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11   UNITED STATES DISTRICT COURT

12   NORTHERN DISTRICT OF CALIFORNIA

13   SAN JOSE DIVISION

14

15   COALITION FOR ICANN   )   Case No. 5:05-CV-04826 (RMW) PVT
     TRANSPARENCY INC., a Delaware   )
16   corporation,   )   DECLARATION OF ANGEL L. TANG IN
)   SUPPORT OF DEFENDANT VERISIGN,
17   Plaintiff,   )   INC.'S OPPOSITION TO PLAINTIFF'S
)   MOTION FOR LEAVE TO FILE A
18   v.   )   SECOND AMENDED COMPLAINT
)
19   VERISIGN, INC., a Delaware corporation;)
     INTERNET CORPORATION FOR   )
20   ASSIGNED NAMES AND NUMBERS, a   )   Date: December 15, 2006
     California corporation,   )   Time: 9:00 a.m.
21   )   Ctrm: 6
                      Defendants.   )   Judge: Ronald M. Whyte
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- 1 -

I, Angel L. Tang, declare:

1.   I am an attorney duly admitted to practice law in the State of California and a member of the bar of this Court. I am an associate in the law firm of Arnold & Porter LLP, counsel of record for defendant VeriSign, Inc. ("VeriSign") in this action. I make this declaration of my own personal knowledge of the facts set forth herein and am competent to testify to them if called upon to do so.
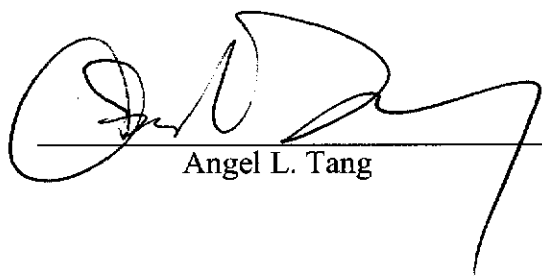
2.   I make this declaration in support of VeriSign's Opposition to Plaintiff's Motion for Leave to File A Second Amended Complaint.

3.   Attached hereto as Exhibit 1 is a true and correct copy of the Tentative Order Granting Defendants' Motions to Dismiss, issued by the Court on or about June 8, 2006.

4.   Attached hereto as Exhibit 2 is a true and correct copy of a redlined document comparing the allegations of CFIT's Proposed Second Amended Complaint to the allegations of the CFIT's First Amended Complaint.

5.   Attached hereto as Exhibit 3 is a true and correct copy of the Order Granting Defendants' Motions for Judgment on the Pleadings, entered by the Court on February 28, 2006.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Los Angeles, California on November 22, 2006.

_____
Angel L. Tang

417649

DECL. OF ANGEL L. TANG IN SUPPORT OF VERISIGN, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT -- No. 5:05-CV-04826 (RMW) PVT

EXHIBIT 1

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4   **E-FILED on** _____

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7

8   IN THE UNITED STATES DISTRICT COURT

9   FOR THE NORTHERN DISTRICT OF CALIFORNIA

10   SAN JOSE DIVISION

11

12 COALITION FOR ICANN TRANSPARENCY INC., a Delaware corporation,	No. C-05-04826 RMW
13	TENTATIVE ORDER GRANTING
Plaintiff,	DEFENDANTS' MOTIONS TO DISMISS
14	
15 v.	**[Re Docket Nos. 152, 160]**
16 VERISIGN, INC., a Delaware corporation; INTERNET CORPORATION FOR	
17 ASSIGNED NAMES AND NUMBERS, a California corporation,	
18 Defendants.	

19

20   Defendant VeriSign, Inc. ("VeriSign") and defendant Internet Corporation for Assigned

21   Names and Numbers ("ICANN") (collectively, "defendants") each move to dismiss plaintiff's First

22   Amended Complaint ("FAC") for failure to state a claim. Plaintiff Coalition For ICANN

23   Transparency, Inc. ("CFIT") opposes both motions. The court has read the moving and responding

24   papers and considered counsels' arguments. For the reasons set forth below, the court tentatively

25   grants defendants' motions to dismiss.

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TENTATIVE ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS
C-05-04826 RMW
SPT

I. BACKGROUND

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

A.   The Parties

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

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

B.   The Internet Domain Name System

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

A domain name is created when it is registered with the appropriate registry operator. *Id.* ¶ 25. A registry operator maintains the definitive database, or registry, that associates the registered domain names with the proper IP numbers for the respective domain name servers. *Id.* The domain name servers direct Internet queries to the related web resources. *Id.* A registrant can register a domain name only through companies that serve as registrars for second level domain names. Registrars accept registrations for new or expiring domain names, connect to the appropriate registry operator's TLD servers to determine whether the name is available, and register available domain names on behalf of registrants. *Id.* ¶ 48. As such, registrars necessarily need access to the registry maintained by the registry operators. When a domain name is expiring (and not renewed by the current registrant), the registry operator notifies the registrars. To register an expired domain name, registrars send "add" commands to the registry database. *Id.* An "add" command is accepted (thereby registering the name) only if the name is available. *Id.* Therefore, to increase the chances of obtaining a popular expired domain name, a registrar may send a rapid series of "add" commands for the expired name. *See* Feb. 28 Order at 3. Due to competition for registration of expiring

1 domain names, a registrant may use the services of "back order service providers." *Id.* ¶ 49. Back

2 order service providers further increase the chances of a registrant obtaining a highly demanded

3 expiring domain name by pooling the resources of several registrars. In this way, the registrant's

4 chances of an "add" command being accepted increases. *See* Feb. 28 Order at 3-4.

5   The majority of domain name registrations for commercial purposes utilize the .com TLD.

6 *Id.* ¶ 43. CFIT alleges that demand for .com TLDs is not interchangeable with other TLDs and

7 consumers are willing to pay substantially more for .com domain name registrations. *Id.* ¶ 40. As

8 an example, CFIT alleges that no significant number of consumers switched from .com to .net as a

9 result of the more than thirty percent decrease in registration fee for .net registrations in July 2005.

10 *Id.* ¶ 44. Indeed, CFIT asserts that many .com domain name registrants consider the other TLDs to

11 be complements to, rather than substitutes for, the .com registration. *Id.* ¶ 41. Thus, a registrant

12 often seeks concurrent domain name registrations in a number of TLDs (e.g., verisign.com,

13 verisign.net, verisign.info, verisign.biz). *Id.* On the other hand, .net domain names have been the

14 primary domain names used by registrants in the networking service, such as internet service

15 providers and e-mail service providers. *Id.* ¶ 45. CFIT contends that substitution among TLDs is

16 not feasible because many registrants' .com or .net domain names have become their trademark or

17 tradename, are associated with consumer goodwill, and represent their online brand name and

18 identity. *Id.* ¶¶ 42, 45.

19   **C.**   **VeriSign and ICANN's Relationship**

20   In the past ICANN has selected the registry operator for the .com and .net TLDs through a

21 bidding process. FAC ¶ 34. Once a registry operator is selected, it serves as the sole registry

22 operator for the applicable TLD registry (.com or .net) until the expiration of the registry agreement.

23 *Id.* ¶ 35. Currently, VeriSign is the registry operator for the .com and .net domains pursuant to

24 written registry agreements between ICANN and VeriSign. *Id.* ¶¶ 16, 25.

25   In May 2001 VeriSign and ICANN entered into a .com registry agreement (the "2001 .com

26 Agreement") and a .net registry agreement (the "2001 .net Agreement") under which VeriSign

27 would be the sole registry operator of the .com and .net TLD registries. *Id.* ¶¶ 67-68. The 2001

28 .com Agreement expires November 10, 2007. *Id.* ¶ 69. Under this agreement VeriSign may make a

1 written proposal sometime between November 10, 2005 and May 10, 2006 to request a four-year

2 renewal term. ¶ 69. ICANN must then consider the proposal and grant the extension unless (1)

3 ICANN determines that VeriSign is in material breach of the agreement, (2) the proposal contains a

4 maximum price that exceeds what is allowed under the existing 2001 .com Agreement, or (3)

5 "certain other conditions apply." *Id.*   The 2001 .net Agreement was set to expire June 30,

6 2005. Competitive bidding was solicited prior to its expiration and VeriSign was again selected as

7 the .net registry operator. *Id.* ¶ 34. Thus, in 2005, VeriSign and ICANN entered into a .net registry

8 agreement (the "2005 .net Agreement").

9   VeriSign and ICANN have also negotiated and signed a proposed .com registry agreement

10 that will replace the current 2001 .com Agreement (the "2006 .com Agreement"). The 2006 .com

11 Agreement effectively extends VeriSign's operation of the .com registry for an additional five years

12 beyond the original expiration date without any competitive bidding process. *Id.* ¶ 84. CFIT alleges

13 that by negotiating and agreeing to the 2006 .com Agreement ICANN and VeriSign are "bypassing"

14 the process in the 2001 .com Agreement that would trigger ICANN's solicitation of competitive

15 bids. *Id.* ¶ 71. Specifically, VeriSign has proposed a maximum price for domain name registrations

16 which exceeds that allowed under the 2001 .com Agreement which CFIT contends would otherwise

17 have triggered an obligation on ICANN's part to seek competitive bids. *Id.* ¶ 89. According to

18 ICANN, registry agreements, including renewals, must be approved by ICANN's board of directors

19 and by the DOC. ICANN's RJN Ex. E (MOU Am. 3)[1]; *see also* ICANN's Mot. at 5. ICANN notes

20 that the 2006 .com Agreement was approved by the ICANN board of directors on February 28,

21 2006, but has not yet been approved by the DOC.

22   CFIT alleges that the contractual relationships between VeriSign and ICANN present several

23 problems. First, pursuant to the 2001 .com Agreement ICANN has the right to seek competitive

24 bids to replace VeriSign as registry operator upon the original expiration on November 10, 2007 (or

25 earlier because VeriSign has already allegedly breached the 2001 .com Agreement repeatedly). *Id.* ¶

26 _____

27   [1]   Pursuant to ICANN's Request for Judicial Notice the court takes judicial notice of the
MOU and amendments available on ICANN's Internet site and to which several of CFIT's
allegations reference. *In re Silicon Graphics Securities Litigation*, 183 F.3d 970, 986 (9th Cir. 1999)

28 (a court may consider documents referred to within a complaint on a motion to dismiss).

1   70. CFIT suggests that ICANN is "required" to seek competitive bids because of the MOU's

2   mandate that ICANN support competition and ICANN has purportedly not sought such competitive

3   bids. *Id.* CFIT alleges that both the 2006 .com and 2005 .net Agreements include a renewal

4   provision that allows ICANN to solicit competitive bids upon expiration of the agreement "only if a

5   court or arbitrator issued a non-appealable final order finding VeriSign to be in breach of the

6   agreement, and VeriSign failed to cure the breach." *Id.* ¶ 38. CFIT asserts that this renewal

7   provision constitutes ICANN's "conspiratorial agreement to waive its right to impose competitive

8   bidding" for operation of the .com and .net registries. *Id.* ¶ 87. In comparison, the renewal

9   provisions in the 2001 .com and .net Agreements allowed ICANN to solicit competitive bids upon

10 expiration if ICANN deemed VeriSign to be in material breach. *Id.* ¶ 69.

11   Second, VeriSign has been freed from pricing constraints formerly in place in the 2001 .com

12 and .net Agreements. In particular, the maximum price in the 2006 .com Agreement now excludes

13 the "registry-level transaction fee" (paid to ICANN), sets the (maximum) price at $6.00 through

14 December 31, 2006, and permits VeriSign to increase the price seven percent in four of the

15 following six years, which CFIT asserts is excessive. *Id.* ¶ 89. At the same time, registrars and

16 Internet stakeholders have no input into prices as the fee increases are allegedly automatic pursuant

17 to the contractual provision. *Id.* ¶ 90. Similarly, the 2005 .net Agreement sets the maximum price at

18 $4.25 until December 31, 2006 and then "[b]eginning in 2007, the price controls set forth in the

19 2005 .net Agreement will be eliminated." *Id.* ¶ 91. CFIT contends that "VeriSign will be

20 unconstrained in setting prices and will charge the maximum cap allowed." *Id.* ¶ 88.

21   Third, CFIT alleges that under the 2006 .com Agreement ICANN may permit VeriSign to

22 provide additional registry services if ICANN determines that no competition concern exists. *Id.* ¶

23 93. CFIT concludes that VeriSign is therefore permitted to launch services, such as VeriSign's

24 proposed Central Listing Service ("CLS") and Wait List Service ("WLS") that would "displace the

25 competitive back order services market . . . or similar services." *Id.* ¶ 94. Further, CFIT asserts that

26 because "nothing in the contracts or otherwise will prevent VeriSign from further increasing prices,"

27 consumers will pay more. *Id.* ¶ 111 The 2005 .net Agreement and the 2006 .com Agreement also

28 abandon certain "Consensus Policies" representing the interests of Internet stakeholders and certain

1   provisions and obligations set forth in the 2001 .com and .net Agreements designed to avoid

2   unreasonable restraints on trade and to promote fair competition. *Id.* ¶¶ 74-77, 80.

3   **C.   CFIT's Causes of Action**

4   CFIT alleges causes of action against (1) VeriSign in the .com and .net Registration Markets

5   for monopolization under section 2 of the Sherman Act, (2) VeriSign in the .com and .net

6   Registration Markets for attempted monopolization under section 2 of the Sherman Act, (3)

7   VeriSign in the Expiring Names Registration Services under section 2 of the Sherman Act, (4)

8   VeriSign and ICANN in "all relevant markets" for conspiracy to monopolize under section 2 of the

9   Sherman Act, (5) VeriSign and ICANN in "all relevant markets" for conspiracy in restraint of trade

10   under section 1 of the Sherman Act and (6) VeriSign and ICANN in "all relevant markets" for

11   conspiracy in restraint of trade under the Cartwright Act.

12   The court's February 28, 2006 order ("Feb. 28 Order") granted defendants' motions for

13   judgment on the pleadings because CFIT's complaint did not adequately allege facts supporting that

14   CFIT had associational standing to file the present action. Feb. 28 Order at 14. The Feb. 28 Order

15   also clarified certain pleading issues with respect to CFIT's antitrust allegations. In particular, the

16   court noted that the amended complaint should differentiate the alleged Expiring Names

17   Registration Services Market from domain names in general and provide detailed allegations tending

18   to show that registered and unregistered domain names are not reasonably interchangeable. Feb. 28

19   Order at 17.

20   **II. ANALYSIS**

21   **A.   Legal Standard**

22   A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.

23   Dismissal can be based on the "lack of a cognizable legal theory" or "the absence of sufficient facts

24   alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th

25   Cir. 1988). The issue is not whether the non-moving party will ultimately prevail but whether it is

26   entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d

27   246, 249 (9th Cir. 1997). The court's review is limited to the face of the complaint, documents

28   referenced in the complaint, and matters for which the court may take judicial notice. *Levine v.*

1 | *Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991). When evaluating a Rule 12(b)(6) motion,

2 | the court must accept all material allegations in the complaint as true and construe them in the light

3 | most favorable to the non-moving party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994). A

4 | court must not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that

5 | the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

6 | *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also United States v. Redwood City*, 640 F.2d 963,

7 | 966 (9th Cir. 1981). However, the court is not required to accept conclusory legal allegations "cast

8 | in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts

9 | alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

10 | **B.   Associational Standing**

11 | VeriSign and ICANN argue that CFIT's amended complaint still fails to allege adequate facts

12 | to support that CFIT has associational standing to file the present action. An association may invoke

13 | the doctrine of "associational standing" to bring a complaint "on behalf of its members." *See New*

14 | *York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9 (1988). It may do if "(a) its members

15 | would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are

16 | germane to [its] purpose; and (c) neither the claim asserted nor the relief requested requires the

17 | participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432

18 | U.S. 333, 343 (1977). When a defendant moves to dismiss on standing grounds, the court must

19 | "accept as true all material allegations of the complaint, and . . . construe [it] in favor of the

20 | complaining party." *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). At the same time, though,

21 | "[i]t is a long-settled principle that standing cannot be inferred argumentatively from averments in

22 | the pleadings, but rather must affirmatively appear in the record." *FW/PBS, Inc. v. City of Dallas*,

23 | 493 U.S. 215, 231 (1990) (plurality opinion) (citations and quotation marks omitted). Therefore,

24 | "[i]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to

25 | the complaint or by affidavits, further particularized allegations of fact deemed supportive of

26 | plaintiff's standing." *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975).

27 |

28 |

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1   VeriSign argues that CFIT has failed to adequately allege association standing.[2] CFIT's initial

2 complaint had only alleged vague categories of members that might suffer harm. Thus, the court found

3 that associational standing had not been alleged because CFIT failed to name even one member. As

4 amended to support standing CFIT's complaint now alleges that its purpose is "to promote the interests

5 of its member businesses by seeking a competitive and fair market for domain name registry services":

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

12 has been largely adopted, encourages competition based on quality of service and price. FAC ¶¶ 49-50.

13 Elsewhere in the complaint CFIT contends that the 2006 .com Agreement includes a provision that

14 permits VeriSign to propose new services, including the CLS service, which CFIT alleges would

15 displace "the competitive back order services market." *Id.* ¶ 94. Based on these allegations, the court

16 finds that the FAC adequately identifies at least one member (Pool.com) who CFIT alleges will suffer

17 threat of injury based on the 2005 .net and 2006 .com Agreements. Thus, the court finds these

18 allegations sufficient to meet the first and second prongs of the requirements under *Hunt. See Hunt*, 432

19 U.S. at 342 ("The association must allege that its members, *or any one of them*, are suffering immediate

20 or threatened injury as a result of the challenged action of the sort that would make out a justiciable case

21 had the members themselves brought suit.") (emphasis added).

22   **C.   Antitrust Standing**

23   In addition to identifying at least one member, however, plaintiffs must allege facts sufficient

24 to establish that there is "immediate or threatened injury as a result of the challenged action[s]." *Id.*

25 _____

26   [2]   ICANN argues that CFIT fails to establish that any member of CFIT could possibly
      have standing to sue in its own right because CFIT has failed to allege any antitrust violations or
27   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   CFIT's allegations of improper monopoly are two fold. First, ICANN and VeriSign's "agreements and

2   understandings" have the effect of making VeriSign the permanent operator of the .com and .net

3   registries. CFIT alleges that this shields VeriSign from competitive pressures of a re-bidding process

4   and discordant with ICANN's obligation to maintain competition. FAC ¶ 3. Second, ICANN and

5   VeriSign's "agreements and understandings" improperly permit VeriSign to extend its monopoly control

6   to the downstream markets for back order and other services. *Id.* Therefore, here, plaintiffs must also

7   establish antitrust standing:

8   [T]he focus of the doctrine of "antitrust standing" is somewhat different from that
          of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient
9   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
10   antitrust action.

11   *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535

12   (1983). "A plaintiff may only pursue an antitrust action if it can show 'antitrust injury, which is to

13   say injury of the type the antitrust laws were intended to prevent and that flows from that which

14   makes defendants' acts unlawful.'" *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055

15   (9th Cir. 1999) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)).

16   The Ninth Circuit has articulated four requirements for establishing antitrust injury: "(1) unlawful

17   conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct

18   unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt.,*

19   *Inc.*, 190 F.3d at 1055.

20   One way to demonstrate market power for a § 2 claim of unlawful monopoly is through

21   direct evidence of the "injurious exercise of market power." *Rebel Oil Co., Inc. v. Atlantic Richfield*

22   *Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Under this method, the plaintiff offers evidence of

23   "restricted output and supracompetitive prices that is direct proof of the injury to competition which

24   a competitor with market power may inflict" in the relevant market. *Id.* Accordingly, an act is

25   deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and

26   raises the prices of goods above competitive levels or diminishes their quality. *Id.* at 1433.

