Antitrust Liability.

There is another, entirely separate reason why the Complaint fails to state a claim. CFIT attempts to create antitrust liability associated with alleged breaches by ICANN of its MOU with the DOC, but the MOU does not establish prescriptive rules for competitive conduct, nor does it establish standards that are enforceable by CFIT or anyone else. Rather, the MOU is a policy document whose stated "Purpose" is simply to set forth the "Principles" by which the DOC and ICANN "will jointly design, develop, and test the mechanisms, methods, and procedures to carry out . . . . DNS management functions . . . without disrupting the functional operation of the

Internet." (MOU, ¶ II.B). It is a statement of mutual intentions – nothing more.

According to CFIT, the MOU "mandate[s] that ICANN support competition" and therefore the MOU "requires" ICANN "to seek competitive bids" for future .NET and .COM Agreements. (Am. Compl. ¶ 70) But the MOU contains no such mandate. While, as CFIT acknowledges, the MOU "promotes the management of the DNS in a manner that will permit market mechanisms and support competition and consumer choice," (*id.* ¶ 60(C)(2)), the MOU does not prescribe rules for ICANN or require that specific actions be taken to accomplish these goals. Indeed, the MOU, by its terms, was designed to leave to ICANN the day-to-day operational decisions related to the management of the DNS, while allowing the DOC (which asserts a historical claim to oversight of the DNS) to determine, over time, whether ICANN's operation of these functions is consistent with the goals set forth in the MOU. The MOU is periodically renewable; by its terms it expires on September 30, 2006. The DOC's ability to decide what to do upon the expiration of the MOU is the only enforcement mechanism contemplated in the MOU.

Even if there were some mandate in the MOU relating to renewal provisions, it would not create a right enforceable by CFIT. The MOU is an agreement between ICANN and the DOC, and CFIT is neither a party to the contract nor a third-party beneficiary. As such, CFIT lacks standing to raise these claims. *See Klamath Water Users Protective Ass'n*, 204 F.3d at 1211-12 (non-signatories to a contract with the federal government are "incidental beneficiaries," not third-party beneficiaries, and thus cannot file suit under the contract); *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284, 288-89 (9th Cir. 1987) (same). The only party capable of taking any action with respect to the MOU is the DOC.

B. THE PRICE CAP IN THE 2005 .NET AGREEMENT AND 2006 .COM EXTENSION CANNOT VIOLATE THE ANTITRUST LAWS.

CFIT claims that the Extension as well as the .NET agreement allow VeriSign too much price flexibility, but nothing in the antitrust laws requires ICANN to put any price constraints on registry operators. Thus, the fact that ICANN has chosen to limit the prices VeriSign can charge is, if anything, procompetitive. *See, e.g.*, *Atl. Richfield*, 495 U.S. at 344 n.13 (noting vertical

maximum price restraints can have pro-competitive effects); *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (reversing *per se* rule of illegality maximum price fixing and noting, with approval, Judge Posner's observation that "a supplier might . . . fix a maximum resale price in order to prevent his dealers from exploiting a monopoly position."). Indeed, again assuming *arguendo* that CFIT is correct in asserting that .COM and .NET are monopolies in a relevant product market (an assertion ICANN contests), where there is a single supplier, the "use of a maximum resale price agreement [] protect[s] consumers from the exercise of a retailer's monopoly power." *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 753 (1st Cir. 1994) (Breyer, J.) (maximum price fixing has pro-competitive uses: namely, "use of a *maximum* resale price agreement that protects consumers from the exercise of a retailer's monopoly power."). The price limits in the 2005 and 2006 Agreements, therefore, cannot support CFIT's claims.

C. VERISIGN'S ABILITY TO PROPOSE NEW SERVICES CANNOT VIOLATE THE ANTITRUST LAWS.

Perhaps the most frivolous of CFIT's claims is that the Extension and the 2005 .NET Agreement give VeriSign the authority to offer new services that would compete with those offered by some of CFIT's members. Even if this were true, it would not violate the antitrust laws because creating the potential for new competition obviously is not anticompetitive. *Dotster*, 296 F.Supp. 2d at 1166. In fact, nothing in these agreements gives VeriSign the right to do anything more than to seek ICANN's approval for new registry services.