27   Alternatively, unlawful market power may be demonstrated circumstantially by: (1) defining the

28   relevant market, (2) showing that the defendant owns a dominant share of that market, and (3)

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1   showing that there are significant barriers to entry and that existing competitors lack the capacity to

2   increase their output in the short run. *Id.* at 1434.

3   1.   The Expiring Names Registration Services Market

4   As the court noted in its Feb. 28 Order, a plaintiff must allege a relevant product and

5   geographic market to state a claim under sections 1 and 2 of the Sherman Act. A market consists of

6   all "commodities reasonably interchangeable by consumers for the same purposes[.]" *United States*

7   *v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). "If consumers view the products as

8   substitutes, the products are part of the same market." *Rebel Oil Co.*, 51 F.3d at 1435. "In

9   economists' terms, two products or services are reasonably interchangeable where there is sufficient

10   cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight

11   increase in the price of one product by switching to another product." *Todd v. Exxon Corp.*, 275

12   F.3d 191, 201-02 (2d Cir. 2001). "Congress prescribed a pragmatic, factual approach to the

13   definition of the relevant market and not a formal, legalistic one." *Brown Shoe Co. v. United States*,

14   370 U.S. 294, 336 (1962).

15   CFIT alleges that the market for back order services used by end users in the purchase and

16   sale of expiring domain name registrations (the "Expiring Names Registration Services Market") is a

17   separate relevant market. *Id.* In the court's Feb. 28 Order, the court noted that *Weber v. Nat'l*

18   *Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000) and *Smith v. Network Solutions, Inc.*, 135

19   F. Supp. 2d 1159 (N.D. Ala. 2001) have rejected the market definition of Expiring Names

20   Registration Services as a matter of law. Feb. 28 Order at 16-17. The *Weber* court reasoned that the

21   infinite number of potential domain names made the proper market "domain names in general." 112

22   F. Supp. 2d at 673-74. Similarly, the *Smith* court held that domain names were reasonably

23   interchangeable whether expired or not:

24   [T]here is no inherent difference in character, for purposes of interchangeability
             and cross-elasticity of demand, between domain names that are 'expired' and held
25   by NSI and those that are not. It is true in a literal sense that each domain name is
             unique. And one given individual domain name may be far more valuable on the
26   open market than others. But products need not be entirely fungible to be
             considered part of the same relevant market . . . . [T]he *Weber* court did more
27   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
28   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.

135 F. Supp. 2d at 1169-70. Nevertheless, in the Feb. 28 Order the court declined to hold that CFIT's market definition necessarily fails as a matter of law. Feb. 28 Order at 16-17. Instead, the court found that it was at least theoretically possible that CFIT could allege facts tending to show that registered and unregistered domain names are not reasonably interchangeable, and granted leave to amend. *Id.* On the one hand "products need not be entirely fungible to be considered part of the same relevant market." *Smith,* 135 F. Supp. 2d at 1169. On the other hand, price disparities are relevant for grouping commodities into relevant markets. *See E.I. du Pont de Nemours & Co.,* 351 U.S. at 404. To the extent CFIT's new allegations differentiate the alleged Expiring Names Registration Services Market from domain names in general, CFIT may properly allege a relevant market.

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

These allegations, however, do not indicate that domain names are not reasonably interchangeable by virtue of their "expired" status or otherwise raise an inference that the alleged Expiring Domain Names Registration Services market is a separate relevant market. At most, these allegations suggest that some expired domain names may be in greater demand than others such that

1 a registrant might be willing to pay an additional fee in order to increase its chances of procuring

2 that domain name. Registration of a domain name, whether new or expired, are completed through

3 the same process with a registrar. As CFIT alleges, "to register a new or expiring domain name, a

4 registrar sends an 'add' command to VeriSign's registry computer for that domain name." FAC ¶ 48.

5 It appears that a registrant register expired names with or without the use of a back order service

6 provider. There is no indication that an expired domain name always commands a higher price or

7 there are any price differentials charged by the registrars for an expired domain name versus a new

8 domain name. Even if "price disparities are relevant for grouping commodities into relevant

9 markets," *see* Feb. 28 Order at 17 (citing *E.I. du Pont de Nemours & Co.*, 351 U.S. at 404), no such

10 disparity is alleged here. Rather, similar to the *Smith* court's analysis, here, CFIT has not alleged

11 any "inherent difference in character, for purposes of interchangeability and cross-elasticity of

12 demand, between domain names that are 'expired' and held . . . and those that are not."[4] Essentially,

13 the only distinction alleged is that there is an additional service available for the registration of

14 expiring domain names, which customers may choose to use for some expired domain names.

15 Therefore, CFIT has not alleged, for purposes of assessing alleged antitrust injury, that there exists a

16 relevant market for Expiring Domain Names Registration Services separate from the market for the

17 registration of domain names in general.

18   2.   The Domain Name Registration Market

19   CFIT also identifies the market for the purchase and sale of domain name registrations (the

20 "Domain Name Registration Market") as a relevant market. FAC ¶ 11. It is unclear whether CFIT

21 is alleging that the market is that of the .com and .net domain name registrations only or whether it is

22 that of domain name registrations in general. CFIT defines the Domain Name Registration Market

23 as purchase and sale of domain name registrations in general, yet CFIT's allegations suggest the lack

24 of demand cross-elasticity between the registration of .com and .net domain names on the one hand

25 ─────────────────────

26   [4]   CFIT does allege that the other TLDs are not substitutes for the .com and .net TLDs and that there is low demand cross-elasticities between the .com domain name and domain names

27 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 different registration statuses as

28 would be required to indicate that the Expiring Domain Names Registration Services constitute a separate relevant market.

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1   and the registration of domain names for all other TLDs on the other hand.[5] *See* FAC ¶¶ 39-47.

2   Regardless, CFIT's allegations adequately show that at least the .com and .net domain name

3   registrations constitute a relevant market. It is not disputed that because there can only be one

4   registry operator per registry, VeriSign, as the sole registry operator of the .com and .net registries,

5   necessarily holds a monopoly in domain name registration for those registries during the term of the

6   applicable registry agreement. FAC ¶ 35.[6]

7   VeriSign and ICANN argue that CFIT cannot establish antitrust standing because the alleged

8   injuries are not the type of injuries that antitrust laws are intended to prevent. Sherman Act § 2 ("§

9   2") states: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire

10 with any person or persons, to monopolize trade shall be guilty" of an antitrust violation. 15 U.S.C. §

11 2. To establish a § 2 violation for attempted monopolization, the plaintiff must show "specific intent

12 to control prices or destroy competition, predatory or anticompetitive conduct directed at

13 accomplishing that purpose, dangerous probability of achieving monopoly power, and causal

14 antitrust injury." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir.1988). Similarly, to

15 establish a conspiracy to restrain trade, there must be a showing of specific intent or awareness as to

16 one or more of the alleged co-conspirators. *Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990,

17 1001 (9th Cir. 1986). CFIT must plead facts establishing injury to competition in the market for the

18 registration of domain names in general. 15 U.S.C. § 1. Here, CFIT's allegations of antitrust

19 violations, attempted antitrust violations, and conspiracy in restraint of trade stem from VeriSign and

20 ICANN's agreement to certain revisions to the 2005 .net and 2006 .com Agreements.

21   First, CFIT alleges that the renewal provisions in the Agreements permit VeriSign to serve as

22 the sole registry operator of the .net and .com registries "in perpetuity." Opp. at 8. The renewal

23 provision under both Agreements "virtually guarantee that VeriSign will not have to periodically bid

24

25   [5]   If CFIT contends the market consists of the domain name registrations regardless of
        TLD, then CFIT has failed to allege that VeriSign has any monopoly in that market.

26   [6]   This "monopoly" relates to the operation of registries but CFIT's argues that
        VeriSign's sole access to the .com and .net traffic data combined with the proposed CLS service
27   would necessarily result in CFIT being the sole "auctioneer" of expired domain names. Regardless,
        as discussed earlier, CFIT does not adequately allege there exists a relevant market of Expiring
28   Names Registration Services.

1   for control over the registries." *Id.* CFIT's complains that the replacement of the 2001 .com

2   Agreement with the 2006 .com Agreement constitutes ICANN's waiver of its right to impose

3   competitive bidding with respect to operation of the .com registry. FAC ¶ 87. These allegations

4   merely show, however, that the proposed 2006 .com Agreement extends the term of VeriSign's

5   designation as the registry operator for the .com registry under the 2001 .com Agreement. The

6   parties do not dispute that VeriSign was lawfully selected to be the registry operator for the .com

7   registry. Mere extension of VeriSign's lawful appointment as the registry operator does not

8   constitute an antitrust violation.

9   Under the 2001 .com Agreement, VeriSign may propose a four year extension which ICANN

10   must consider "before deciding whether to call for competing proposals from potential successor

11   registry operators." FAC ¶ 69. ICANN must then consider the proposal and grant the extension

12   unless (1) ICANN determines that VeriSign is in material breach of the agreement, (2) the proposal

13   contains a maximum price that exceeds what is allowed under the existing 2001 .com Agreement, or

14   (3) "certain other conditions apply." *Id.* Under the proposed 2006 .com Agreement, ICANN may

15   solicit competitive bids upon expiration of the agreement "only if a court or arbitrator issued a non-

16   appealable final order finding VeriSign to be in breach of the agreement, and VeriSign failed to cure

17   the breach." *Id.* ¶ 86. Thus, under either the 2001 and the 2006 versions, as alleged by CFIT,

18   ICANN may solicit competing bids upon expiration of the agreement. The only difference is that

19   under the 2001 provision ICANN makes the decision whether VeriSign is in material breach, thus

20   warranting solicitation of competing bids while under the 2006 provision ICANN defers the decision

21   of whether VeriSign is in material breach (and thus whether competitive bids should be solicited) to

22   a court or arbitrator.[7] The court fails to see how this modified provision results in VeriSign as the

23   registry operator of the .com and .net registries "in perpetuity." While the methodology differs, both

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27   [7]   Notably, under the 2001 .com Agreement VeriSign has the right to challenge a non-
       renewal under section 15 of the agreement, which provides for resolution of disputes in court or
28   through arbitration. FAC, Ex. 1 ¶¶ 15, 25.

1   provisions contemplate that competitive bids will be solicited in the event VeriSign is deemed to be

2   in material breach of the registry agreement.[8]

3   Second, CFIT contends that 2005 .net and 2006 .com Agreements increase the prices that

4   VeriSign may charge for registrations by increasing the maximum permissible price and permitting

5   significant price increases in future years.[9] Specifically, the 2005 .net Agreement removes price

6   controls after 2007 and the 2006 .com Agreement permits future price increases of up to seven

7   percent in four of the next six years. VeriSign argues that increases in prices, without more, are not

8   subject to antitrust scrutiny. ICANN argues that the setting of maximum prices is not precluded by

9   antitrust laws and have been found to be pro-competitive in some instances. In opposition, CFIT

10   contends only that defendants cannot dispute that the price increases are permissive rather than

11   mandated, as that is a factual issue. Opp. at 14-15. It does not appear disputed that the revisions to

12   the 2005 .net and 2006 .com may result in increases in future prices. However, CFIT provides no

13   argument to support why its allegations of the increases in price caps or removal of price controls

14   support, as a matter of law, an antitrust violation. Specifically, CFIT has not alleged facts

15   supporting that the future prices contemplated in the agreements will serve as significant barriers to

16   entry or are otherwise supra-competitive.[10]

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18   [8]   CFIT's suggestion that ICANN's deferral of the decision of whether a breach by
VeriSign is material to the courts or to an arbitrator constitutes a waiver of ICANN's right to solicit
19 competitive bids is unpersuasive. *See* FAC ¶ 87. The only difference is that the material breach
determination will be made by a court or arbitrator. CFIT's suggestion necessarily assumes that
20 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
21 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
22 violation of any MOU obligations. In any event, the proposed 2006 .com Agreement is subject to
express review and approval by the DOC.
23

24   [9]   CFIT's allegations appear inconsistent in that CFIT alleges that pricing in the 2005
.net Agreement is wrongful and 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*
25 Opp. at 8 ("For example, because the 2001 .net Agreement did not have the renewal provisions that
VeriSign now seeks for the 2006 .com Agreement, VeriSign faced competitive bidding upon
26 renewal of the 2001 .net Agreement, and had to lower its fees.") (citing FAC ¶¶ 69-70).

27   [10]   CFIT's assertion that the prices are supra-competitive is conclusory and does not
represent a factual allegation giving rise to an inference of antitrust injury. Moreover, since these
28 increases in price levels are "permissible" under the agreement, there can be no factual allegations at

1   Third, CFIT asserts that VeriSign (and ICANN in collusion) has leveraged and threatens to

2   leverage its monopolies in the registry operator market (for .com and .net domain names,

3   presumably) to adjacent and downstream markets. CFIT alleges that the unlawful conduct stems

4   from VeriSign's intention to implement CLS which will eliminate the current competitive

5   marketplace for back order services. FAC ¶¶ 108-112. In particular, CFIT contends that VeriSign's

6   launch of such services would eliminate competition because of VeriSign's exclusive access, as

7   registry operator, to traffic data of Internet users' attempts to visit unregistered domain names. *Id.* ¶

8   94. Currently, when a domain name expires, VeriSign releases the name and customers may register

9   the expired domain name through a registrar, with or without the assistance of a back order service

10   provider. *See* FAC ¶ 110. With CLS, VeriSign will offer expired domain names for auction.

11   Registrants may bid for the expired domain names through registrars. CFIT alleges "[r]egistrants

12   will continue to order domain names through registrars, but registrars must deal directly with

13   VeriSign in order to receive expiring names to offer to prospective clients." *Id.*

14   VeriSign and ICANN both argue that CLS would be pro-competitive because it creates the

15   potential for new competition. Further, VeriSign may only propose such new services to

16   ICANN—ICANN must still approve the services. To the extent CFIT's allegations assumes that

17   CLS will be anticompetitive, it improperly presupposes that ICANN will abdicate its regulatory to

18   review the competitive effects of proposed services. ICANN's Mot. at 15. In opposition, CFIT

19   argues whether CLS will be a competitive service is "irrelevant" and "the Complaint's allegations

20   that CLS threatens to harm competition by eliminating a highly competitive back order services

21   pooling industry . . . and other adjacent markets, must be accepted as true." Opp. at 15.

22   Defendants' arguments are well taken. Even if the court assumes, as it must, that CLS will

23   eliminate the demand for back order services, the court need not assume as true that such elimination

24   suffices as predatory conduct actionable under antitrust laws. "It is well established that the antitrust

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26   this juncture that the prices have created barriers to entry. In its opposition CFIT argues that the
     issue of whether the price increases or removal of price controls constitute required price increases

27   or permissive price increases is a question of fact not before the court on these motions, CFIT has
     nevertheless 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

28   VeriSign *will* impose these higher prices are conclusory and unsupported by factual allegations. *Id.*

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1   laws are only intended to preserve competition for the benefit of consumers." *Am. Ad Mgmt., Inc.*,

2   190 F.3d at 1055 (citing *Associated Gen.*, 459 U.S. 519, 538 (1983)). "A plaintiff has the burden to

3   plead and prove that the defendant's actions harmed competition, not that the actions harmed

4   plaintiff in its capacity as a competitor." *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*,

5   783 F.2d 1347, 1350 (9th Cir. 1986). At issue here is the market for the registration of .com and .net

6   domain names by registrants. As ICANN notes, what is to be protected are the "competitive

7   conditions that foster the development of cost-effective and high quality products" to registrants.

8   Here, CFIT has alleged that the back order services market is highly competitive and participants

9   compete on the basis of price and service. As alleged, currently expired domain names are made

10 available and registrars randomly send "add" commands in attempts to secure the domain name for a

11 registrant. A registrant seeking to increase the number of "add" commands made on its behalf could

12 procure the services of a back order service provider to pool together resources of several registrars.

13 As alleged, VeriSign's CLS product proposes to notify participating registrars of expiring domain

14 names and hold a five-day auction for such names during which registrars may bid for the names on

15 behalf of registrants. FAC ¶ 96. The registration goes to the successful bidder and the proceeds is

16 divided ten percent to VeriSign (as registry operator) and ninety percent to the registrar. *Id.*

17   Other than arguing that back order service providers will be displaced by CLS, CFIT does

18 not allege how consumers, namely the registrants, would be harmed by CLS. CFIT makes no

19 allegations that CLS would result in higher prices or lower quality of service to registrants. Indeed,

20 the inference is that an auction, open to all registrars and registrants, would result in the registration

21 of expired names at a price determined by market forces. Moreover, the allegations give rise to an

22 inference that there might be increased competition among registrars under an auction system as

23 compared to the present lottery-like system. CFIT's assertion that there will be "predictable adverse

24 price effects for consumers" is conclusory. In any event, under the 2006 .com Agreement, ICANN

25 shall refer any proposed services that it believes raises significant competition issues to the

26 appropriate government authority. FAC ¶ 93. In sum, CFIT has failed to allege that VeriSign's

27 rights under the 2006 .com Agreement to propose new registry services for ICANN's approval

28 violates antitrust laws or constitutes specific intent to violate antitrust laws.

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III. ORDER

For the foregoing reasons, the court tentatively grants defendants' motions to dismiss.

DATED: _____

_____
RONALD M. WHYTE
United States District Judge

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EXHIBIT 2

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8

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10   IN THE UNITED STATES DISTRICT COURT

11   FOR THE NORTHERN DISTRICT OF CALIFORNIA

12   SAN JOSE DIVISION

13

14 COALITION FOR ICANN   )   Case No. 05-4826 (RMW) PVT
    TRANSPARENCY INC., a Delaware)
    Corporation,   )   **[P R O P O S E D]**
15   )
)
16   Plaintiff,   )   ~~FIRST~~**SECOND** AMENDED COMPLAINT
)   **FOR VIOLATION OF THE ANTITRUST**
17   v.   )   **LAWS AND DECLARATORY AND**
)   **INJUNCTIVE RELIEF**
18 VERISIGN, INC., a Delaware   )
    Corporation; INTERNET   )   Honorable Ronald M. Whyte
    CORPORATION FOR ASSIGNED   )
19 NAMES AND NUMBERS, a   )
    California Corporation,   )
20   )
)
21   Defendants.   )
)
22 _____)

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#413321
    ~~FIRST~~**SECOND** AMENDED COMPLAINT
    C-05-4826 RMW PVT   **EXHIBIT A**

1   Plaintiff Coalition for ICANN Transparency Inc. ("CFIT") brings this action against

2 Internet Corporation for Assigned Names and Numbers ("ICANN") and VeriSign, Inc.

3 ("VeriSign"), and alleges as follows:

4   **I.   NATURE OF THE ACTION**

5   1.   This action is brought to enjoin and prevent defendants ICANN and VeriSign from

6 carrying out their unlawful agreement to establish a permanent monopoly over the relevant

7 markets as alleged herein, and for declaratory and other relief. The unlawful agreement gives

8 VeriSign a permanent monopoly over all the ".com" and ".net" domain name registrations, a

9 monopoly for related services that it does not currently enjoy, and permits VeriSign to

10 permanently and indefinitely increase prices above the natural rate of inflation and what a fair

11 market would otherwise bear.

12   2.   This is an action to restore competitive conditions in markets for ".com" and ".net"

13 Internet domain names, and to prevent VeriSign from expanding its monopoly control over the

14 .com and .net domain name registries into downstream and adjacent markets. CFIT seeks an

15 injunction against the defendants and their respective management personnel preventing them

16 from taking further steps to implement their unlawful agreement, including without limitation

17 preventing the signing or implementation of a proposed .com Registry Agreement between

18 ICANN and VeriSign (the "2006 .com Agreement"); an injunction against VeriSign's monopoly

19 leveraging conduct as specified herein; an injunction requiring ICANN to adhere to its

20 governmental mandate to maintain competition and prevent discrimination in markets related to

21 Internet domain names; and an injunction requiring VeriSign and ICANN to abide by the terms of

22 the current .com agreement (the "2001 .com Agreement") until it expires and requiring ICANN to

23 entertain competing bids for the operation of the .com registry at that time. Plaintiff also requests

24 declaratory relief that the agreements and understandings between the defendants, as reflected in

25 the terms of the 2006 .com Agreement, as well as the similar "2005 .net Agreement," constitute

26 violations of federal and state antitrust laws, and ordering appropriate relief to restore competitive

27 conditions in affected markets.

28

1   3.   ICANN has abrogated its government-mandated obligation to maintain

2   competition and prevent discrimination in markets related to Internet domain names by

3   acquiescing and colluding in VeriSign's strong-arm tactics to leverage its limited-duration

4   contractual monopoly over the .com and .net Internet domain name registries into permanent

5   monopolies over those registries and over adjacent and downstream markets for various domain

6   name services. Specifically and without limitation, ICANN and VeriSign have agreed to terms

7   that have the practical effect of installing VeriSign as the permanent operator of the .com and .net

8   registries and shielding VeriSign from the competitive pressures of the periodic re-bidding

9   process that ICANN typically imposes on registry operators. ICANN and VeriSign have also

10   agreed to terms that permit VeriSign to extend its monopoly control to the downstream markets

11   for back order services and other services. The unlawful agreements and understandings between

12   VeriSign and ICANN have the effects of imposing supracompetitive prices on consumers,

13   distributing the monopoly profits between ICANN and VeriSign, and excluding competition and

14   rivals from the relevant markets permanently.

15   **4.   The anticompetitive arrangements described in this Complaint have been the**

16   **subject of rational and irrational concern. Both the U.S. Senate and the U.S. House of**

17   **Representatives have held hearings at which the monopolization of .com has been a central**

18   **focus. CFIT is informed and believes that the unlawful arrangements described herein also**

19   **have been the subject of a U.S. Justice Department inquiry as well as by inquiries and/or**

20   **investigations launched by other governments and government competition authorities.**

21   **II.   PARTIES**

22   **5.**   ~~4.~~ ICANN is a private not-for-profit corporation, organized and existing under the

23   laws of the State of California, and having its principal place of business in Marina Del Rey,

24   California. ICANN is responsible for providing technical coordination of the Internet domain

25   name system.

26   **6.**   ~~5.~~ VeriSign is a corporation, organized and existing under the laws of the State of

27   Delaware, and having its principal place of business in Mountain View, California. VeriSign

28   currently acts under contract with ICANN as the "registry" for all .com and .net domain names.

7.   ~~6.~~ CFIT is a not-for-profit membership corporation, organized and existing under the laws of the State of Delaware, and having its principal place of business in the District of Columbia.

III.   STANDING

8.   ~~7.~~ CFIT brings this action for injunctive and declaratory relief on behalf of its members. CFIT's purpose, as stated in its Articles of Incorporation, is to "promote the interests of its member businesses by seeking a competitive and fair market for domain name registry services." CFIT was formed for the purpose of challenging the anticompetitive agreements and activities of defendants alleged herein, including the 2006 .com Agreement.

9.   CFIT's members include Internet domain name registrars, ~~registrants,~~ and back order service providers, including but not limited to Pool.com, Inc. ("Pool.com**"), Momentous, Inc. ("Momentous"),**"~~) and~~ R. Lee Chambers Company, LLC (hereinafter referred to as "CFIT's Supporters").

10.   CFIT's members also include domain name registrants, including but not limited to Pool.com, Inc. ("Pool.com"), Momentous, Inc. ("Momentous") R. Lee Chambers Company, LLC, and the World Association of Domain Name Developers ("WADND") (hereinafter referred to as "CFIT's Supporters") and other individuals and companies that, collectively, have registered tens of thousands of domain names in the .com and .net registries.

IV.   JURISDICTION AND VENUE

11.   ~~8.~~ This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337; the Declaratory Judgment Act, 28 U.S.C. § 2201; and principles of supplemental jurisdiction under 28 U.S.C. § 1367.

12.   ~~9.~~ Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c), in that defendant VeriSign resides, transacts business, and is found in this district and defendant ICANN resides, transacts business, and is found in the State of California and in this district.

1   **13.**   ~~10.~~ **Intradistrict Assignment:** A substantial part of the events giving rise to

2   CFIT's claims occurred in Santa Clara County, California, where defendant VeriSign has its

3   principal place of business. Assignment to the San Jose division is therefore proper.

4

5   **V.   RELEVANT MARKETS**

6   **14.**   ~~11.~~ The relevant markets for antitrust analysis in this case include the following:

7   1.   The markets for the purchase and sale of domain name registrations (the

8   "Domain Name Registration Markets"), which include:

9   (a)   The market for .com domain name registrations (the ".com

10   Registration Market").

11   (b)   The market for .net domain name registrations (the ".net

12   Registration Market").

13   2.   The market for back order services used by end users in the purchase and

14   sale of expiring domain name registrations (the "Expiring Names

15   Registration Services Market"). The Expiring Names Registration Services

16   Market includes various services that are bought by end users to register

17   domain names when they expire on the .com and .net registries. The

18   relevant services include, without limitation, "back order" services that

19   assist registrars in acquiring expiring domain names for registration on

20   behalf of clients (potential and actual registrants), and auctions through

21   which expiring domain name registrations are released to the public for

22   bidding.

23   **15.**   **The markets for .com domain name registrations and .net domain name**

24   **registrations are distinct markets for purposes of domain name registrations.**

25   **16.**   ~~12.~~ Although over 250 TLDs[1] exist, they are not equally accessible to businesses

26   based in the United States. All country-code TLDs are operated and managed outside of the

27   _____

28   [1] TLDs or "top-level domains" are described more fully in section VII.B, paragraphs 16 through 19. ".com" and
     ".net" are examples of TLDs.

1   United States, and are therefore not subject to United States antitrust laws and statutes.

2   Registration with ccTLDs requires a Registrant to leave the borders and protection of the United

3   States. Therefore these ccTLDs cannot be counted as part of the relevant market for determining

4   antitrust violations.

5   **17.**   ~~13.~~ Many of the generic TLDs, or gTLDs, are restricted either in use or in

6   meaning. Specifically, gTLDs such as ".edu," ".mil," ".gov," ".aero," and ".coop" are reserved

7   for specific types of institutions and are not available to businesses or private persons. Many

8   gTLDs carry inherent meanings which cause confusion Registrants would want to avoid. The

9   gTLD ".org" carries the connotation of a non-profit organization, and similarly ".travel" connotes

10   a travel-related Registrant. As a result, ".com" and ".net" have become more than just the most

11   used TLD, they have become the definitive TLDs for all commercial and private Registrants

12   within the United States who seek to avoid confusion with other types of associations.

13   **18.**   **As between .com and .net, Verisign agrees that .com is a distinct market.**

14   **19.**   **No top-level domain is a substitute for the .com top-level domain.**

15   **20.**   **As a matter of business strategy, Verisign operates as though .com is a**

16   **distinct market, and it markets its registration services for the .com TLD differently than it**

17   **markets any other registration services.**

18   **21.**   ~~14.~~ The relevant geographic market as to each relevant product market is the

19   world.

20   **22.**   ~~15.~~ VeriSign is a participant in each relevant market. ICANN is a participant in

21   each relevant market in that it collects fees that are either directly or ultimately borne by registrars

22   and registrants for each registration.

23   **23.**   ~~16.~~ VeriSign is the sole Registry for the .com and .net domains. As a result, any

24   arrangements Verisign enters into to control competition in the expired domain names market or

25   in the site finder market, or to fix prices, constitutes an unjustifiable use of monopoly power.

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VI.   INTERSTATE COMMERCE

2   **24.**   ~~17.~~ The conduct of defendants VeriSign and ICANN complained of herein will

3   take place in and affect interstate trade and commerce of the United States in that the purchases

4   and sales of services in the relevant markets are transacted across state lines.

5   **25.**   ~~18.~~ The conduct of defendants VeriSign and ICANN complained of herein will

6   directly, substantially, and foreseeably affect interstate trade and commerce in that defendants

7   will obstruct free and open competition in the .com and .net Registration Markets and in the

8   Expiring Names Registration Services Market.

9

10

VII.   BACKGROUND

11   **A.   THE INTERNET DOMAIN NAME SYSTEM**

12   **26.**   ~~19.~~ The Internet is a network of interconnected computers and computer networks.

13   Every computer connected directly to the Internet has a unique numerical address. These

14   addresses, which are known as Internet Protocol ("IP") addresses, are necessary for computers to

15   communicate with each other over the Internet. An example of an IP address is 64.233.161.147.

16   **27.**   ~~20.~~ Because numerical IP addresses can be cumbersome and difficult for Internet

17   users to remember or to use, the numerical IP address system has been overlaid with a more user-

18   friendly system of domain names, the Domain Name System or DNS.

19   **B.   DOMAIN NAME SYSTEM HIERARCHY**

20   **28.**   ~~21.~~ The DNS defines a hierarchical name space divided into zones, each of which

21   has authority over the zones below it. For purposes of the DNS, domain names are read from

22   right to left. The top zone is divided into top-level domains, or "TLDs" such as ".com" and

23   ".net." Each TLD is divided into second-level domains or "SLDs" such as "example.com" or

24   "example.net." Second-level domains can be further divided into third-level domains, such as

25   "another.example.com," and so on.

26   **29.**   ~~22.~~ A set of "root servers" provides a list of the registries responsible for

27   maintaining each TLD. For example, at present, the root servers tell users looking for .com or

28   .net domain names to find the location for that domain name on name servers operated by

1   VeriSign. For example, a user looking for google.com would be directed to VeriSign's .com

2   name server to find the entry for "google." The VeriSign server, in turn, would tell the user that

3   google could be found at the host identified by the address 64.233.161.147.

4   **30.**   ~~23.~~ There are currently two different types of TLDs: seventeen generic TLDs

5   ("gTLDs"): ".aero," ".biz" ".com," ".coop," ".info," ".jobs," ".mobi," ".museum," ".name,"

6   ".net," ".org," ".pro," ".travel," ".gov," ".edu," ".mil," and ".int" and approximately 240 two-

7   letter country code TLDs ("ccTLDs"), such as ".us," ".uk," ".jp," and ".kr."

8   **31.**   ~~24.~~ Because domain names are essentially "addresses" that allow computers

9   connected to the Internet to communicate with each other, each domain name must be unique,

10   even if it differs from another domain name by only one character (*e.g.*, "uscourts.com" is

11   different from "uscourt.com" or "us-courts.com"). A given domain name, therefore, can be

12   registered to only one entity.

13   **C.**   **REGISTRIES, REGISTRARS, AND REGISTRANTS**

14   **32.**   ~~25.~~ VeriSign acts as the "Registry" for domain names registered in the .com and

15   .net gTLDs in accordance with a written agreement with ICANN. As the Registry for the .com

16   and .net gTLDs, VeriSign maintains the definitive database that associates registered domain

17   names in these gTLDs with the corresponding IP numbers of their respective domain name

18   servers. The domain name servers, in turn, direct Internet queries to resources such as websites

19   and e-mail systems. This database is known as a "zone file." Oftentimes, the Registry is referred

20   to as a "Registry operator" and the zone file is referred to as the "Registry."

21   **33.**   ~~26.~~ A domain name is created by an individual or organization that registers the

22   domain name and thereby includes it in the zone file. The individual or organization that registers

23   a specific domain name is a "Registrant."

24   **34.**   ~~27.~~ Registrants do not have direct access to the VeriSign Registry and do not

25   interact directly with the Registry in connection with domain name registrations. Instead,

26   prospective registrants must register domain names through any one of over 130 private

27   companies located in the United States and throughout the world that act as domain name

28   "Registrars" for the second-level domain names in the .com and .net gTLDs.

1   **35.**   ~~28.~~ Internet users typically interact with the DNS through their Internet Service

2   Providers ("ISP"). Specifically, when a user requests a Web site associated with a domain name,

3   the user's computer searches its local cache for the IP address associated with that domain name.

4   If the IP address is not found locally, the computer will query the ISP's name server. If the ISP's

5   name server does not have the address for the domain name requested, it will query the

6   appropriate Registry's name server (*i.e*., its zone file), from which it will obtain the name and IP

7   address of the name server associated with the domain name requested. It will then query the

8   name server associated with the domain name, and pass the IP address back to the user's

9   computer.

10   **D.   COMPETITION FOR THE TLD REGISTRY AGREEMENTS**

11   **36.**   ~~29.~~ Historically, ICANN has sought to obtain the benefits of competition by

12   putting TLD registry agreements out for bid, and by selecting a registry operator on the basis of

13   the benefits to consumers in price and quality of service presented by each prospective registry

14   operator.

15   **37.**   ~~30.~~ In fact, one of the principal reasons ICANN was created was to enable

16   competition in the registration of domain names.

17   **38.**   ~~31.~~ As set forth more completely below, on July 1, 1997, as part of the Clinton

18   Administration's Framework for Global Electronic Commerce, the President directed the

19   Secretary of Commerce to privatize the domain name system (DNS) in a manner that increases

20   competition and facilitates international participation in its management.

21   **39.**   ~~32.~~ This Presidential directive resulted in a policy process that created ICANN.

22   One of the principal statements of United States policy behind the creation of ICANN was a

23   document released by the U.S. Department of Commerce on June 5, 1998, and titled

24   "Management of Internet Names and Addresses," Docket Number: 980212036-8146-02. This

25   document is often referenced by ICANN and the entities that are involved in ICANN as the

26   "White Paper." The White Paper specifically provided that the corporation which would become

27   ICANN should seek to use "Where possible, market mechanisms that support competition and

28

1   consumer choice." The United States believed that competition would "lower costs, promote

2   innovation, encourage diversity, and enhance user choice and satisfaction."

3   **40.**   ~~33.~~ This mandate to create competition is one of the core values currently written

4   into ICANN's by-laws ("In performing its mission, the following core values should guide the

5   decisions and actions of ICANN:…. (6) Introducing and promoting competition in the registration

6   of domain names where practicable and beneficial in the public interest.").

7   **41.**   ~~34.~~ Periodic bidding for the TLD registry agreements has yielded substantial

8   benefits for consumers. For example, VeriSign and others recently bid competitively for the right

9   to operate the .net registry beginning in July 2005. VeriSign's bid was selected as the winning

10   bid in part because VeriSign promised immediately to *lower* .net registration fees by more than

11   thirty percent.

12   **42.**   ~~35.~~ Because there can be only one registry operator at a time for each TLD

13   registry, there is no competition among prospective registry operators during the term of each

14   registry agreement. The only time there can be competition among prospective registry operators

15   is at the end of a registry agreement, when the next registry operator must be selected.

16   **43.**   ~~36.~~ The only competitive constraint on a TLD registry operator is the meaningful

17   prospect that the operator could lose the registry in the next round of bidding on the basis of

18   overcharging or poor performance during the current contract term.

19   **44.**   ~~37.~~ The threat of future competitive bidding not only constrains the TLD operator

20   at the moment when it bids, but also during its operation of the registry. A failure to act

21   reasonably and provide service on competitive terms and conditions throughout the contract term

22   poses a potential for the current operator to lose in future bidding competition for the TLD

23   registry agreement.

24   **45.**   ~~38.~~ Until June 2005, VeriSign had operated both the .net and the .com registries

25   under the competitive threat of future competitive bidding. When ICANN awarded the contract

26   for the .net registry to VeriSign in July 2005, however, ICANN and VeriSign eliminated all

27   realistic prospects that VeriSign would face competitive bidding for that registry in the future.

28   The new 2005 .net Agreement included a renewal provision that allowed ICANN to solicit

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1   competitive bids for the .net registry only if a court or arbitrator issued a non-appealable final

2   order finding VeriSign to be in breach of the agreement, and VeriSign failed to cure the breach.

3   The proposed 2006 .com Agreement challenged in this action includes an identical provision,

4   thereby eliminating all realistic prospect that VeriSign will face competitive bidding for the .com

5   registry in the future.

6   **E.   OTHER TLDs ARE NOT SUBSTITUTES FOR .COM AND.NET**

7   **46.**   ~~39.~~ The .com registry does not compete with other TLDs. The .net registry also

8   does not compete with other TLDs. The .com and .net registries cannot compete with each other

9   for an additional, separate reason: VeriSign controls both the .com and the .net registries.

10   **47.**   ~~40.~~ Consumers do not regard .com domain names as having reasonable substitutes

11   in any other top-level domain name registries. Demand cross-elasticities between .com domain

12   names, on the one hand, and domain names in other TLDs such as .net, .info, .biz and in country

13   code TLDs, are low. Decreases in the price of domain name registrations in other TLDs (such as

14   occurred on July 1, 2005 when .net domain name registration prices were cut by more than thirty

15   percent) do not result in price decreases for .com domain name registrations. As a promotional

16   device, .info domain names were given away for free for a significant period when that registry

17   first started to operate. During that time, there was no discernible number of registrants switching

18   from .com domain names to .info domain names. The prices that consumers are willing to pay

19   for .com domain name registrations in auctions substantially exceed the prices they are willing to

20   pay for domain name registrations in other TLDs when they are offered at auctions. For example,

21   during the past year, nine .com domain names sold for $600,000.00 or more, while the highest

22   selling .biz domain name was $15,000.00.

23   **48.**   ~~41.~~ Many .com domain name registrants regard domain names in other TLDs as

24   complements to, rather than substitutes for, .com domain name registrations and seek similar

25   domain name registrations in a number of TLDs. In fact, VeriSign itself has registered not only

26   "verisign.com" but also "verisign.net," "verisign.info," and "verisign.biz ," among others.

27   Moreover, most .com domain name registrants would experience overwhelming costs to switch

28   from a .com domain name registration to the complementary domain name in another TLD (for

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1   example, a switch from cook.com to cook.net or to cook.info), including potential lost traffic, e-

2   mails, and goodwill, as well as slippage in search engine results and costs associated with revising

3   letterhead, business cards, Internet listings, and websites. As a result, they would not regard

4   domain names in other TLDs as reasonable substitutes for domain names in the .com TLD.

5   **49.**   ~~42.~~ For many .com domain name registrants, their .com domain name has become

6   their trademark or trade name, such as "Amazon.com~~.~~" **and "Pool.com."** These registrants do

7   not regard domain names in other TLDs, such as "Amazon.net," to be reasonable substitutes for

8   their .com domain name registrations. For a company that has branded its online identity with a

9   .com domain name, the costs of changing that branding to a new TLD are enormous. For this

10   reason, .com registrants are locked into their use of the .com registry.

11   **50.**   ~~43.~~ .com domain names are the primary commercial domain names and dominate

12   the market for domain names registered for commercial purposes. There are in excess of

13   46,000,000 .com domain name registrations, which is 76 percent of domain names registered in

14   generic TLDs (.com, .net, .org, .info, and .biz) and roughly 46 percent of all domain names

15   registered in any TLD (including those registered in restricted TLDs such as .gov or .museum,

16   and the country code TLDs).

17   **51.**   ~~44.~~ Consumers likewise do not regard .net registrations as having reasonable

18   substitutes in any other top level domain name registries. Demand cross-elasticities between

19   domain names in the .net TLD, on the one hand, and domain names in other TLDs such as .com,

20   .info, .biz and country code TLDs, are low. The significant decrease in the registration fee for

21   .net domain names in July 2005 (more than thirty percent) did not result in significant numbers of

22   consumers switching to .net domain names from domain names in other TLDs. When .info

23   domain names were being given away for free when that registry first started to operate, there was

24   no discernible number of registrants switching from .net domain names to .info domain names.

25   The prices that consumers are willing to pay at auctions for .net domain name registrations

26   substantially exceed the prices they are willing to pay for domain names in all other TLDs when

27   they are offered at auction, with the sole exception of .com domain names. For example, during

28

1   the past year the highest selling .net domain name was $150,000.00, which more than double

2   what anyone was willing to pay for a domain name in the other TLDs (other than the .com TLD).