CFIT alleges that, at some future date, VeriSign, pursuant to its right to propose new services, will implement a new system for the registration of expiring domain names. (Am. Compl. ¶ 95) Currently, when domain name registrations expire, the names can be purchased by registrars who send rapid-fire "add" commands to registry databases to attempt to claim an expiring domain name. Sensing an opportunity, companies now known as back order service providers (including CFIT member Pool.com) began "pooling resources" with multiple registrars to maximize the number of "add" commands that they could send to a registry database. According to CFIT, the services they provide have over time become less expensive. (*Id.* ¶¶ 49, 50; Order, Feb. 28, 2006, at 3) CFIT expresses concern that, under the new system that CFIT

worries VeriSign may propose at some point in the future, expiring names will no longer be acquired by chance, through this rapid-fire "add" scenario, but rather through a market-based auction system. (*Id.* ¶ 96) Merely to state CFIT's allegation is to demonstrate that it cannot possibly involve competition-reducing effects.

CFIT first alleges that this change in business model would result in "predictable adverse price effects for consumers." (*Id.* ¶ 111) But CFIT has alleged no facts that could support this claim. Since no such system has yet been proposed, there are no details about the structure and market mechanisms of such a program, and certainly none that would suggest any new service offered by VeriSign would leave consumers worse off.

Second, CFIT complains that, by adopting a provision that gives VeriSign the right to propose registry services, ICANN "swears off any attempt to review the competitive effect of any proposed registry service." (*Id.* ¶ 98) But as noted, VeriSign has the "right" only to propose, not to unilaterally implement, new registry services. Under the Extension and the 2005 .NET Agreement, as under the agreements that preceded them and all other registry agreements, VeriSign is required to provide written notice in advance to ICANN if it "may make a change in a Registry Service." (2006 .COM Extension, Art. III, § 3.1(d)(iv); 2005 .NET Agreement, Art. III, § 3.1(d)(iv)) Under the earlier agreements, ICANN itself was to decide whether the proposed actions were anticompetitive. The most recent agreements specify that, "[i]f ICANN determines . . . that the Registry Service might raise significant competition issues," then "ICANN *shall* refer the issue to the appropriate governmental competition authority or authorities . . . ." (Am. Compl. ¶ 93; 2006 .COM Extension, Art. III, §3.1(d)(iv)(E)) It is inconceivable that an agreement requiring ICANN to determine if "significant competition issues" are raised, and if so to refer them to antitrust enforcement agencies, can fairly be characterized as ICANN "swearing off" review, much less provide the basis for antitrust liability.

What CFIT is really concerned about is that VeriSign will propose a new registry service dealing with expiring domain names, that it will pass the competition and Internet stability and security screens set forth in the Extension and the 2005 .NET Agreement, and, eventually, be approved by ICANN. If that point is reached, VeriSign could offer the service. CFIT obviously

fears that VeriSign's service would be more attractive to consumers than what CFIT's members are able to offer, which explains CFIT's concerns. Thus, CFIT is essentially asking this Court to protect one competitor from the potential of new competition — a request that is decidedly inconsistent with both the letter and the spirit of the antitrust laws.

Indeed, the antitrust laws seek to avoid injury to the "characteristic or function of a competitive market," not injury to particular competitors. *Les Shockley Racing, Inc.*, 884 F.2d at 509; *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the [Sherman] Act protects."); *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987) ("Indispensable to any section 1 claim is an allegation that *competition* has been injured rather than merely competitors."); *Great Escape, Inc. v. Union City Body Co., Inc.*, 791 F.2d 532, 540 (7th Cir. 1986) ("Competition means that some may be forced out of business. The antitrust laws are not designed to guarantee every competitor tenure in the marketplace."). That is because antitrust law is not based on "solicitude for private concerns but out of concern for the public interest," and so it protects the markets themselves, not individual companies making money in these markets. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). *See Cascade Cabinet Co. v. W. Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983) ("Although Cascade complains of its business losses, economic injury to a competitor does not equal injury to competition."); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978) ("To amount to an unreasonable restraint of trade the anticompetitive conduct must have an effect greater than its effect upon the plaintiff's business.").