3   **52.**   ~~45.~~ As with registrants of .com domain names, many .net domain name registrants

4   use their .net domain name as their trademark or trade name, such as "earthlink.net." They would

5   be unwilling to incur the substantial switching costs involved in switching from their .net domain

6   name to a complementary domain name in another TLD (such as a switch from "att.net" to

7   "att.info"). Moreover, because .net domain names are the primary domain names used for

8   networking purposes and dominate the market for such names, they are commonly used by

9   Internet and e-mail service providers who could not easily substitute a domain name in an

10   alternative TLD without potentially disrupting traffic for thousands if not millions of customers.

11   Domain names in the .net TLD exceed 6,500,000, comprising 11 percent of all domain names

12   registered in unrestricted generic TLDs and roughly 7 percent of all registered domain names.

13   **53.**   ~~46.~~ There are a limited number of generic TLDs. A number of these generic

14   TLDs, such as .mil, .museum, and .travel, impose restrictions on who can register a domain name

15   in the TLD and the purpose for which such a domain name can be used . Other generic TLDs,

16   such as .org and .edu, are recognized by consumers as being used in connection with particular

17   purposes, such as non-profit organizations and educational institutions. None of these generic

18   TLDs compete with the .com or .net TLDs.

19   **54.**   ~~47.~~ The country codes TLDs do not compete with either the .com TLD or the .net

20   TLD. Many ccTLDs impose nexus requirements between the prospective registrant and the host

21   country for the ccTLD, preserving the idea that domain names in ccTLDs should be used by

22   individuals and entities that have a nexus with the host country. Some of these nexus

23   requirements can be quite onerous, for example, limiting domain name registrations to entities

24   formed or incorporated in the host country. Even in those cases where there is no nexus

25   requirement, a ccTLD is not viewed as a reasonable substitute for a .com or .net domain name for

26   individuals and entities who have no nexus with the host country because it could lead to

27   consumer confusion. For example, a company located in the United States would not view a

28   domain name registered in the Mexican TLD as a substitute for a domain name registered in the

1   .com or .net TLDs. Additionally, all country code TLDs are operated and managed outside of the

2   United States, and are therefore not subject to United States antitrust laws and statutes.

3   Registration with ccTLDs requires a Registrant to leave the borders and protection of the United

4   States. Therefore, these ccTLDs cannot be counted as part of the relevant market for determining

5   antitrust violations.

6   **F.   COMPETITION IN REGISTRATION OF EXPIRING NAMES**

7   **55.**   ~~48.~~ Qualified registrars are granted a limited number of connections to VeriSign's

8   registry computers, which they use to register domain names on behalf of registrants. To register

9   a new or expiring domain name, a registrar sends an "add" command to VeriSign's registry

10   computer for that domain name; if the name is available, the "add" command is accepted, and the

11   domain name is registered on behalf of a registrant.

12   **56.**   ~~49.~~ There currently exists a competitive marketplace for obtaining expired domain

13   names. ~~This market~~

14   **57.   Expired domain names become available for a variety of reasons.**

15   **58.   As domain name registrations age, the likelihood that a registrant dies or**

16   **becomes uninterested in maintaining an Internet presence increases. Over time, every**

17   **individual who has registered a domain name will die. Those domain names eventually will**

18   **fall into the market for expiring domain names.**

19   **59.   For commercial registrations, most businesses started in the United States,**

20   **and elsewhere, fail with a few years from the time they are created. Commercial**

21   **registrations from failed businesses are not renewed and eventually will fall into the market**

22   **for expiring domain names.**

23   **60.   Many commercial registrations center on specific product lines or**

24   **promotions. Oftentimes, these products or promotions have a limited lifetime, and the**

25   **domain name registrant may decide not to renew the domain name once the immediate**

26   **need for it has passed. Such domain names eventually will fall into the market for expiring**

27   **domain names.**

28

1   **61.   Both individuals and corporations commonly register domain names for time-**

2   **specific events, such as meetings, conferences, concerts, picnics, etc. Once the event has**

3   **passed, the registrant may decide not to renew the domain name. Such domain names**

4   **eventually will fall into the market for expiring domain names.**

5   **62.   Expiring domain names have more value than newly registered domain**

6   **names in part because they have been advertised by the previous registrant and/or because**

7   **websites associated with the domain name have been indexed by search engines. This**

8   **means that expiring domain names typically have visitors to, links to, and traffic to the web**

9   **sites and other Internet services associated with the domain name. Such Internet traffic**

10 **makes it easier for a new domain name registrant to monetize the domain name registration**

11 **by associating advertisements or other services with the domain name.**

12 **63.   Expiring domain names also often have more value than newly registered**

13 **domain names because they were registered at a time when good, short domain names were**

14 **less scarce.   For example, every dictionary word in English was registered many years in**

15 **the past. Currently, the only way to register a common dictionary word in the .com TLD is**

16 **to buy it directly from its current registrant or acquire the domain registration in the**

17 **expiring domains market.**

18 **64.   This market for expired domain names** is comprised of back order service

19 providers, who compete to provide the lowest prices and highest quality service to customers

20 seeking to register recently-expired domain names. Many companies, such as SnapNames and

21 Pool.com, compete in this Expiring Names Registration Services Market. Back-order service

22 providers compete on the basis of price and on quality of service to obtain customers who are

23 seeking recently-expired domain names. Price competition has at times been fierce. For

24 example, at one time SnapNames charged approximately $60 to a customer seeking an expired

25 domain name irrespective of whether SnapNames was ultimately successful in obtaining the

26 domain name for the customer.

27 **65.**   ~~50.~~ Pool.com introduced "pay-for-performance" as a competitive initiative,

28 offering a back order service for which the customer paid only if it obtained the domain name for

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1 the customer. The competitive market has largely adopted "pay-for-performance." In order to

2 attract customers, back order service providers have had to compete on quality of service. The

3 more effective a back order service provider is in obtaining domain names, the more customers it

4 attracts, resulting in more income. Consumers have benefited in both price and quality of service

5 from competition in the Expiring Name Registration Services Market.

6   **66.   Verisign understands and appreciates that the market for expiring domain**

7 **names is a separate and distinct market from the market for new registrations.**

8

9 **G.   HISTORY OF gTLD DOMAIN NAME ADMINISTRATION**

10   **67.   51.** Today's Internet has its origin in a network called the ARPAnet which was

11 launched by the Department of Defense ("DOD") in 1969. ARPAnet was later linked to other

12 networks established by various government agencies, universities, and research facilities. In

13 1990, NSFnet, the network developed by the National Science Foundation superseded ARPAnet.

14   **68.   52.** In 1992, Congress passed the Scientific and Advanced-Technology Act of

15 1992, 42 U.S.C. § 1862(g), which allowed commercial activity on NSFnet and permitted NSFnet

16 to interconnect with commercial networks.

17   **69.   53.** In 1993, NSF signed a cooperative agreement with Network Solutions ("NSI")

18 under which NSI became the exclusive registrar for second-level domains in .com, .net, .org, and

19 .edu, as well as the exclusive Registry operator for each of those top-level domains. The NSF

20 initially underwrote NSI's domain registration services, thereby allowing Internet users to register

21 domain names free of charge. However, on or about September 13, 1995, NSF and NSI entered

22 into Amendment 4 of the cooperative agreement, which permitted NSI to charge Internet users

23 $100 for a two-year registration of a second-level domain in the .com, .net, and .org domains.

24 Thirty percent of the registration fees were to be paid into an NSF Infrastructure fund. In April

25 1998, the portion of the fee allocated to the Infrastructure fund was held to constitute an

26 unconstitutional tax, and the effective rate for domain registrations dropped to $35 per year.

27   **70.   54.** On July 1, 1997, the Clinton administration issued a report on electronic

28 commerce, "*A Framework for Global Electronic Commerce*." The report supported private

1   efforts to address Internet governance and made the Department of Commerce ("DOC") the lead

2   agency on this initiative. Accompanying the report was a presidential directive that called on the

3   DOC to "support efforts to make the governance of the domain name system private and

4   competitive and to create a contractually based self-regulatory regime that deals with potential

5   conflicts between domain name usage and trademark laws on a global basis." To carry out this

6   mission, the DOC first issued a Request for Comment on DNS administration, and then on

7   February 20, 1998, it published "*Proposal to Improve Technical Management of Internet Names*

8   *and Addresses*" (commonly referred to as the "Green Paper").

9   **71.**   55. After receiving more than 650 comments, the DOC ended the proposed

10 rulemaking and instead published on June 10, 1998, a policy statement also known as the "White

11 Paper." The White Paper, reflecting the views of the overwhelming majority of comments, called

12 upon the private sector to create a new, not-for-profit corporation to assume responsibility, over

13 time, for the management of certain aspects of the DNS. The White Paper identified four specific

14 functions to be performed by this new corporation: (i) To set policy for and direct the allocation

15 of Internet Protocol number blocks; (ii) To develop overall policy guidance and control of top-

16 level domains and the Internet root server system; (iii) To develop policies for the addition,

17 allocation, and management of gTLDs, and the establishment of domain name registries and

18 domain name registrars and the terms, including licensing terms, applicable to new and existing

19 gTLDs and registries under which registries, registrars, and gTLDs are permitted to operate; and

20 (iv) To coordinate maintenance and dissemination of the protocol parameters for Internet

21 addressing. The White Paper also articulated the fundamental policies that would guide United

22 States participation in the transfer of DNS management responsibility to the private sector:

23 stability; competition; private, bottom-up coordination; and representation.

24   **72.**   56. The White Paper listed a number of tasks to be undertaken on a priority basis,

25 including, in particular, the creation and organization of a new, not-for-profit corporation

26 ("NewCo") to manage the DNS and the rapid introduction of competition in the provision of

27 domain name registration services. The Department of Commerce committed to enter into an

28 agreement with NSI by which NSI would agree to take specific actions, including commitments

1 as to pricing and equal access, designed to permit the development of competition in domain

2 name registration.

3   **73.** ~~57.~~ In fulfillment of the commitment expressed in the White Paper, on October 7,

4 1998, the DOC and NSI entered Amendment 11 to the Cooperative Agreement. In Amendment

5 11, NSI agreed to recognize NewCo "when recognized by the [DOC] in accordance with the

6 provisions of the Statement of Policy." NSI further committed to enter into a contract with

7 NewCo, and acknowledged "that NewCo will have the authority, consistent with the provisions of

8 the Statement of Policy and the agreement between the [DOC] and NewCo, to carry out NewCo's

9 Responsibilities." Under Amendment 11, "NewCo's Responsibilities" specifically include the

10 establishment and implementation of DNS policy and the terms, including licensing terms,

11 applicable to new and existing gTLDs and registries under which registries, registrars and gTLDs

12 are permitted to operate." Amendment 11 also provided for the development, deployment, and

13 licensing by NSI (under a license agreement to be approved by the Department of Commerce) of

14 a mechanism to allow multiple registrars to submit registrations for the gTLDs for which NSI

15 acted as the Registry (the "Shared Registration System," or "SRS").

16 **H.   ICANN'S ROLE IN THE INTERNET DOMAIN NAME SYSTEM**

17   **74.** ~~58.~~ In September 1998, Defendant Internet Corporation for Assigned Names and

18 Numbers was formed. ICANN is a non-profit public benefit corporation organized without

19 members pursuant to California Corporation Code § 5110 et. seq. According to its by-laws, the

20 board of directors of ICANN controls it.

21   **75.** ~~59.~~ In October 1998, ICANN transmitted to the Department of Commerce a copy

22 of its articles of incorporation, and proposed by-laws. In November 1998, the DOC entered into a

23 Memorandum of Understanding ("MOU") with ICANN that recognized ICANN as the new, now

24 completely independent, not-for-profit corporation for DNS management and specifically

25 contemplated ultimate transition of management responsibility to ICANN. The MOU expressly

26 identified the promotion of competition in the DNS as one of its central principles.

27   **76.** ~~60.~~ In the MOU, ICANN expressly agreed to abide by principles of stability,

28 competition, private, bottom-up coordination, and representation:

1   C. The Principles:

2   The parties will abide by the following principles:

3   1. Stability

4
    This Agreement promotes the stability of the Internet and allows
the Parties to plan for a deliberate move from the existing structure
5   to a private-sector structure without disruption to the functioning of
the DNS. The Agreement calls for the design, development, and
6   testing of a new management system that will not harm current
functional operations.
7
    2. Competition
8
    This Agreement promotes the management of the DNS in a manner
9   that will permit market mechanisms to support competition and
consumer choice in the technical management of the DNS. This
10   competition will lower costs, promote innovation and enhance user
choice and satisfaction.
11
    3. Private, Bottom-Up Coordination
12
    This Agreement is intended to result in the design, development,
13   and testing of a private coordinating process that is flexible and able
to move rapidly enough to meet the changing needs of the Internet
14   and of Internet users. This Agreement is intended to foster the
development of a private sector management system that, as far as
15   possible, reflects a system of bottom-up management.

16   4. Representation.

17
    This Agreement promotes the technical management of the DNS in
a manner that reflects the global and functional diversity of Internet
18   users and their needs. This Agreement is intended to promote the
design, development, and testing of mechanisms to solicit public
19   input, both domestic and international, into a private-sector decision
making process. These mechanisms will promote the flexibility
20   needed to adapt to changes in the composition of the Internet user
community and their needs.
21

22   **77.**   ~~61.~~ The MOU also obligated ICANN to "act in a non-arbitrary and reasonable

23   manner with respect to design, development, and testing of the DNS Project and any other

24   activity related to the DNS Project," and to refrain from acting "unjustifiably or arbitrarily to

25   injure particular persons or entities or particular categories of persons or entities."

26   **78.**   ~~62.~~ Under the MOU, ICANN exclusively awards the generic and country code

27   TLD registry agreements, including the registry agreements for the .com and .net TLDs.

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1   **79.**   63. The original MOU was scheduled to terminate on September 30, 2000, and

2   has been amended six times. The most recent amendment, which was entered into on or around

3   September 17, 2003, is scheduled to terminate on September 30, 2006. In this amendment, the

4   DOC reaffirmed "its policy goal of privatizing the technical management of the DNS in a manner

5   that promotes stability and security, competition, coordination, and representation."

6   **80.   Most recently, ICANN and the United States Department of Commerce**

7   **extended their agreement by means of a Joint Project Agreement ("JPA"). This new JPA**

8   **reaffirmed ICANN's operational principles, including that ICANN foster and enable**

9   **"competition."**

10   **81.**   64. ICANN's by-laws also explicitly recognize "core values," which "should

11   guide the decisions and actions of ICANN," including:

12   1.   "Where feasible and appropriate, depending on market mechanisms to

13   promote and sustain a competitive environment."

14   2.   "Introducing and promoting competition in the registration of domain

15   names where practicable and beneficial in the public interest."

16   **82.**   65. Within the mandate contained in the MOU, ICANN has had and continues to

17   have very broad discretion over how it fulfills its obligations under the MOU. The DOC no

18   longer has any control over the workings of ICANN, nor does it actively influence ICANN's

19   decision-making procedures. The DOC has recognized that ICANN is subject to federal anti-trust

20   laws.

21   **I.   ICANN'S AGREEMENTS WITH VERISIGN**

22   **1.   The 2001 .com and .net Agreements ("the 2001 Registry Agreements")**

23   **83.**   66. On or about November 10, 1999, NSI and ICANN entered into a written

24   Registry Agreement (the "1999 Registry Agreement") with respect to NSI's operation of the

25   Registry for the .com and .net gTLDs.

26   **84.**   67. On or about May 25, 2001, VeriSign and ICANN entered into the 2001 .com

27   Agreement with respect to VeriSign's operation of the .com registry and the 2001 .net Agreement

28

1   with respect to VeriSign's operation of the .net registry. The 2001 Registry Agreements

2   superseded the 1999 Registry Agreement with NSI.

3   **85.**   ~~68.~~ In accordance with the 2001 Registry Agreements, Verisign undertook to

4   operate the .com and .net gTLD registry and to pay certain registry-level fees to ICANN.

5   Verisign is the sole registry for the .com and .net gTLDs and therefore maintains a monopoly

6   over the .com and .net gTLDs.

7   **86.**   ~~69.~~ The 2001 .com Agreement is set to expire on November 10, 2007, but

8   provides that VeriSign may submit a written proposal to extend the agreement between

9   November 10, 2005, and May 10, 2006. ICANN is required to consider this proposal for a period

10   not to exceed six (6) months "before deciding whether to call for competing proposals from

11   potential successor registry operators." VeriSign "shall be awarded a four-year renewal term"

12   unless ICANN determines that VeriSign is in material breach of the 2001 .com Agreement, or the

13   proposal to extend the agreement contains a maximum price that exceeds the price allowed under

14   Section 22 of the 2001 .com Agreement or certain other conditions apply. This four-year renewal

15   term, if granted, would expire on November 10, 2011.

16   **87.**   ~~70.~~ VeriSign has repeatedly breached the terms of the 2001 .com Agreement, and

17   ICANN itself has sought to redress certain of VeriSign's breaches in litigation against VeriSign.

18   These breaches give ICANN the right to seek competitive bids to replace VeriSign at the

19   expiration of the current term, or even earlier. The MOU's mandate that ICANN support

20   competition requires it to exercise its right to seek competitive bids because of VeriSign's

21   repeated breaches.

22   **88.**   ~~71.~~ VeriSign and ICANN have agreed to bypass this process by entering into a

23   new .com Registry Agreement that will replace the current .com Registry Agreement prior to its

24   expiration. In the new 2006 .com Agreement, negotiated and agreed to by defendants, VeriSign

25   is proposing to set a new maximum price for domain name registrations that exceeds the price

26   allowed under Section 22 of the 2001 .com Agreement. If VeriSign had proposed this pricing

27   change to ICANN as part of a written proposal to extend the 2001 .com Agreement (as

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1   contemplated by that agreement), ICANN would have had the right, and (because of the MOU)

2   the obligation, to seek competitive bids for the .com registry.

3   **89.**   ~~72.~~ The 2001 .net Agreement also allowed for competitive bidding, which took

4   place in advance of its expiration on June 30, 2005. That agreement established a procedure by

5   which ICANN was to select as a successor operator of the .net registry "the eligible party that it

6   reasonably determines is best qualified to perform the registry function . . . taking into account all

7   factors relevant to the stability of the Internet, promotion of competition, and maximization of

8   consumer choice . . . ."

9   **90.**   ~~73.~~ Under both the 2001 .com Agreement and the 2001 .net Agreement, VeriSign

10   is required to provide "Registry Services" to ICANN-accredited registrars in a manner meeting

11   the performance and functional specifications attached to the agreement. "Registry Services" are

12   defined in the 2001 .com Agreement as follows:

13   "Registry Services" means services provided as an integral part of
     the Registry TLD, including all subdomains. These services
14   include: receipt of data concerning registrations of domain names
     and nameservers from registrars; provision to registrars of status
15   information relating to the Registry TLD zone servers,
     dissemination of TLD zone files, operation of the Registry zone
16   servers, dissemination of contact and other information concerning
     domain name and nameserver registrations in the Registry TLD,
17   and such other services required by ICANN through the
     establishment of Consensus Policies as set forth in Definition 1 of
18   this Agreement.

19
     The 2001 .net Agreement contains a substantially similar definition of "Registry Services."
20
     91.   ~~74.~~ Under both the 2001 .com Agreement and the 2001 .net Agreement, VeriSign
21
     is also obligated to comply with "Consensus Policies," which consist of specifications and
22
     policies established on the basis of a consensus among Internet stakeholders represented in the
23
     ICANN process, as demonstrated by compliance with detailed procedures prescribed in the
24
     agreement.   The consensus policy limits VeriSign's ability to exact monopoly pricing or other
25
     monopoly terms.
26
     92.   ~~75.~~ The 2001 .com Registry Agreement defines "Consensus Policies" as
27
     consisting of those specifications and policies established on the basis of a consensus among
28

1   Internet stakeholders represented in the ICANN process, as demonstrated by compliance with

2   specific, detailed procedures prescribed in the agreement. Exh. 1, section I.1.

3   **93.**   ~~76.~~ The 2001 Registry Agreements set forth "General Obligations of Registry

4   Operator [VeriSign]."   VeriSign generally is obligated to comply with Consensus Policies if,

5   among other requirements, they are properly adopted by ICANN and consistent with ICANN's

6   other contractual obligations, and (A) they "do not unreasonably restrain competition"; and (B)

7   relate to "(1) issues for which uniform or coordinated resolution is reasonably necessary to

8   facilitate interoperability, technical reliability, and/or stable operation of the Internet or DNS, (2)

9   Registry policies reasonably necessary to implement Consensus Policies relating to registrars, or

10   (3) resolution of disputes regarding the registration of domain names (as opposed to the use of

11   such domain name)." Exh. 1, section II.

12   **94.**   ~~77.~~ In an effort avoid federal antitrust violations by VeriSign, the 2001 .com

13   Registry Agreement further sets forth the following "General Obligations of ICANN." "With

14   respect to all matters that impact the rights, obligations, or role of Registry Operator," the

15   agreement explicitly provides that ICANN shall, among other obligations: (i) "exercise its

16   responsibilities in an open and transparent manner," (ii) "not unreasonably restrain competition

17   and, to the extent feasible, promote and encourage robust competition. . . ." As discussed below,

18   these goals were abandoned in the 2005 .net and 2006 .com Registry Agreements. Exh. 1, section

19   II.4.

20   **95.**   ~~78.~~ Appendix G to both the 2001 .com Agreement and the 2001 .net Agreement

21   sets forth the maximum prices VeriSign can charge for specified services. Among other things,

22   Appendix G sets a maximum price of six dollars ($6.00) per year for registration of a domain

23   name and six dollars ($6.00) per year for renewal or extension of the registration of a domain

24   name. In addition, for each one-year domain name registration a "registry-level transaction fee"

25   of $0.25 is charged and paid to ICANN. Under the 2001 .com Agreement, a registrar currently

26   pays $6.00 per year to register each domain name registered with VeriSign. The registrar also

27   pays $0.25 to ICANN for the registry-level transaction fee. Any amount above $6.25 that is

28   charged to the registrant is kept by the registrar. On information and belief, VeriSign has always

1   charged the maximum price allowed under the 2001 .com Agreement and 2001 .net Agreement to

2   register a .com or .net domain name. Thus, the maximum price has been more than a price cap; it

3   has been the *de facto* price.

4   **96.**   ~~79.~~ Appendix I to both the 2001 .com Agreement and the 2001 .net Agreement

5   includes a Code of Conduct. Under the Code of Conduct, VeriSign is obligated to "at all times

6   strive to operate as a trusted and neutral third-party provider of Registry Services." Among other

7   obligations, the Code of Conduct requires VeriSign to treat all ICANN-accredited registrars

8   equally and to give them equivalent access to the registry and prohibits VeriSign from

9   warehousing or registering domain names in its own right other than through an ICANN-

10   accredited registrar.

11   **2.**   **The Unlawful and Anticompetitive 2005 Registry Agreements**

12   **97.**   ~~80.~~ Unrestrained by any competition, ICANN and VeriSign have now abandoned

13   their commitments to avoid unreasonable restraints of trade and promote fair competition in the

14   "Covenants" or "General Obligations" to this effect.

15   **98.**   ~~81.~~ Moreover, VeriSign is now using its monopoly power to raise prices above

16   their natural level and permit VeriSign to leverage their power into other markets. The antitrust

17   and unfair competition laws were enacted to prohibit this very conduct.

18   **99.**   ~~82.~~ Defendants have agreed to eliminate the competitive constraints imposed by

19   the competitive bidding process, the Consensus Policies and the Code of Conduct, and thereby to

20   secure for VeriSign an unlawful monopoly in each of the relevant markets. Pursuant to the

21   conspiracy, ICANN allowed VeriSign to alter substantial terms of its bid for the 2005 .net

22   Agreement, after the bid was accepted by ICANN and after bidding was closed to other

23   participants. The conspiracy led to the implementation of the monopolistic provisions in the 2005

24   .net Agreement, and also includes an understanding between the conspirators as to the terms for

25   the .com Registry Agreement.

26   **100.**   ~~83.~~ The objectives of the unlawful conspiracy are to replace the 2001 .com and

27   .net Agreements with successor agreements that eliminate permanently all vestiges of competition

28   in the operation of these two registries and in the Relevant Markets; to secure for VeriSign free

1   reign to impose supracompetitive prices for registrations of domain names in the .com and .net

2   TLDs; to free VeriSign from current limitations that prevent it from leveraging monopolies in

3   downstream and adjacent markets; and to divide between VeriSign and ICANN the monopoly

4   profits achieved by operation of the conspiracy.

5   **101.** ~~84.~~ ICANN and VeriSign have agreed (a) to extend the term of VeriSign's control

6   of the .com registry for an additional five years beyond the termination date under the current

7   2001 .com Agreement, in violation of its terms and without ever submitting the renewal to any

8   sort of competitive bidding; (b) to eliminate any meaningful prospect that VeriSign will ever have

9   to compete to operate the .net registry or the .com registry or that there will be any competitive

10   bidding to operate either of them; (c) to increase the overall prices to consumers of domain names

11   in the .com and .net TLDs; (d) to assure that any contractual price caps will be identical to the

12   actual prices by having eliminated any competitive constraint on VeriSign in the relevant

13   markets; (e) to free VeriSign to launch preemptive services that, by virtue of its control of the

14   .com and .net registries, will eliminate rivalry and permit VeriSign to exploit a complete

15   monopoly over traffic data and other resources it has never paid or competed for the right to

16   exploit; and (f) to provide mechanisms by which ICANN shares in the resulting monopoly profits.

17   **102.** ~~85.~~ **Elimination of Competitive Bidding.** Under the terms of the conspiracy,

18   ICANN has agreed to divest itself of any meaningful ability to require VeriSign to bid for a

19   renewal term against competing registry operators for the .com TLD. Under the existing 2001

20   .com Agreement, ICANN has the right to require VeriSign to bid for a renewal term to begin in

21   November 2007. Under the MOU between ICANN and the Department of Commerce, ICANN is

22   required to avail itself of every available opportunity to harness competition for the benefit of

23   consumers and the Internet.

24   **103.** ~~86.~~ The 2006 .com Registry Agreement provides for the automatic renewal of the

25   agreement, *inter alia*, as follows:

26   Renewal. This Agreement shall be renewed upon the expiration of
               the term set forth in Section 4.1 above and each later term, unless
27   the following has occurred : (i) following notice of breach to
               Registry Operator in accordance with Section 6.1 and failure to cure
28   such breach within the time period prescribed in Section 6.1, an

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arbitrator or court has determined that Registry Operator has been in fundamental and material breach of Registry Operator's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2 or Section 7.3 and (ii) following the final decision of such arbitrator or court, Registry Operator has failed to comply within ten days with the decision of the arbitrator or court, or within such other time period as may be prescribed by the arbitrator or court.

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Upon renewal, in the event that the terms of this Agreement are not similar to the terms generally in effect in the Registry Agreements of the 5 largest gTLDs (determined by the number of domain name registrations under management at the time of renewal), renewal shall be upon terms reasonably necessary to render the terms of this Agreement similar to such terms in the Registry Agreements for those other gTLDs. The preceding sentence, however, shall not apply to the terms of this Agreement regarding the price of Registry Services…Upon renewal, Registry-Level Transaction Fees may be reasonably modified so long as any increase in such fees shall not exceed the average of the percentage increase in Registry-Level Transaction Fees for the 5 largest gTLDs (determined as for the 5 largest gTLDs (determined as above), during the prior three-year period.

12   **104.** **87.** ICANN's conspiratorial agreement to waive its right to impose competitive

13   bidding with respect to operation of the .com registry, and to violate its contract with the federal

14   government, is a keystone of the overall conspiracy with VeriSign. ICANN has similarly

15   conspired with VeriSign to eliminate future competitive bidding for operation of the .net registry.

16   In 2005, competitive bidding for the .net registry yielded a reduction in the price for .net domain

17   name registrations that was in excess of thirty percent. ICANN's and VeriSign's conspiracy

18   eliminates this possibility in the future.

19   **105.** **88.** **Increasing Prices.** The conspiracy increases significantly the prices that

20   VeriSign will charge for .com and .net domain name registrations. The conspiracy also, in effect,

21   raises the amounts that registrants ultimately bear for the registry level transaction fees paid to

22   ICANN. By eliminating periodic rivalry to run the registry, VeriSign will be unconstrained in

23   setting prices and will charge the maximum cap allowed by the terms of the conspiracy.

24   **106.** **89.** The 2006 .com Registry Agreement affects prices by not only redrafting the

25   previous provisions for maximum price, but also redefining which terms are included in the

26   maximum price. In the 2006 .com Registry Agreement VeriSign and ICANN effectively fix the

27   price for .com domain name registration at $6 through December 31, 2006, and further conspire

28   to permit VeriSign to permanently raise the price of .com registration 7% for four out of the next

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1   six years.   This price exceeds the historical rate of inflation and is greater than what a fair market

2   would otherwise bear.[2]

3   **107.**   ~~90.~~ Furthermore, the 2006 .com Registry Agreement specifically excludes the

4   "registry-level transaction fee" from the definition of the maximum price. Therefore, the actual

5   price is not simply $6.00 plus the ICANN sanctioned 7% increase in four of the next six years,

6   but these two terms plus the registry-level transaction fee. Exh. 2, section 7.3(d). Under the

7   terms of the 2006 .com Registry Agreement, the increase in the registry-level transaction fee is an

8   automatic process. The Agreement makes no provision for registrars and Internet stakeholders to

9   provide any input into the process. *Id*.

10   **108.   VeriSign and ICANN each believe that VeriSign could raise prices to the**

11   **maximum permitted by the caps under .com and to any price whatsoever under .net**

12   **without running afoul of the antitrust laws.**

13   **109.**   ~~91.~~ In addition, pursuant to the conspiracy, the 2005 .net Agreement provides for

14   higher prices in the future for new or renewal domain name registrations in the .net TLD. Until

15   December 31, 2006, the maximum price is set at $4.25, which includes a $0.75 Registry-Level

16   Transaction Fee that is paid to ICANN by the registrars. Beginning in 2007, the price controls set

17   forth in the 2005 .net Registry Agreement will be eliminated. Without the constraint of

18   competitive bidding, VeriSign will be free to impose, and will impose, monopoly pricing on .net

19   domain name registrations.

20   **110.**   ~~92.~~ **Monopoly Leveraging.** The conspiracy also suspends the application of

21   Consensus Policies, contractual restrictions and competitive constraints that otherwise could limit

22   VeriSign's freedom to exact monopoly profits from the relevant markets that are downstream and

23   adjacent to the relevant markets for .com and .net domain name registrations.

24

25   [2] In the 2005 .net Registry Agreement, entered into on June 29, 2005, ICANN and VeriSign agree to set the price for
     new and renewed domain name registrations at $4.25. The Agreement then goes on to say that, effective January 1,

26   2007, the "controls on [VeriSign's] pricing set forth in this Agreement shall be eliminated…." Exh. 3, section 7.3.
     Virtually the only restriction the Agreement places on pricing is that all registrars be equally subject to the price

27   VeriSign sets and treated equally under any incentive programs VeriSign offers. The unfettered ability to raise prices
     indefinitely demonstrates the collusive manipulation and control which ICANN and VeriSign are perpetrating. Only

28   with certain monopolistic control over the market could the two defendants create such an agreement.

1   **111.**   ~~93.~~ The 2006 .com Registry Agreement sets forth a "Process for Consideration of

2   Proposed Registry Services" whereby ICANN makes a preliminary determination as to whether a

3   Registry Service "(i) could raise significant Security or Stability issues; or (ii) could raise

4   significant competition issues."   If ICANN determines that the proposed Registry Service raises

5   significant competition issues, then it must refer the issue "to the appropriate governmental

6   competition authority." If ICANN finds that no competition concerns exist, VeriSign is permitted

7   to provide the new Registry Service.

8   **112.**   ~~94.~~ Thus, VeriSign will be free to launch the very services, among others, that

9   ICANN and the Internet community have previously thwarted on competitive grounds, including

10   services that would displace the competitive back order services market (such as VeriSign's

11   proposed Central Listing Service ("CLS") or Wait List Service ("WLS")) or similar services. The

12   conspiracy allows VeriSign to mine the economic value of all unregistered domain names by

13   monitoring traffic data (which allows VeriSign to see which unregistered names Internet users

14   attempt to visit), eliminating all forms of competition for which competitive and fair access to this

15   data is necessary. The 2006 .com Agreement permits VeriSign to use its exclusive access to this

16   traffic data for its own commercial benefit, including to promote the sale of domain names.

17   **113.**   ~~95.~~ One of the services VeriSign intends to re-launch under the conspiracy is a

18   modified and expanded version of the Wait List Service, which it has renamed the Central Listing

19   Service ("CLS") **(hereafter, both the Waiting List Service and the Central Listing Service**

20   **are identified as "CLS")**. On information and belief, VeriSign intends to launch CLS as soon as

21   possible. The CLS service will affect the manner in which expired .com domain names are

22   released to the public. Under the current system, when a .com domain name is not renewed by

23   the registrant, VeriSign automatically renews it upon expiration and gives the registrar up to

24   forty-five days to inform the registry that the domain name is to be deleted. Once the registrar

25   confirms with the registry that the domain name is to be deleted, the domain name enters the

26   redemption grace period. During this period, a registrant who failed to renew its domain name

27   may do so upon payment of a fee above the standard registry fee. At the end of the redemption

28   grace period, the domain name is added to the pending delete file and all of the registrars are

1   notified that it is pending deletion. At that point, the registrars may use their back order service

2   providers to try to register the domain name on behalf of their registrants.

3   **114.** ~~96.~~ Under the proposed CLS service, the pending delete period, as well as the

4   daily release of deleted domain names, will be eliminated. Instead, VeriSign will notify all

5   registrars who have signed the CLS service agreement of the domain names to be deleted, and

6   will hold a five-day auction for all of the domain names. If there are no bids on a particular

7   domain name, it will be released by VeriSign and can be registered as with any other previously

8   unused domain name. If there is a successful bid for the domain name, VeriSign will deduct the

9   bid amount (plus the registry fee and any ICANN fees) from the successful registrar's account

10 and the domain name will enter a ten-day grace period designed to permit the registrar to collect

11 the bid amount from the successful registrant to complete the auction. Although a registrar has no

12 ownership interest in a domain name, if the registrar that released the domain name has signed the

13 CLS agreement, then the registrar will receive ninety percent of the auction bid. VeriSign will

14 receive the remaining ten percent.

15 **115.** ~~97.~~ The 2006 .com Agreement would create a new definition of "Consensus

16 Policies," including new limitations on what policies can be "Consensus Policies." The effect of

17 the new limitations on "Consensus Policies" is to restrict the ability of Internet stakeholders other

18 than VeriSign to require VeriSign to act in the interest of the entire Internet community and

19 consistently with the pro-competitive mandate of the Department of Commerce MOU.

20 **116.** ~~98.~~ In conspiring with VeriSign to allow VeriSign to leverage its monopoly,

21 ICANN intentionally abdicated its responsibility under the MOU to support competition and to

22 ensure that new proposed registry services are not anticompetitive. As part of the 2006 .com

23 Agreement, ICANN swears off any attempt to review the competitive effect of any proposed

24 registry service. As a result, anticompetitive services that ICANN previously resisted, and new

25 services that ICANN should resist under the MOU's pro-competition mandate, would be

26 approved under the 2006 .com Agreement. Under this agreement, if ICANN determines that the

27 proposed registry service "might raise significant competition issues, ICANN shall refer the issue

28 to the appropriate governmental competition authority." The agreement further provides that

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1 "[f]ollowing such referral, ICANN shall have no further responsibility, and [VeriSign] shall have

2 no further obligation to ICANN, with respect to any competition issues relating to" the proposed

3 registry service.

4 **117.** ~~99.~~ **ICANN's Economic Motives to Conspire.** ICANN is motivated to enter into

5 the conspiracy by economic factors.

6 **118.** First, the conspiracy provides for ICANN to share in the monopoly profits,

7 including among other things, through the payment by VeriSign to ICANN of a "registry level

8 fee," beginning at $6 million dollars per year and increasing over the next two years to potentially

9 in excess of $12 million dollars per year.

10 **119.** Second, VeriSign has put ICANN in financial jeopardy through a stream of costly

11 and aggressive litigation: VeriSign brought claims in federal court that were dismissed without

12 prejudice; filed similar claims again in federal court that were dismissed with prejudice;

13 proceeded to file for a third time in state court; and has also proceeded in arbitration against

14 ICANN.

15 **120.** ICANN has acquiesced to VeriSign's pressure to conspire, and ICANN has further

16 been lured by the share of monopoly profits that it will receive from VeriSign's operations of the

17 .net and .com registries.

18 **121.** In addition, the 2005 .net Agreement provides for a maximum price per year for

19 each new or renewal domain name registration. Until December 31, 2006, the maximum price is

20 set at $4.25, which includes a $0.75 Registry-Level Transaction Fee that is paid to ICANN by the

21 registrar. The increase in the "Registry-Level Transaction Fee" from $0.25 under the 2001 .net

22 Agreement to $0.75 under the 2005 .net Agreement allows ICANN to share in the monopoly

23 profit generated by VeriSign's and ICANN's conspiracy.

24 **122.** ~~100.~~ The conspiracy hands VeriSign an additional windfall by relieving it of its

25 obligation under the 2001 .com Agreement to expend a minimum of two hundred million dollars

26 ($200,000,000) "for research, development, and infrastructure improvements to the .com, .net,

27 and .org Registries" between May 25, 2001, and December 31, 2010.

28

1   **123.**   ~~101.~~ The conspiracy also frees VeriSign from the Code of Conduct in Appendix I

2   to the 2001 .com Agreement.

3

4   **VIII.   ICANN'S AND VERISIGN'S ANTICOMPETITIVE, EXCLUSIONARY AND**

5   **PREDATORY CONDUCT IN THE RELEVANT MARKETS**

6   **124.**   ~~102.~~ The history of ICANN's oversight of the Internet domain name system has

7   seen an ever-expanding empire-building by VeriSign, most recently with ICANN's capitulation.

8   **125.**   VeriSign has repeatedly taken steps to expand its limited-duration contractual

9   monopoly over the registry itself into a permanent monopoly over that registry and over markets

10   for various domain name services. VeriSign's misconduct has included in several instances

11   outright breaches of its contracts with ICANN. Indeed, these breaches have led to litigation

12   between VeriSign and ICANN in which ICANN brought a counterclaim alleging that VeriSign

13   was in violation of material provisions of its contracts with ICANN. However, ICANN's

14   resistance to VeriSign's misconduct has all along been feeble, and now ICANN has capitulated

15   entirely in return for a share of the monopoly profits its acquiescence will afford to VeriSign.

16   **A.   ANTICOMPETITIVE CONDUCT IN THE DOMAIN NAME REGISTRATION**

17   **MARKET**

18   **126.**   ~~103.~~ VeriSign's persistence in challenging ICANN's oversight authority has been

19   rewarded with a steady erosion of competition under ICANN.