Of course, what markets need – competitive conditions that foster the development of cost-effective and high quality products – is not necessarily the same as what individual businesses prefer. Thus "[a] plaintiff has the burden to plead and prove that the defendant's actions harmed competition, not that the actions harmed plaintiff in its capacity as a competitor." *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 783 F.2d 1347, 1350 (9th Cir. 1986). All CFIT has alleged here is that at some undetermined point in the future, VeriSign may win the ability to compete with existing registrars and back order suppliers, and that VeriSign's product may be more attractive to consumers than plaintiff's existing product. This does not state a claim

under the antitrust laws.

D. CFIT HAS NOT AND CANNOT ALLEGE THAT ICANN ACTED WITH SPECIFIC INTENT TO MONOPOLIZE.

CFIT has not and cannot allege facts establishing that ICANN acted with the specific intent to monopolize, as it is required to do to state a Sherman Act Section 2 conspiracy to monopolize claim. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003); *Standfacts Credit Servs. v. Experian Info. Solutions, Inc.*, 405 F. Supp. 2d 1141, 1152-53 (C.D. Cal. 2005) (must plead specific intent to monopolize the market). A showing of specific intent to monopolize requires proof that "more than one of the alleged co-conspirators had at least some awareness that the underlying conduct was anticompetitive or monopolistic." *See Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 1000-01 (9th Cir. 1986). This proof can be presented directly, or it can be inferred from the defendant's conduct. *See Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1174 (9th Cir. 1988). If a plaintiff relies on conduct to supply an inference of intent, "[t]he conduct must [] amount to an unreasonable restraint of trade under Sherman Act, section 1 standards." *Id*.

Here, CFIT has alleged no facts from which specific intent can be inferred. All CFIT has alleged is that ICANN is doing its job, and this cannot support an inference of intent to monopolize. *Official Airline Guides, Inc. v. Federal Trade Comm'n*, 630 F.2d 920, 925 (2d Cir. 1980). ICANN does not participate in the "markets" identified in CFIT's complaint, even assuming they are accurate descriptions of relevant markets for antitrust purposes. ICANN is neither a registrar nor a registry operator, and indeed it cannot be either pursuant to its bylaws. (Bylaws Art. II, § 2)

So all that CFIT has alleged is that ICANN will get a fee from VeriSign in return for designating VeriSign as the registry operator. CFIT tries to use this fact to argue that ICANN is properly included in the claim for conspiracy to monopolize because it is acting out of a desire to obtain from VeriSign a share of "monopoly profits." (Am. Compl. ¶ 99, 103) But since ICANN previously received a fee from VeriSign under the 2001 agreements that CFIT has described as "competitive," the mere fact of a fee obviously cannot support the necessary inference of intent.

As best we can tell, CFIT is arguing that, because ICANN's fee is higher under the Extension and 2005 .NET Agreement than under the 2001 Agreements, this fact alone is sufficient to justify an inference that ICANN intended to enter into a conspiracy to monopolize.

This flimsy argument falls of its own weight. The fees that ICANN negotiated from VeriSign with respect to the .NET agreement and the Extension are not identical; are both of them "evidence" of the necessary intent to monopolize, or just the Extension? If both, does that mean that any increase in fees that ICANN negotiates with any registry operator is "evidence" of the specific intent to monopolize, or just increased fees negotiated with VeriSign? In either case, that would mean that some or all of ICANN's existing fee structure is locked in perpetuity, regardless of changed conditions, or else ICANN would be at risk of similar antitrust attacks whenever it negotiated a higher fee. Or maybe CFIT's argument is that a higher fee is only evidence of a specific intent to monopolize when it is accompanied by an agreement by ICANN to change or eliminate any fee cap that now exists in its registry agreements? That is equally nonsensical, since it would mean that ICANN was barred by the antitrust laws from entering into contracts that allowed its designees (or licensees, to use the patent analogy) to charge a market price for the services they offer.