20   **127.**   For example, in negotiating to take over operation of the .com registry in 2001,

21   VeriSign deployed its substantial economic muscle to extract from ICANN a renewal term that

22   would make it difficult for ICANN to reopen the registry contract to competitive bidding. Now,

23   the conspiracy all but eliminates that potential for competition in all of the relevant markets, and

24   virtually ensures VeriSign's monopoly control over these markets. Without the threat of future

25   open bidding on its registry operation contracts, VeriSign is free to increase the prices consumers

26   are charged for registering domain names. In just one manifestation of VeriSign's monopoly

27   control, the proposed .com Registry Agreement calls for an increase in registration fees coupled

28

1   with guaranteed annual additional increases (in four of the next six years) – and with the renewal

2   provision for four of every six years, in perpetuity.

3   **128.**   By contrast, because VeriSign failed to secure similar favorable renewal terms in

4   its initial 2001 contract to operate the .net registry, VeriSign faced competitive bidding when it

5   sought to renew the .net registry agreement in 2005. As a result, VeriSign was forced to agree to

6   lower registration fees by thirty percent in connection with that registry in order to win renewal of

7   the contract. The conspiracy frees VeriSign from competitive bidding for either registry in the

8   future.

9   **129.**   ~~104.~~ VeriSign also used its litigation with ICANN and the confidential settlement

10   negotiations attendant to that litigation to obtain an unfair competitive advantage in its 2005 bid

11   to operate the .net registry. In its settlement negotiations for .com~~,~~ which preceded the

12   submission of competitive bids for .net, VeriSign learned of material changes in ICANN's

13   registry contractual terms, including the release of price caps and changes in the approval process

14   for new registry services, that allowed VeriSign to submit a more competitive bid for .net than it

15   could have had it been subject to the rules applicable to other bidders.

16   **130.**   ~~105.~~ VeriSign, insulated from the threat of future competition, has engaged in

17   monopolistic conduct that has disrupted the competitive balance of the Internet, and at times has

18   included flagrant breaches of its obligations under the existing .com and .net registry agreements.

19   For example, VeriSign has taken impermissible steps, without obtaining required consent from

20   ICANN, to introduce, *inter alia*, fee-based services, including "IDN" (international domain name)

21   and "ConsoliDate," in each case undermining ICANN's ability to maintain competitive and

22   nondiscriminatory balance in the markets for domain name services.

23   **131.**   ~~106.~~ VeriSign engaged in a predatory and exclusionary campaign that included

24   depleting ICANN's resources while at the same time luring it with a share of monopoly profits, in

25   order to exclude rivals from the relevant markets.

26   **132.   Through its own conduct, including its unlawful conspiracy with ICANN,**

27   **VeriSign has monopolized and will continue to monopolize the relevant markets for .com**

28   **domain name registrations, has imposed and will impose supracompetitive prices on**

1   **consumers in those markets, and has eliminated and will continue to eliminate any**

2   **economic pressure on itself to innovate or offer improvements in service including security**

3   **and stability.**

4   **133.**   ~~107. Through its own conduct, including its unlawful conspiracy with~~

5   ~~ICANN, VeriSign has monopolized the relevant markets for .com and~~**Through its own**

6   **conduct, including its unlawful conspiracy with ICANN, VeriSign has monopolized and will**

7   **continue to monopolize the relevant markets for** .net domain name registrations, has imposed

8   **and will impose** supracompetitive prices on consumers in those markets, and has eliminated **and**

9   **will continue to eliminate** any economic pressure on itself to innovate or offer improvements in

10   service including security and stability.

11   **B.   ANTICOMPETITIVE CONDUCT IN THE EXPIRING NAMES REGISTRATION**

12   **SERVICES MARKET**

13   **134.**   ~~108.~~ Acting alone and also in collusion with ICANN, VeriSign has leveraged, and

14   threatens to leverage, contractual registry monopolies into monopolies over other adjacent and

15   downstream markets and to destroy and completely transform a functioning and competitive

16   marketplace for Internet domain names and related services.

17   **135.**   ~~109.~~ As described above in more detail, there is strong competition within the

18   Expiring Names Registration Services Market for the registration of expiring domain names. A

19   number of back order service providers compete in this market, and their services have been well-

20   received by consumers.

21   **136.**   ~~110.~~ ICANN and VeriSign have conspired to eliminate all competition for such

22   services and share between themselves the monopoly profits that VeriSign will take by excluding

23   all other back order service providers. Under the conspiracy, VeriSign will discontinue the

24   existing competitive process through which it currently releases expiring domain names to the

25   public. Instead, VeriSign will implement the Central Listing Service ("CLS") whereby it will

26   retain all expiring .com and .net domain names, and open them up for auction through a dedicated

27   auction site. Registrants will continue to order domain names through registrars, but registrars

28   must deal directly with VeriSign in order to receive expiring names to offer to prospective clients.

1   **137.** ~~111.~~ The conspiracy will immediately and permanently substitute a complete

2 VeriSign monopoly in place of the existing competition among back order service providers, with

3 predictable adverse price effects for consumers. At the outset, VeriSign, again with ICANN's

4 blessing, will skim ten percent off winning bids and nothing in the contracts or otherwise will

5 prevent VeriSign from further increasing prices.

6   **138.** ~~112.~~ VeriSign's CLS auction monopoly entirely displaces the currently

7 competitive market for back order services.

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CAUSES OF ACTION

FIRST CAUSE OF ACTION

Monopolization Under Section 2 of the Sherman Act

(Against VeriSign–.com and .net Registration Markets)

</div>

12   **139.** ~~113.~~ Plaintiff repeats and incorporates by reference the allegations set forth above

13 as if fully set forth herein.

14   **140.** ~~114.~~ For purposes of this claim, the relevant product markets are the .com and .net

15 Registration Markets. The relevant geographic markets are global.

16   **141.** ~~115.~~ VeriSign has a complete monopoly in the .com and .net Registration

17 Markets, and exercises market power in those markets. VeriSign has acted alone and in concert

18 with ICANN unlawfully to maintain its monopoly indefinitely into the future in violation of

19 Section 2 of the Sherman Act, 15 U.S.C. § 2.

20   **142.** ~~116.~~ VeriSign's monopoly control of the .com and .net Registration Markets has

21 been maintained and extended through exclusionary and predatory conduct.

22   **143.** ~~117.~~ It is unnecessary and unreasonable for a single company to continue

23 indefinitely to maintain monopoly control over the .com and .net registries.

24   **144.** ~~118.~~ VeriSign's unlawful conduct has caused and, unless enjoined by this Court,

25 will continue to cause adverse and anticompetitive injury to consumers and to the business and

26 property of Internet stakeholders and to CFIT's **Members and** Supporters, including Pool.com

27 and R. Lee Chambers Company LLC.

28

1

SECOND CAUSE OF ACTION

2

Attempted Monopolization Under Section 2 of the Sherman Act

3

(Against VeriSign - .com and .net Registration Markets)

4   **145.** ~~119.~~ Plaintiff repeats and incorporates by reference the allegations set forth above

5   as if fully set forth herein.

6   **146.** ~~120.~~ For purposes of this claim, the relevant product markets are the .com and .net

7   Registration Markets. The relevant geographic markets are global.

8   **147.** **For purposes of this claim, CFIT alleges that .com and .net are separate**

9   **markets and that VeriSign has engaged in exclusionary and predatory conduct with respect**

10   **to each of them separately and individually.**

11   **148.** ~~121.~~ VeriSign has a complete monopoly in the .com and .net Registration

12   Markets**, and each of them individually**, and exercises market power in those markets.

13   **149.** ~~122.~~ VeriSign has engaged in exclusionary and predatory conduct with the

14   specific intent to extend and perpetuate its monopoly over these relevant markets in violation of

15   Section 2 of the Sherman Act, 15 U.S.C. § 2.

16   **150.** ~~123.~~ The acts done and threatened by VeriSign are exclusionary insofar as they

17   have prevented and threaten to further prevent in perpetuity any other entity from ever competing

18   to operate the .com and .net registries such as by offering lower prices, superior service or

19   innovation.

20   **151.** ~~124.~~ By virtue of VeriSign's exclusionary scheme and unlawful conduct, there is a

21   dangerous probability that VeriSign will succeed in extending its monopoly control over the .com

22   and .net Registration Markets in perpetuity in violation of Section 2 of the Sherman Act, 15

23   U.S.C. § 2.

24   **152.** ~~125.~~ If not enjoined, there is a dangerous likelihood that VeriSign's

25   monopolization will continue, with the result that all other existing and potential competitors will

26   be forever excluded from competition in the relevant .com and .net Registration Markets, and

27   VeriSign will continue to impose supra-competitive price increases.

28

1   **153.** ~~126.~~ If not enjoined by this Court, VeriSign will continue to cause adverse and

2   anticompetitive injury to consumers and to the business and property of Internet stakeholders and

3   to CFIT's Supporters, including Pool.com and R. Lee Chambers Company LLC.

4

5   **THIRD CAUSE OF ACTION**

6   **Attempted Monopolization Under Section 2 of the Sherman Act**

7   **(Against VeriSign – Expiring Names Registration**
     Services Market)

8

9   **154.** ~~127.~~ Plaintiff repeats and incorporates by reference the allegations set forth above

10   as if fully set forth herein.

11   **155.** ~~128.~~ For purposes of this claim, the relevant product market is the Expiring

12   Names Registration Services Market. The relevant geographic market is the world.

13   **156.** ~~129.~~ VeriSign has a complete monopoly in the .com and .net Registration

14   Markets, and exercises market power in those markets.

15   **157.** ~~130.~~ The Expiring Names Registration Services Market is currently highly

16   competitive.

17   **158.** ~~131.~~ VeriSign has engaged in exclusionary and predatory conduct with the

18   specific intent to acquire and maintain unlawfully a monopoly in each of the currently

19   competitive relevant markets, including the Expiring Names Registration Services Market.

20   **159.** ~~132.~~ VeriSign's unlawful monopoly, if not enjoined and restrained, will result in

21   the elimination of competition from rival service providers, including CFIT's Supporters, as well

22   as supra-competitive price increases.

23   **160.** ~~133.~~ The acts done and threatened by VeriSign pursuant to the 2006 .com

24   Agreement, and the acts undertaken pursuant to the 2005 .net Agreement, as well as the other acts

25   taken by VeriSign to implement this scheme, are exclusionary and predatory insofar as they

26   preclude others from competing for the provision of registration services in the Expiring Names

27   Registration Services Market.

28

~~FIRST~~SECOND AMENDED COMPLAINT   35
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1   **161.**   ~~134.~~ By virtue of VeriSign's exclusionary scheme and unlawful conduct, there is a

2   dangerous probability that VeriSign will succeed in gaining monopoly control over the currently

3   competitive markets for registering expiring domain names, in violation of Section 2 of the

4   Sherman Act, 15 U.S.C. § 2.

5   **162.**   ~~135.~~ If not enjoined, there is a dangerous likelihood that VeriSign's

6   monopolization will continue, with the result that all other existing and potential competitors will

7   be forever excluded from competition in the relevant Expiring Names Registration Services

8   Market, and that VeriSign will continue to impose supra-competitive price increases.

9   **163.**   ~~136.~~ If not enjoined by this court, VeriSign will continue to cause adverse and

10   anticompetitive injury to consumers and to the business and property of Internet stakeholders and

11   to CFIT's Supporters, including Pool.com and R. Lee Chambers Company LLC.

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FOURTH CAUSE OF ACTION

Conspiracy to Monopolize Under Section 2 of the Sherman Act

(Against VeriSign and ICANN – All Relevant Markets)

</div>

15   **164.**   ~~137.~~ Plaintiff repeats and incorporates by reference the allegations set forth above

16   as if fully set forth herein.

17   **165.**   ~~138.~~ For purposes of this claim, the relevant product markets are the .com and .net

18   Registration Markets and the Expiring Names Registration Services Market. The relevant

19   geographic markets are global.

20   **166.**   ~~139.~~ VeriSign has a complete monopoly in the .com and .net Registration

21   Markets, and exercises market power in those markets. It is unnecessary and unreasonable for a

22   single company to continue indefinitely to maintain monopoly control over the .com and .net

23   registries.

24   **167.**   ~~140.~~ VeriSign has acted in concert with ICANN unlawfully to acquire and

25   maintain VeriSign's monopoly over these relevant markets indefinitely into the future in violation

26   of Section 2 of the Sherman Act, 15 U.S.C. § 2, and both have acted with the specific intent to

27   confer upon VeriSign unlawful monopoly power in these relevant markets.

28

1 **168.** ~~141.~~ The Expiring Names Registration Services Market is currently highly

2 competitive. VeriSign and ICANN have combined and conspired to act together to obtain

3 monopoly power for VeriSign in each of the relevant markets. In furtherance of their conspiracy,

4 VeriSign and ICANN negotiated and entered into agreements and profit-sharing arrangements

5 whereby VeriSign and ICANN will in various ways share the monopoly overcharges that the

6 conspiracy will impose on consumers in the relevant markets.

7 **169.** ~~142.~~ Defendants' conspiracy to monopolize the relevant markets has been in

8 violation of § 2 of the Sherman Act.

9 **170.** ~~143.~~ Defendants' unlawful conspiracy has caused and, unless enjoined by this

10 Court, will continue to cause adverse and anticompetitive injury to consumers and to the business

11 and property of Internet stakeholders and to CFIT's Supporters, including Pool.com and R. Lee

12 Chambers Company LLC.

13 **171.** ~~144.~~ If not enjoined, defendants' conspiracy and restraint on trade will continue.

14   **FIFTH CAUSE OF ACTION**

15   **Conspiracy in Restraint of Trade Under Section 1 of the Sherman Act**

16   **(Against VeriSign and ICANN – All Relevant Markets)**

17 **172.** ~~145.~~ Plaintiff repeats and incorporates by reference the allegations set forth above

18 as if fully set forth herein.

19 **173.** ~~146.~~ For purposes of this claim, the relevant product markets are the .com and .net

20 Registration Markets and the Expiring Names Registration Services Market. The relevant

21 geographic markets are global.

22 **174.** **For purposes of this claim, CFIT alleges that .com and .net are separate**

23 **markets and that Verisign has engaged in exclusionary and predatory conduct with respect**

24 **to each of them separately and individually.**

25 **175.** ~~147.~~ VeriSign has a complete monopoly over the relevant .com and .net

26 Registration Markets, and **each of them individually, and** exercises market power in those

27 markets. It is unnecessary and unreasonable for a single company to continue indefinitely to

28 maintain monopoly control over the .com and .net registries.

~~FIRST~~SECOND AMENDED COMPLAINT   37
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1   **176.** ~~148.~~ VeriSign has acted in concert with ICANN unlawfully to secure monopoly

2   power and to restrain and eliminate competition in the relevant .com and .net Registration

3   Markets indefinitely into the future in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

4   **177.** ~~149.~~ The Expiring Names Registration Services Market is currently highly

5   competitive.

6   **178.** ~~150.~~ VeriSign and ICANN have conspired to act together to restrain trade and

7   competition in each of these relevant markets in violation of Section 1 of the Sherman Act, 15

8   U.S.C. § 1.

9   **179.** ~~151.~~ Defendants' conspiracy to restrain trade in the relevant markets has had, and

10   unless enjoined will continue to have, the effect of harming the competitive process in interstate

11   commerce.

12   **180.** ~~152.~~ If not enjoined, defendants' restraint on trade will continue, with the result

13   that all other existing and potential competitors will be excluded from competing in the relevant

14   markets and consumers will be forced to pay, and continue to pay in perpetuity, supra-

15   competitive prices for the registration of .com and .net domain names.

16   **181.** ~~153.~~ Defendants' conspiracy has caused, and unless enjoined will continue to

17   cause, injury to consumers and to the business and property of VeriSign's existing and potential

18   competitors and Internet stakeholders and to CFIT's Supporters, including Pool.com and R. Lee

19   Chambers Company LLC.

20   **SIXTH CAUSE OF ACTION**

21   **Conspiracy in Restraint of Trade Under the Cartwright Act**

22   **(Against VeriSign and ICANN – All Relevant Markets)**

23   **182.** ~~154.~~ Plaintiff repeats and incorporates by reference the allegations set forth above

24   as if fully set forth herein.

25   **183.** ~~155.~~ For purposes of this claim, the relevant product markets are the .com and .net

26   Registration Markets and the Expiring Names Registration Services Market. The relevant

27   geographic markets are global, including California.

28

1   **184.**   ~~156.~~ VeriSign has a complete monopoly over the relevant .com and .net

2   Registration Markets, and exercises market power in those markets. It is unnecessary and

3   unreasonable for a single company to continue indefinitely to maintain monopoly control over the

4   .com and .net registries.

5   **185.**   ~~157.~~ VeriSign has acted in concert with ICANN unlawfully to restrain and

6   eliminate competition in the relevant .com and .net Registration Markets indefinitely into the

7   future in violation of the Cartwright Act, California Business & Professions Code sections 16720

8   *et seq.*

9   **186.**   ~~158.~~ The Expiring Names Registration Services Market is currently highly

10   competitive.

11   **187.**   ~~159.~~ VeriSign and ICANN have conspired to act together to restrain trade and

12   competition in each of these relevant markets in violation of the Cartwright Act California

13   Business & Professions Code sections 16720 *et seq.*

14   **188.**   ~~160.~~ Defendants' conspiracy to restrain trade in the relevant markets has had, and

15   unless enjoined will continue to have, the effect of harming the competitive process in California.

16   **189.**   ~~161.~~ If not enjoined, defendants' restraint on trade will continue, with the result

17   that all other existing and potential competitors will be excluded from competing in the relevant

18   markets in California and consumers will be forced to pay, and continue to pay in perpetuity,

19   supra-competitive prices for the registration of .com and .net domain names.

20   **190.**   ~~162.~~ Defendants' conspiracy has caused, and unless enjoined will continue to

21   cause, injury to consumers and to the business and property of VeriSign's existing and potential

22   competitors and Internet stakeholders and to CFIT's Supporters, including Pool.com and R. Lee

23   Chambers Company LLC.

24   **PRAYER**

25   WHEREFORE, CFIT prays for judgment as follows:

26   1.   For a declaration that the 2005 .net Agreement and the proposed new 2006 .com

27   Registry Agreement are unlawful and in violation of Sections 1 and 2 of the Sherman Act, 15

28

1   U.S.C. §§ 1 and 2; and the Cartwright Act, California Business & Professions Code sections

2   16720 *et seq*;

3   2.   For a declaration that Section 3.1(b)(v) (the limitations on Consensus Policies),

4   Section 3.1(d) (the definition of Registry Services), Section 4.2 ("Renewal"), and Appendix 9

5   (explicitly authorizing the provision of specified new services) of the 2005 .net Agreement are

6   unlawful in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; and the

7   Cartwright Act, California Business & Professions Code sections 16720 *et seq*.;

8   3.   That the Court adjudge and decree that VeriSign has monopolized interstate trade

9   and commerce in the relevant markets in violation of Section 2 of the Sherman Act, 15 U.S.C. §

10 2;

11   4.   That the Court adjudge and decree that VeriSign has attempted to monopolize

12 interstate trade and commerce in the relevant markets in violation of Section 2 of the Sherman

13 Act, 15 U.S.C. § 2;

14   5.   That the Court adjudge and decree that ICANN and VeriSign have combined and

15 conspired to monopolize interstate trade and commerce in the relevant markets in violation of

16 Section 2 of the Sherman Act, 15 U.S.C. § 2;

17   6.   That the Court adjudge and decree that ICANN and VeriSign have combined and

18 conspired to restrain interstate trade and commerce in the relevant markets in violation of Section

19 1 of the Sherman Act, 15 U.S.C. § 1;

20   7.   That the Court adjudge and decree that ICANN and VeriSign have combined and

21 conspired to restrain trade, and to have formed a trust, in violation of the Cartwright Act,

22 California Business & Professions Code §§ 16720 *et seq*.;

23   8.   That Defendants and all persons, firms, and corporations acting on their behalf and

24 under their direction or control be permanently enjoined from engaging in, carrying out, renewing

25 or attempting to engage, carry out, or renew, any contracts, agreements, practices, or

26 understandings in violation of the Sherman Act, the Lanham Act, the Cartwright Act, or the

27 Unfair Competition Act, and specifically including, without limitation, the renewal provisions of

28 the proposed .com registry agreement and Section 2.4 "Renewal" of the 2005 .net Agreement;

FIRSTSECOND AMENDED COMPLAINT   40
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1   9.   That VeriSign be enjoined and prohibited from engaging in any "Registry

2   Services" except for services that are defined as "Registry Services" in the 2001 .com Agreement;

3   10.   That VeriSign be ordered to divest promptly and in any event within 90 days the

4   registry business and all assets used or reasonably necessary to its operation to a separate

5   company that will be prohibited from engaging in any business except for services that are

6   defined as "Registry Services" in the 2001 .com Agreement;

7   11.   That ICANN be prohibited from approving any service offered by VeriSign, its

8   divestee, or any future party operating the .com or .net registries where the effect may be to tend

9   to create a monopoly, to substantially harm competition, or to restrain trade and competition in

10   any line of commerce;

11   12.   That CFIT and other third parties who shall have been or might be injured in their

12   business or property as a result of any violation by ICANN or Verisign of any of the provisions of

13   the Court's order, including CFIT's Supporters, be specifically authorized to enforce the

14   provisions of thereof in this Court, including without limitation pursuant to the antitrust laws of

15   the United States as well as any applicable state antitrust or unfair competition laws;

16   13.   That VeriSign and ICANN be ordered to abide by the terms of the 2001 .com

17   Agreement until it expires on November 10, 2007, and that ICANN be ordered to entertain

18   competing bids for the operation of the .com registry by that time;

19   14.   That VeriSign and ICANN be ordered and required to comply with the price

20   provisions of Appendix G of the 2001 .com Agreement, and the Code of Conduct provisions of

21   Appendix I of the 2001 .com Agreement and 2001 .net Agreement;

22   15.   That VeriSign and ICANN be ordered and required to comply with the research

23   and development provisions of Appendix W of the 2001 .com Agreement and make public the

24   required annual reports thereunder;

25   16.   That plaintiff have such other relief as the Court may consider necessary or

26   appropriate to restore competitive conditions in the markets affected by defendants' unlawful

27   conduct; and

28   17.   That plaintiff recover the costs of this action **and its attorneys fees**.

1

2   Dated: ~~March~~October 1~~4~~3, 2006

3   CATHCART COLLINS & KNEAFSEY LLP

4

5   By:_____
                                                          ~~Patrick~~Bret A. ~~Cathcart~~Fausett

6

7   Attorneys for Plaintiff
                                                    COALITION FOR ICANN TRANSPARENCY INC.

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EXHIBIT 3

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4   E-FILED on ___2/28/06___

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7

8   IN THE UNITED STATES DISTRICT COURT

9   FOR THE NORTHERN DISTRICT OF CALIFORNIA

10   SAN JOSE DIVISION

11

12 COALITION FOR ICANN TRANSPARENCY | No. C-05-04826 RMW
    INC, a Delaware corporation,
13   ORDER DENYING VERISIGN'S MOTION
              Plaintiff,   TO DISMISS AND GRANTING
14   DEFENDANTS' MOTIONS FOR
         v.   JUDGMENT ON THE PLEADINGS
15
    VERISIGN, INC., a Delaware corporation;   [Re Docket No. 63, 66, 74]
16 INTERNET CORPORATION FOR
    ASSIGNED NAMES AND NUMBERS, a
17 California corporation,

18   Defendants.

19

20   On November 28, 2005 the Coalition For ICANN Transparency, Inc. ("CFIT") sued

21 VeriSign, Inc. ("VeriSign") and the Internet Corporation for Assigned Names and Numbers

22 ("ICANN") (collectively "defendants") for antitrust violations, unfair competition, cybersquatting,

23 and intentional interference with prospective economic advantage. CFIT filed a motion for a

24 Temporary Restraining Order ("TRO"). On November 30, 2005 this court denied CFIT's motion.

25 The court noted that it would construe the motion as a request for a preliminary injunction if CFIT

26 desired and set a briefing schedule. On January 17, 2006 CFIT withdrew its motion. VeriSign now

27 moves to dismiss CFIT's complaint for improper venue. In addition, both defendants seek judgment

28
    ORDER DENYING VERISIGN'S MOTION TO DISMISS AND GRANTING DEFENDANTS' MOTIONS FOR JUDGMENT ON THE
    PLEADINGS
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    DOH

1   on the pleadings. The court has read the moving and responding papers and considered counsels'

2   arguments. For the reasons set forth below, the court denies VeriSign's motion to dismiss and grants

3   defendants' motions for judgment on the pleadings with leave to amend.

I. BACKGROUND

5   CFIT is a nonprofit membership organization whose members "include certain Internet

6   domain registrars, registrants, back order service providers, and other Internet stakeholders."

7   Complaint ("Comp.") ¶ 7. CFIT alleges that every computer connected to the Internet has a unique

8   Internet Protocol ("IP") address. *Id.* at ¶ 15. IP addresses are long strings of numbers, such as

9   64.233.161.147. *Id.* The Internet domain name system ("DNS") provides an alphanumeric

10 shorthand for IP addresses. *Id.* at ¶ 16. For example, the IP address 64.233.161.147 is commonly

11 known by its domain name: google.com. *Id.* The portion of the domain name to the right of the

12 period is the top-level domain ("TLD"). TLDs include .com, .gov, .net., and .biz. *Id.* at ¶ 17. The

13 .com and .net TLDs are "dominant" in the United States and of paramount importance for many

14 businesses. *Id.* at ¶¶ 6, 20, 25. Second-level domain names are to the left of the TLDs, such as

15 "google" in "google.com." *Id.* Each domain name is unique and thus can only be registered to one

16 entity. *Id.* at ¶ 18. Thus, recognizable domain names are a finite resource. *Id.* at ¶ 25. To ensure

17 that each domain name refers to the appropriate IP address, each TLD has a single "registry" that

18 links the two. *Id.* at ¶ 19.

19 ICANN is a private not-for-profit corporation that coordinates the DNS on behalf of the

20 United States Department of Commerce ("DOC"). *Id.* at ¶¶ 1, 5, 27. ICANN's bylaws provide that

21 it shall "[i]ntroduc[e] and promot[e] competition in the registration of domain names where

22 practicable and beneficial in the public interest." *Id.* at ¶ 29. ICANN operates under a

23 Memorandum of Understanding ("MOU") with the DOC. *Id.* at ¶ 27. The MOU "is effectively

24 ICANN's charter." *Id.* The MOU's purpose is to "promote[ ] the management of the DNS in a

25 manner that will permit market mechanisms to support competition and consumer choice in the

26 technical management of the DNS." *Id.* The MOU prohibits ICANN from "unjustifiably or

27 arbitrarily" injuring "particular persons or entities or particular categories of persons or entities." *Id.*

28

ORDER DENYING VERISIGN'S MOTION TO DISMISS AND GRANTING DEFENDANTS' MOTIONS FOR JUDGMENT ON THE
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1   It requires ICANN to "act in a non-arbitrary and reasonable manner with respect to . . . any . . .

2   activity related to a DNS project." *Id.* The original MOU was scheduled to expire in September

3   2000. *Id.* ICANN and the DOC have amended it six times. *Id.* The most recent amendment

4   reiterates the DOC's "policy goal of privatizing the technical management of the DNS in a manner

5   that promotes stability and security, competition, coordination, and representation." *Id.* In this

6   amendment, ICANN also reaffirms its "commitment to maintaining security and stability in the

7   technical management of DNS, and to perform as an organization founded on the principles of

8   competition, bottom up coordination, and representation." *Id.*

9   ICANN has contracted with VeriSign to serve as the registry for all .com and .net domain

10   names. Consumers, or "registrants," sign up for domain names, causing VeriSign's database to relate

11   the domain name with the specific IP address. *Id.* at ¶¶ 19, 21. Registrants do not have direct access

12   to this database. *Id.* at ¶ 21. Instead, prospective registrants use "registrars" to handle the technical

13   details. *Id.* This process is automated. *Id.* at ¶ 22. VeriSign grants a limited number of connections

14   to its registry computers. *Id.* A registrar sends an "add" command to the registry. *Id.* If the name is

15   available, the registrar acquires the name on behalf of the registrant. *Id.* When a popular domain

16   name expires, registrars send rapid-fire "add" commands to try to register the name. *Id.* at ¶ 23.

17   Because the system is based on chance, and because a registrar's odds of registering an expired

18   domain name increase with the number of "add" commands it sends, it "functions, in essence, like a

19   lottery." *Id.* "[J]ust as buying more tickets in a lottery increases the chance of winning, lining up

20   more registrars to participate in the domain name lottery on behalf of a registrant increases the

21   chance of success." *Id.* at ¶ 64.

22   Accordingly, this regime spawned a new business: "back order service providers." Back

23   order service providers are companies that combine forces with several registrars in order to increase

24   the odds of winning the domain name registration lottery. *Id.* at ¶ 24. A registrar receives an order

25   from a client and hires a back order service provider to pool the resources of several registrars. *Id.*

26   If the back order service provider is successful, it and its partner-registrars "all share appropriately in

27   the registration fee charged to the client." *Id.* The back order service business is "robust and

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1   competitive," with hundreds of registrars generating millions of dollars in revenue. *Id.* at ¶ 26.

2   Without back order service, the cost to register a new or previously-released name is between $6.95

3   and $7.50. *Id.* VeriSign and ICANN collect $6.25 ($6.00 to VeriSign and $0.25 to ICANN) for

4   registration of each .com domain name and $4.25 ($3.50 to VeriSign and $0.75 to ICANN) for each

5   .net domain name. *Id.* The registrar keeps the balance. *Id.* However, a valuable domain name is

6   likely to be registered through a back order service provider. *Id.* The price of back order service is

7   generally around $60. *Id.* Of this, VeriSign collects $6.00 for the registry fee for .com domain

8   names and $4.25 for .net domain names. *Id.* The back order service provider generally retains about

9   half of the remaining sum and splits the other half among its registrar partners. *Id.*

10   Two contracts govern ICANN and VeriSign's relationship: the .com Registry Agreement and

11   the .net Registry Agreement. ICANN and VeriSign initially signed these agreements on May 25,

12   2001 ("the 2001 Agreements"). *Id.* at ¶ 31. Both 2001 Agreements require VeriSign to provide

13   "Registry Services" to ICANN-accredited registrars "in a manner meeting certain performance and

14   functional specifications." *Id.* at ¶ 34. "Registry Services" is a defined term. *Id.* VeriSign also

15   must comply with "Consensus Policies": rules established by certain Internet stakeholders. *Id.* at ¶

16   35. Appendix G to both Agreements caps the prices VeriSign can charge for its services. *Id.* at ¶

17   36. Under Appendix G, VeriSign can charge no more than $6 per year for registration or renewal of

18   a domain name. *Id.* In addition, it calls for a "registry-level transaction fee" payment of $0.25 to

19   ICANN for each domain name registration. *Id.* Appendix I to both Agreements includes a Code of

20   Conduct that tasks VeriSign with "at all times striv[ing] to operate as a trusted and neutral third-

21   party provider of Registry Services." *Id.* The Code of Conduct also forbids VeriSign from

22   "warehousing or registering domain names in its own right other than through an ICANN-accredited

23   registrar." *Id.* Appendix W to both Agreements provides that VeriSign will spend $200,000,000

24   "for research, development, and infrastructure improvements to the .com, .net, and .org Registries"

25   between 2001 and 2010. *Id.* at ¶ 38. Finally, both Agreements prohibit VeriSign from

26   "unreasonably retrain[ing] competition." *Id.*

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1   The 2001 .com Agreement is scheduled to expire on November 10, 2007, but allows

2   VeriSign to submit a written extension proposal between November 10, 2005 and May 10, 2006. *Id.*

3   at ¶ 32. ICANN must consider this proposal for no more than six months "before deciding whether

4   to call for competing proposals . . . ." *Id.* VeriSign "shall be awarded a four-year renewal term,"

5   expiring on November 10, 2011, unless ICANN determines that VeriSign has materially breached

6   the 2001 .com Agreement or the proposal's prices are too high. *Id.* According to CFIT, ICANN

7   believes that VeriSign has materially breached the 2001 .com Agreement. In addition, VeriSign's

8   current proposal to renew the 2001 .com Agreement contains excessive prices. *Id.* Thus, if ICANN

9   wishes, it can "require competitive bidding for operation of the .com registry in 2007." *Id.*

10   Instead, however, defendants intend to replace the 2001 .com Agreement with the 2005 .com

11   Agreement. *Id.* at ¶ 40. On October 24, 2005 defendants agreed to submit the 2005 .com

12   Agreement for public comment and approval by ICANN's Board of Directors. *Id.* at ¶ 41. The

13   Board was scheduled to vote at an ICANN meeting between November 30, 2005 and December 4,

14   2005. *Id.* The initial expiration of the 2005 .com Agreement is November 30, 2012. *Id.* at ¶ 42. It

15   will be renewed thereafter unless an arbitrator or court has issued a final ruling stating that VeriSign

16   has materially breached its obligations under the contract. *Id.* It increases the maximum price for

17   domain name registration. *Id.* at ¶ 43. Until December 31, 2006 the maximum price is $6.00. *Id.*

18   Beginning in 2007, it increases by seven percent each year. *Id.* In addition, the 2005 .com

19   Agreement defines maximum price so that it does not include "registry-level transaction fees." *Id.* at

20   ¶ 44. Thus, a registrar would pay these fees in addition to VeriSign's fee. *Id.* The "registry-level

21   transactions fees" also increase over time, thus "allow[ing] ICANN to share in the monopoly profit

22   generated by . . . the 2005 .com Agreement." *Id.*

23   The 2005 .com Agreement allows VeriSign "to use commercially valuable traffic data for its

24   own commercial benefit, including promoting the sale of domain names." *Id.* at ¶ 45. It defines

25   "Registry Services" in a manner that permits VeriSign to exclude certain tasks from the maximum

26   price provisions. *Id.* at ¶ 46. Appendix 9 to the Agreement allows VeriSign "to offer many services

27   in markets that are downstream and adjacent to the [DNS] market." *Id.* at ¶ 48. ICANN previously

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1   opposed these services under the 2001 .com Agreement unless they were approved through the

2   Consensus Policy. *Id.* One such service is the "Wait List Service," which ICANN viewed as a

3   breach of the 2001 .com Agreement. *Id.* at ¶ 49. VeriSign intends to launch a modified version of

4   the Wait List Service, which it has renamed the Central Listing Service ("CLS"). *Id.* The CLS

5   overhauls the domain name registration system. *Id.* Under the current regime, when a registrant

6   does not renew a domain name, VeriSign provides a forty-five day grace period before releasing the

7   name. *Id.* By contrast, under the CLS, VeriSign will immediately conduct an auction for expired

8   names among all registrars who have signed a CLS service agreement. *Id.* at ¶ 50. VeriSign will

9   receive ten percent of the auction price. *Id.* In addition, while the 2001 .com Agreement allows

10 registrants to "return" domain names within five days of acquiring them, the 2005 .com Agreement

11 provides no such guarantee. *Id.* The 2005 .com Agreement also defines Consensus Policies

12 differently and eliminates (1) the provision in the 2001 .com Agreement that requires VeriSign to

13 spend $200,000,000 for research and development and (2) the Code of Conduct. *Id.* at ¶¶ 52-54.

14   ICANN and VeriSign signed the 2005 .net Agreement, on June 29, 2005. *Id.* at ¶ 56. The

15 2005 .net Agreement shares many provisions with the 2005 .com Agreement, including the

16 automatic renewal procedure. *Id.* at ¶¶ 57, 58. It also eliminates the 2001 .net Agreement's price

17 controls and raises the registry-level transaction fee." *Id.* at ¶ 58.

18   CFIT contends that the 2005 Agreements will destroy the back order service provider

19 business by replacing the current lottery-like system with the CLS. *Id.* at ¶¶ 65, 68. Because

20 "nothing in the contracts or otherwise will prevent VeriSign from further increasing prices,"

21 consumers will pay more. *Id.* at ¶¶ 66-67. In addition, VeriSign intends to use its monopoly power

22 over the .com and .net domain names to lock up the market for Web address directory assistance

23 services. Under the current system, if a user enters domain name that is not registered, he receives a

24 standard error page. *Id.* at ¶ 70. VeriSign's proposed SiteFinder service would "replace the standard

25 error page with a customized VeriSign page that states that the desired page could not be found and

26 offers some links to domain names with similar spellings." *Id.* at ¶ 71. For example, if a user types

27 www.bokkstore.com, which is not registered, "the user will be directed to a VeriSign SiteFinder

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1   page at www.bokkstore.com featuring such links as www.bookstore.com or www.bkstore.com." *Id.*

2   VeriSign may be able to collect a Pay Per Click fee from the owners of these web sites. *Id.* Some

3   registrants already purchase domain names that are misspellings of common web sites for the sole

4   purpose of generating Pay Per Click revenue. *Id.* Because of VeriSign's unique position as the

5   depository of all unregistered .com and .net domain names, only it will be able to receive revenue

6   from this service and will drive out "some of those who are currently active in the Pay Per Click

7   market." *Id.* at ¶ 72. In addition, because VeriSign has eliminated the five-day grace period for

8   "returning" registered domain names, only VeriSign will be able to "test .com and .net domain

9   names to see if they are suitable for use in the Pay Per Click market without paying a registry fee."

10 *Id.* at ¶ 73. No one will be able to compete with VeriSign in this market because every other

11 registrant will have to pay the non-refundable $6 or $4.25 registry fee to test traffic on such a

12 domain name. *Id.* VeriSign has employed the SiteFinder service before, on September 15, 2003.

13 *Id.* at ¶ 74. An ICANN advisory board determined that it "considerably weakened the stability of

14 the Internet." *Id.* VeriSign abandoned the system only after ICANN threatened to take legal action.

15 *Id.* at ¶ 75. However, VeriSign "announced that it would reintroduce SiteFinder at its discretion, and

16 made clear that it had no intention of turning SiteFinder off for good." *Id.* Now, ICANN has agreed

17 to permit VeriSign to launch SiteFinder "subject only to perfunctory procedural requirements." *Id.*

18 at ¶ 76.

19   CFIT alleges causes of action against (1) VeriSign in the .com and .net Registration Markets

20 for monopolization under section 2 of the Sherman Act, (2) VeriSign in the .com and .net

21 Registration Markets for attempted monopolization under section 2 of the Sherman Act, (3)

22 VeriSign in the Expiring Names Registration Services and Directory Assistance Services Markets

23 for attempted monopolization under section 2 of the Sherman Act, (4) VeriSign and ICANN in "all

24 relevant markets" for conspiracy to monopolize under section 2 of the Sherman Act, (5) VeriSign

25 and ICANN in "all relevant markets" for conspiracy in restraint of trade under section 1 of the

26 Sherman Act, (6) VeriSign and ICANN in "all relevant markets" for conspiracy in restraint of trade

27 under the Cartwright Act, (7) VeriSign and ICANN for unfair competition under California Business

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1   and Professions Code section 17200, (8) VeriSign for cybersquatting under 15 U.S.C. section

2   1125(d), and (9) VeriSign and ICANN for intentional interference with prospective economic

3   advantage. *Id.* at ¶¶ 79-147. CFIT seeks (1) a declaration that the 2005 .com Agreement is

4   unlawful, (2) a declaration that sections of the 2005 .net Agreement is unlawful, and (3) injunctive

5   relief.