ICANN is in the business of designating registry operators, among other things. When it does so, it charges a fee, which is negotiated with the designated operator. That fee reflects many things, including most importantly ICANN's predicted costs of operations and need for resources. Such a fee, which is an ordinary and natural part of the ICANN designation process, provides absolutely no basis for an inference that ICANN, which does not operate in the registry marketplace and thus could never monopolize that market, however defined, intended to participate in a conspiracy to monopolize what is and must be in any event a "monopoly" or sole source designation for any particular registry.

Further, CFIT has not identified any conduct by anyone, and certainly not by ICANN, that could even remotely be considered as monopolistic. Accepting, solely for purposes of this motion, the relevant market allegations put forth by CFIT – that .COM is a monopoly (Am. Compl. ¶ 68) – it is settled law that it is not a violation of the antitrust laws for the holder of a

legitimate monopoly to merely charge a monopoly price. *Verizon Commc'ns Inc.*, 540 U.S. at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system"). Assuming *arguendo* that the maximum prices established in the Extension and the 2005 .NET Agreement are in fact monopoly prices, the fact that ICANN has agreed to a particular price cap, or even if it had agreed to no price cap at all, cannot violate the antitrust laws.

Again, the patent analogy is useful here. ICANN effectively stands in the same shoes as a patent owner, which licenses its patented technology in return for a royalty payment. A patent holder can either choose to commercialize its discovery itself, and gain revenues directly from the sale of patented materials or products, or it can license to one or more other entities the right to commercialize, gaining in return a royalty stream or a fixed payment, or sometimes both, from the licensee. The patent holder has no antitrust duty to license, *Hartford-Empire Co. v. United States*, 323 U.S. 386, 432-33, *clarified*, 324 U.S. 570 (1945) (patent owner "has no obligation either to use it or to grant its use to others"); *In re Independent Serv. Org. Antitrust Lit.*, 203 F.3d 1322 (Fed. Cir. 2000) (in absence of fraud on the PTO, sham litigation, or tying, unilateral refusal license is beyond the reach of the antitrust laws), and if it does license, it has no antitrust duty to license more than one licensee. *Genentech*, 998 F.2d at 949; *See also, United States v. Westinghouse Electric Corp.*, 648 F.2d 642, 647 (9th Cir. 1981) (affirming directed verdict for defendants on antitrust charges: "The right to license that patent, exclusively or otherwise, or to refuse license at all, is 'the untrammeled right' of the patentee.") It can grant exclusive or non-exclusive licenses, and it can charge for those licenses whatever the market will bear, *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964) ("A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly."); *W.L. Gore & Assocs. v. Carlisle Corp.*, 529 F.2d 614, 623 (3d Cir. 1976) (same), without fear of antitrust liability.

CFIT concedes that there can only be one operator for each TLD registry, so here the "license" is necessarily exclusive. And ICANN is free to charge any fee it chooses (or can negotiate) with its "licensee," the registry operator. Most licensees, or in this analogy the registry operator, would then be free to charge a market price for their products; here the Extension

actually limits the price that VeriSign can charge, which if anything is procompetitive. In any event, it cannot provide a basis for attack under the antitrust laws.

Finally, the fact that ICANN and VeriSign negotiated the 2006 .COM Extension in connection with a desire to settle litigation strongly contradicts any inference of specific intent to monopolize. Parties have "[t]he right of access to the courts," *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)), and the fact a suit has been filed cannot be used as the basis of an antitrust violation unless a party demonstrates that the suit was a mere "sham." *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1057 (9th Cir. 2005). CFIT has not alleged, much less provided any evidentiary support, that ICANN has been involved in any such "sham" litigation. And CFIT has provided no reason why an inference of intent to monopolize could possibly be drawn from ICANN and VeriSign's natural desire to settle litigation. "Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the [Sherman] Act." *Standard Oil Co. v. United States*, 283 U.S. 163, 171 (1931). To the contrary, "the public has a strong interest in settlement" of antitrust litigation. *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370, 386 (2d Cir. 2005) (internal quotation omitted).

For all of these reasons, CFIT has failed to identify any conduct from which specific intent to monopolize by ICANN can be inferred and its claim of conspiracy to monopolize fails.

III. CFIT HAS NOT AND CANNOT PLEAD FACTS NECESSARY FOR THIS COURT TO ASSERT JURISDICTION OVER THIS CASE.

Even if CFIT had been able to state a claim under the antitrust laws, dismissal would still be required under Fed. R. Civ. P. 12(b)(1), because CFIT cannot (and has not) allege facts that support this Court's exercise of jurisdiction.

A. CFIT'S ANTITRUST CLAIMS ARE NOT REVIEWABLE AT THIS TIME.

Adjudication of CFIT's challenges to the 2006 .COM Extension would be improper for two independent reasons. First, by the terms of the MOU between ICANN and the DOC, the

Extension cannot go into effect without DOC approval, and thus there is no operable agreement to review until and if that happens. "Until an agency has completed its work by arriving at a definitive decision, judicial review is premature." *Suburban Trails, Inc. v. N.J. Transit Corp.*, 800 F.2d 361, 365 (3d Cir. 1986); *accord MacArthur v. San Juan County*, --- F. Supp. 2d -- , 2005 WL 3764933, at *49-50 (D. Utah June 13, 2005) (because there was "no final determination" on plaintiffs' hospital privileges his antitrust claim based on denial of privileges was not ripe for review).

Second, even if DOC had approved the Extension, CFIT's claims would still not be ripe. To present a case that is justiciable and fit for judicial review, plaintiff must allege a threat that is "real and immediate," not "conjectural or hypothetical." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). "[A] case is not ripe where the existence of the dispute itself hangs on future contingencies that may or may not occur." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996). Even where a plaintiff seeks injunctive relief against future harm, the harm alleged must be immediately threatened, 15 U.S.C. § 26 (Supp. 2004), and require plaintiff to "adjust its conduct immediately." *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). CFIT's claims are not ripe for review because CFIT's claims rest solely and completely on mere predictions of future events that may or may not occur.

The contract provisions of which CFIT complains — the price and new services provisions — do not themselves require any change in VeriSign's conduct. Instead, those contract provisions merely create the possibility that VeriSign in the future may propose changes in prices and services. "Courts have held that challenges to an option are not ripe for resolution before the option is exercised." *Destec Energy, Inc. v. S. Cal. Gas Co.*, 5 F. Supp. 2d 433, 461 (S.D. Tex. 1997) (rejecting antitrust claim as unripe) (collecting cases). Until VeriSign seeks to and receives the necessary permission to change its operations, there is nothing but the mere possibility of future action to review. Grants of authority do not themselves "command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726,

733-36 (1998) (noting that where challenged plan made alleged injury only possible but did not in fact authorize conduct leading to such injury, plaintiffs' claims were unripe).

In this way, CFIT's claims are exactly like the antitrust claims found to be unripe in *Volvo N. Am. Corp. v. Men's Int. Prof. Tennis Council*, 857 F.2d 55 (2d Cir. 1988). In *Volvo*, plaintiff producers of professional sporting events challenged three rules for tennis events proposed by the Men's International Professional Tennis Council. The Court denied all but one of plaintiffs' claims, finding that, for the claims dismissed as unripe, plaintiff presented insufficient evidence that the proposed rules actually "burdened" their present-day business decisions. *Id*. at 64-65. These proposed rules, if enacted, granted the Tennis Council authority, at some point in the future, to withhold its approval from certain events, and to prevent wildcard players from being invited to certain events, for example. The rule found ripe for review, by contrast would prohibit private parties from promoting special events during specified times. Just the prospect of its enactment, the Court found, "inhibited and deterred parties from entering into contracts" to produce events that it might be unable to promote later, and therefore imposed "considerable hardship." *Id.* at 64. In this case, CFIT presents no evidence that the authority granted by the 2005 .NET Agreement and 2006 .COM Extension to raise prices and introduce new services have any present day impact, and could not, since they do not.

B. CFIT HAS FAILED TO ESTABLISH ASSOCIATIONAL STANDING.

CFIT continues to lack associational standing. CFIT's original complaint in this action was dismissed, with leave to amend, because the Court found CFIT had no standing to bring its claims. *See* Order, Feb. 28, 2006, at 14, 20. Although CFIT amended its original complaint to name two "CFIT Supporters," Pool.com and R. Lee Chambers Company LLC (Am. Compl. ¶ 7), it still fails to satisfy constitutional standing requirements.

In order for CFIT to be able to maintain this suit, it must demonstrate, *inter alia*, that "'its members would otherwise have standing to sue in their own right'" – that is, that its members suffered the requisite injury in fact. *UAW v. Brock*, 477 U.S. 274, 282 (1986) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Significantly, "standing cannot be inferred argumentatively from averments in the pleading, but rather must affirmatively appear in

the record." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal alterations, quotation marks, and citations omitted) (*overruled on other grounds, City of Littleton v. Z.J. Gifts D-4 L.L.C.*, 541 U.S. 774, 781 (2004)); *accord Warth v. Seldin*, 422 U.S. 490, 517-18 (1975) (plaintiff must "clearly [] allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute").

CFIT has presented almost no facts in its amended complaint regarding the businesses of one of its two identified "Supporters" – Pool.com (Am. Compl. ¶¶ 7, 49, 50) – and no information about the business of its second "Supporter" – R. Lee Chambers Co. It is impossible to know, therefore, how either of these "Supporters" might be harmed by the conduct they challenge.

But even if CFIT provided more information about these "Supporters," CFIT would still lack standing. As demonstrated above, *see supra* at II.A., none of the conduct that CFIT alleges is actionable under antitrust law because CFIT has failed to allege an anticompetitive effect, as opposed to harm to particular competitors. It follows *a fortiori* that no one – and certainly neither of CFIT's members – can have suffered or been threatened with any injuries cognizable under antitrust law — that is, a threatened loss or damage "'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977)). "Plaintiffs sometimes forget that the antitrust injury analysis must begin with the identification of the defendant's specific unlawful conduct. . . . Without a violation of the antitrust laws, there can be no antitrust injury." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055-56 (9th Cir. 1999); *accord Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 539 & n.40 (1983).

CFIT therefore fails to meet the first prong of the *Hunt* requirements for associational standing because no CFIT member could possibly have standing to sue in its own right for non-existent antitrust violations and non-existent antitrust injuries. *See Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1381 (7th Cir. 1987) (noting that association seeking standing under *Hunt* for alleged antitrust injuries must also show members suffered actual "antitrust injury").

Moreover, to establish standing, a plaintiff must show that he will in fact be harmed by the defendant, not that he imagines he might be harmed at some point in the future. *American-Arab Anti-Discrimination Comm'n v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1992); *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 50-52 (D.D.C. 1998). Here, VeriSign has not yet sought or received the approval necessary to offer expired domain name services of which CFIT complains, and since the Extension is not yet effective, VeriSign could not have (and has not) given the required six month advance notice of any change in price – and yet these are the alleged harms on which CFIT attempts to establish standing. Such events, which are far from coming to pass, are plainly an insufficient basis for standing.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' First Amended Complaint must be dismissed with prejudice against defendant ICANN pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), for lack of standing and for a failure to state a claim.

Dated: April __, 2006

Respectfully submitted,

Jones Day

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