II. ANALYSIS

A.   Motion to Dismiss

8   Federal Rule of Civil Procedure 12(b)(3) permits a defendant to move to dismiss for

9   "improper venue."[1] Each registrar in the .com and .net TLDs must sign a Registry-Registrar

10   Agreement ("RRA") with VeriSign. Dahlquist Decl. Supp. Mot. Dism. ("Dahlquist Decl.") Ex. A.

11   The RRA states that "[a]ny legal action or other legal proceeding relating to this Agreement or the

12   enforcement of any provision of this Agreement shall be brought or otherwise commenced in any

13   state or federal court located in the eastern district of the Commonwealth of Virginia." *Id.* at § 6.7.

14   VeriSign argues that because CFIT purports to sue on behalf of registrars — who are subject to the

15   RRA — it is bound by this mandatory forum selection clause, making venue here improper.[2]

16   VeriSign contends that "[a]ll of the purported claims in the Complaint necessarily relate to the RRA,

17   because they are premised on alleged harm to CFIT's member registrars' ability to compete

18   effectively in the domain name registration business." Mot. Dism. at 5:22-24 (emphasis omitted).

19   VeriSign cites *Hill v. Pac. Gas. & Elec. Co.*, 1995 WL 86567 (N.D. Cal. 1995), *Bense v. Interstate*

20   *Battery Sys. of Am., Inc.*, 683 F.2d 718 (2d Cir. 1982), and *Rini Wine Co., Inc. v. Guild Wineries &*

21   *Distilleries*, 604 F. Supp. 1055 (E.D. Ohio 1985) for the proposition that "forum selection clauses

22

23   _____

24   [1]   VeriSign has answered CFIT's complaint. Although defendants generally must bring
     Rule 12(b) motions before answering, VeriSign pled improper venue as an affirmative defense in its
25   answer, thus preserving its right to bring a Rule 12(b)(3) motion. *See Hopkinson v. Lotus*
     Development Corp., 1995 WL 381888, *5 (N.D. Cal. 1995) (rejecting argument that defendant
26   waived right to contest venue because it "timely raised the defense of improper venue in its . . .
     Answer to Plaintiffs' Complaint").

27   [2]   Federal common law applies to the validity and interpretation of forum selection
     clauses. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988).
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1   apply to non-contractual claims, including antitrust, intellectual property, unfair competition, and

2   tortious interference[.]" Mot. Dism. at 10:10-12.

3   This argument is not convincing. The forum selection applies only to "legal proceeding[s]

4   relating to this Agreement." The plain meaning of this language is that a lawsuit must involve the

5   RRA itself to trigger the clause. Although VeriSign would have no relationship with CFIT's

6   registrars absent the RRA, it is undisputed that CFIT's complaint and filings make no mention of the

7   RRA. VeriSign's interpretation of "relating to" has no limiting principle: under it, all registrars must

8   bring all causes of action against VeriSign in Virginia, no matter how attenuated the relationship

9   between the claim and the RRA. This is not the law. *Cf. Gootnick v. Lighter*, 2005 WL 3079000 *7

10   (N.D. Cal. 2005) (denying motion to transfer venue based on forum selection clause in promissory

11   note because, *inter alia*, "[i]t is unlikely that many legal issues in the claims asserted here will turn

12   on legal interpretation of the note itself"). Indeed, each of VeriSign's authorities involved lawsuits

13   that, in one manner or another, flowed from the contract containing the clause. *See Hill*, 1995 WL

14   86567 at *2 (applying forum selection clause to unfair competition and tort claims where plaintiff

15   alleged that defendants breached the contract that contained the clause "with the intention of causing

16   him emotional distress, and that their breaches were the result of fraud and unfair competition");

17   *Bense*, 683 F.2d at 719 (applying forum selection clause to antitrust allegation that defendant had

18   terminated the contract that contained the clause in retaliation for the plaintiff's refusal to participate

19   in a price-fixing scheme); *Rini Wine*, 604 F. Supp. 1058-59 (applying forum selection clause to

20   antitrust claims where "[t]he incident from which this dispute arises is indeed the termination of the

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1   distributor agreement" that contained the clause).[3] The court thus denies VeriSign's motion to

2   dismiss.[4]

3   **B.   Motions for Judgment on the Pleadings**

4   **1.   Legal Standard**

5   A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is a

6   "means to challenge the sufficiency of the complaint after an answer has been filed." *New.Net, Inc.*

7   *v. Lavasoft,* 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004). A motion for judgment on the pleadings

8   is similar to a motion to dismiss. "For the purposes of the motion, the allegations of the non-moving

9   party must be accepted as true, while the allegations of the moving party which have been denied are

10   assumed to be false. Judgment on the pleadings is proper when the moving party clearly establishes

11   on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled

12   to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.,* 896 F.2d

13   1542, 1550 (9th Cir. 1990).

14   Federal Rule of Civil Procedure 8(a) requires complaints to contain "a short and plain

15   statement of the claim showing that the pleader is entitled to relief." "[A]ntitrust pleadings need not

16   _____

17   [3]   VeriSign argues that "CFIT is clearly invoking the contract-based remedy of specific
     performance" because it "seeks to 'preserve the status quo in markets related to Internet domain
18   names' by 'requiring VeriSign and ICANN to abide by the terms of the current .com [A]greement . . .
     until it expires." Rep. Supp. Mot. Dism. at 3:25-27 (emphasis omitted) (quoting Comp. ¶ 2). There
19   are at least two problems with this contention. First, even if CFIT does request specific
     performance, it does so with respect to the 2001 .com Agreement, not the RRA. Second, the court
20   cannot construe CFIT as seeking specific performance of the 2001 .com Agreement because it is not
     a party to that contract. *See Sheppard v. Banner Food Products,* 78 Cal. App. 2d 808, 812 (1947)
21   ("Plaintiff has no right to enforce performance of the Bortz-Banner contract. He was not a party to it
     and it was not made specifically for his benefit.").
22
          [4]   During oral argument, VeriSign asked the court to deny the motion without prejudice.
23   VeriSign claimed that CFIT will not be able to prove a necessary element of its substantive claims
     — antitrust injury — without implicating the RRA. "Antitrust injury" refers to the fact that only
24   certain types of alleged harm sound in antitrust. *See, e.g., Glen Holly Entertainment, Inc. v.
     Tektronix Inc.,* 343 F.3d 1000, 1008 (9th Cir. 2003) (opining that "the party alleging the injury must
25   be either a consumer of the alleged violator's goods or services or a competitor of the alleged
     violator in the restrained market") (internal quotation marks omitted). Even if the issue of whether
26   CFIT's members are "consumers" or "competitors" arises, the court fails to perceive how the RRA
     will be relevant to this inquiry. Because the court can imagine no scenario causing the parties to
27   dispute their rights and obligations under the RRA, it declines to permit VeriSign to renew its
     motion later.
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1   contain great factual specificity" than other complaints. *Portland Retail Druggists Ass'n v. Kaiser*

2   *Found. Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981). "However, the court is not required to

3   accept legal conclusions cast in the form of factual allegations if those conclusions cannot

4   reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752,

5   754-55 (9th Cir. 1994). "Nor is the court required to accept as true allegations that are merely

6   conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State*

7   *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

8   **2.   Standing**

9   VeriSign and ICANN argue that CFIT lacks standing. The standing requirement ensures that

10   federal courts hear only "cases" or "controversies" under Article III of the United States

11   Constitution. An association has "organizational standing" if it seeks to redress an injury that it

12   personally suffers. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 n.11 (1979).

13   CFIT does not claim standing on this ground. An association may also invoke the doctrine of

14   "associational standing" to bring a complaint "on behalf of its members." *See New York State Club*

15   *Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9 (1988). It may do if "(a) its members would otherwise

16   have standing to sue in their own right; (b) the interests it seeks to protect are germane to [its]

17   purpose; and (c) neither the claim asserted nor the relief requested requires the participation of

18   individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 343

19   (1977).[5] When a defendant moves to dismiss on standing grounds, the court must "accept as true all

20   material allegations of the complaint, and . . . construe [it] in favor of the complaining party."

21   *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). At the same time, though, "[i]t is a long-settled

22   principle that standing cannot be inferred argumentatively from averments in the pleadings, but

23   rather must affirmatively appear in the record." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231

24   (1990) (plurality opinion) (internal citations and quotation marks omitted). Therefore, "[i]t is within

25   the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint

26   _____

27   [5]   The requirement is not that all of the organization's members must have standing, but
      that "at least one of its members would have standing to sue in his own right." *GrassRoots*
      Recycling Network, Inc. v. U.S. E.P.A., 429 F.3d 1109, 1111 (D.C. Cir. 2005).

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1 or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."

2 *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975).

3   The complaint fails to identify a single member of CFIT. *See* Comp. ¶ 7 (alleging only that

4 "[m]embers of CFIT include certain domain name registrars, registrants, back order service

5 providers, and other Internet stakeholders"). At least two cases suggest that this is fatal to CFIT's

6 attempt to plead associational standing. First, in *American Immigration Lawyers Ass'n v. Reno*, 18

7 F. Supp. 2d 38 (D. D.C. 1998) several organizations challenged the Illegal Immigration Reform and

8 Immigrant Responsibility Act of 1996, which worked a sea change in adjudicating the claims of

9 aliens who arrive in the United States without proper documentation. The plaintiffs included

10 refugee assistance associations and coalitions of immigration lawyers. They contended that the

11 statute would harm their members by, *inter alia*, causing the erroneous removal of some immigrants.

12 *Id.* at 49-50. The D.C. Circuit held that plaintiffs failed to allege a legally-cognizable injury-in-fact

13 because they did not pinpoint a specific individual who was likely to be deported:

14   Organizations are obligated to allege facts sufficient to establish that one or more
        of [their] members has suffered, or is threatened with, an injury. *This obligation*

15   *extends to identifying the member or members of plaintiff organizations that have,*
        or will suffer, harm. Here, plaintiffs either generally allege harm to all members

16   of all organizations or identify only vague categories of members that might
        suffer harm. *They can point to no identifiable member or members for which the*

17   *Court can evaluate the harm.* Nowhere in their pleadings do the plaintiffs
        identify one injured person by name, allege that the injured person is a member of

18   one of the plaintiff organizations (naming the specific organization), or allege
        facts sufficient to establish the harm to that member.

19 *Id.* at 51 (emphasis added) (internal citations and quotation marks omitted).

20   Similarly, in *Maine Ass'n of Indep. Neighborhoods Comm'r v. Maine Dep't of Human Servs.*,

21 747 F. Supp. 88 (D. Me. 1990), M.A.I.N., an organization, sought to strike down the "voluntarily

22 quit rule," a regulation that terminated food stamp assistance for "heads of household" when the

23 family's primary wage earner stopped working without good cause. M.A.I.N.'s complaint alleged

24 that it "has members who are the head of a Food Stamp household but are not the primary wage

25 earners[.]" *Id.* at 90. Defendants moved to dismiss on standing grounds. M.A.I.N.'s president

26 submitted an affidavit stating that "M.A.I.N. has at least one member who is a food stamp 'head of a

27 household,' is not the primary wage earner and who recently lost food stamps for the household

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1   when the primary wage earner quit work without good cause." *Id.* at 91. The court granted

2   defendants' motion, explaining that the complaint and the affidavit "do[ ] not identify the member

3   allegedly affected by the voluntary quit rule, nor . . . identify any of the factual circumstances

4   supporting her claim to be subject to the regulation." *Id.* at 92.

5   Like the defective complaints in *American Immigration Lawyers Ass'n* and *Maine Ass'n of*

6   *Indep. Neighborhoods*, which alleged "only vague categories of members that might suffer harm"

7   and "d[id] not identify the member allegedly affected," CFIT's complaint contains a single cryptic

8   sentence about its members' identities. This is insufficient. Regardless of whether there is a bright-

9   line rule mandating that organizations name at least one member in order to satisfy *Hunt*'s first

10   factor, at the very least *American Immigration Lawyers Ass'n* and *Maine Ass'n of Indep.*

11   *Neighborhoods* illuminate that courts may insist on such specificity. This makes sense. Although

12   Federal Rule of Civil Procedure 8(a)(2) only requires complaints to "give the defendant fair notice

13   of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41,

14   47 (1957), "fair notice" entitles defendants to some idea about who is seeking to haul them into

15   court. Two additional considerations warrant such disclosure here. For one, this is an antitrust

16   lawsuit. Such cases are notoriously costly and protracted. *See, e.g., DM Research, Inc. v. College of*

17   *Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (in antitrust litigation, "the price of entry, even to

18   discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further

19   proceedings"). In addition, defendants have faced similar claims before. In 2004, several plaintiffs,

20   including R. Lee Chambers Company LLC, filed antitrust and state law claims against ICANN and

21   VeriSign in the Central District of California. *See* ICANN's Request for Judicial Notice Ex. I at 2.

22   The court dismissed the antitrust claims and remanded the state law claims. *See id.* When CFIT

23   filed its TRO in this court, it included a declaration from Richard L. Chambers. *See* Docket No. 6.

24   If this case involves res judicata or collateral estoppel issues — and the court expresses no view on

25   whether it does — defendants deserve to find out as early as possible.

26   CFIT relies on *Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D. N.J. 2003). In that case,

27   Robert Clark, a paraplegic, and Access Today, an organization to which Clark belonged, brought a

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1 class action, claiming that "architectural barriers" at McDonald's restaurants violated Title III of the

2 Americans with Disabilities Act ("ADA"). The complaint alleged that "at least one member" of

3 Access Today had visited McDonald's franchises which Clark had not. *Id.* at 203. McDonald's

4 contested both Clark and Access Today's standing on a motion to dismiss. The court first concluded

5 that, at a minimum, Clark had standing to assert claims for injunctive relief at restaurants he had

6 visited before filing the complaint. *Id.* at 227-31.[6] In addition, the court reasoned, Clark's Access

7 Today membership satisfied *Hunt*'s first prong and conferred associational standing upon the

8 organization. *Id.* at 214. Noting that Clark's standing was limited to obtaining equitable relief at

9 only certain restaurants, McDonald's then argued that the court should concomitantly restrict Access

10 Today's standing:

> Access Today cannot advance the claims of its unidentified members, say the
> Defendants, because the amended complaint does not 'identify [such members],
> allege which [members] have which disabilities, allege which [members] with which
> disabilities visited which store on which dates, identify what discriminatory conduct
> was encountered, [and] which stores each unnamed member plans to visit (if any).'

14 *Id.* at 215 (alteration in original). The court rejected this contention, calling it an "exaggerated

15 pleading standard." *Id.* (internal quotation marks omitted).

16   *Clark* is distinguishable. For one, unlike CFIT, whose membership remains shrouded in

17 mystery, Access Today did identify at least one member: Clark. *See id.* ("[t]he short answer to

18 Defendants' present challenge, therefore, is that Clark's standing, albeit limited, enables Access

19 Today to satisfy the first prong of the *Hunt* test"). Moreover, *Clark* did not reject the same

20 arguments defendants make here. Instead, that court found unpersuasive McDonald's novel theory

21 that Clark's standing shaped the contours of other Access Today members' standing. *See id.*

22 (describing McDonald as contending that Access Today's standing should be "limited so as to be

23 coextensive with the standing Clark enjoys"). Accordingly, the court grants defendants' motions for

24 judgment on the pleadings without prejudice.

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27   [6]   The court reserved ruling on whether Clark could challenge obstructions in
restaurants he had not visited. *See Clark*, 213 F.R.D. at 229-30.

28

1   **3.   Antitrust Claims**

2   Despite the fact that the court has dismissed CFIT's claims, it may be helpful at this point to

3   clarify several other pleading issues.

4   **a.   Failure to Allege Relevant Product Markets**

5   In general, a plaintiff must allege a relevant product and geographic market to state a claim

6   under sections 1 and 2 of the Sherman Act. A market consists of all "commodities reasonably

7   interchangeable by consumers for the same purposes[.]" *United States v. E.I. du Pont de Nemours &*

8   *Co.*, 351 U.S. 377, 395 (1956). "In economists' terms, two products or services are reasonably

9   interchangeable where there is sufficient cross-elasticity of demand. Cross-elasticity of demand

10   exists if consumers would respond to a slight increase in the price of one product by switching to

11   another product." *Todd v. Exxon Corp.*, 275 F.3d 191, 201-02 (2d Cir. 2001). "Congress prescribed

12   a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic

13   one." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962).

14   One market that CFIT alleges is the "[t]he market for services used by end users in the

15   purchase and sale of expiring domain name registrations ("the Expiring Names Registration Services

16   Market")." Comp. ¶ 11. VeriSign argues that *Weber v. Nat'l Football League*, 112 F. Supp. 2d 667

17   (N.D. Ohio 2000) and *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159 (N.D. Ala. 2001) have

18   rejected this market definition as a matter of law.

19   In *Weber*, a professional domain name dealer registered "jets.com" and "dolphins.com" with

20   Network Solutions Incorporated ("NSI"), VeriSign's predecessor. The National Football League

21   attempted to get NSI to transfer the domain names to the New York Jets and the Miami Dolphins.

22   NSI placed the names on hold and barred the plaintiff from selling them. The plaintiff sued under

23   section 2 of the Sherman Act, describing the relevant product markets as "the demand for the

24   domain names 'jets.com' and 'dolphins.com.'" *Weber*, 112 F. Supp. 2d at 673. The court rejected

25   these definitions, reasoning that the infinite number of potential domain names made the proper

26   market "domain names in general":

27   The football defendants argue that the market should not be defined in terms of their
         specific marks, but rather in terms of domain names in general . . . . The logic of the

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1   football defendants' argument is sound . . . . Although domain names are not a
    traditional commodity, for the purposes of a monopolization claim under the
2   Sherman Act, the examination of the relevant market should be the same. In this
    case, the market is defined in terms of domain names in general, not 'jets.com' and
3   'dolphins.com.'

4   *Id.* at 673-74. Because the plaintiff did not allege that the defendants had monopolized this broader

5   market, the court dismissed his claim. *Id.* at 674.

6   In *Smith*, a computer programmer sued NSI under the Sherman Act for refusing to permit

7   him to try to acquire expired domain names. He defined the relevant product market as "expired

8   domain names." *Smith*, 135 F. Supp. 2d at 1168. Relying on *Weber*, the court reasoned that

9   plaintiff's failure to prove that NSI monopolized the market for "domain names generally" doomed

10 his claim:

11   [T]here is no inherent difference in character, for purposes of interchangeability and
        cross-elasticity of demand, between domain names that are 'expired' and held by NSI
12   and those that are not. It is true in a literal sense that each domain name is unique.
        And one given individual domain name may be far more valuable on the open market
13   than others. But products need not be entirely fungible to be considered part of the
        same relevant market . . . . [T]he *Weber* court did more than decide that the two
14   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.
15   Because the number of domain names, unlike traditional commodities, is essentially
        unlimited, there will always be reasonable substitute names available for any given
16   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.

17 *Id.* at 1169-70. Thus, the court granted summary judgment in NSI's favor. *Id.* at 1170.

18   *Weber* and *Smith* provide an additional bar to CFIT's Sherman Act claims with respect to the

19 Expiring Names Registration Services Market. Although CFIT alleges that "[r]ecognizable (and

20 hence usable) domain names are in limited supply" and "often have substantial commercial value,"

21 comp. ¶ 25, 64, no facts support these conclusory statements. Nevertheless, the court declines

22 VeriSign's invitation to hold that CFIT's market definition necessarily fails as a matter of law. At

23 bottom, both *Weber* and *Smith* rest on an empirical premise: that all domain names are fungible.

24 CFIT may have a colorable argument that this fact-specific issue is not amenable to a pleadings-

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1 based challenge. Indeed, unlike this court, *Smith* had the benefit of an evidentiary record.[7]

2 Although it may be unlikely, it is theoretically possible that CFIT's amended complaint may contain

3 detailed allegations tending to show that registered and unregistered domain names are not

4 reasonably interchangeable.[8] A domain name cannot expire without first being registered; arguably,

5 the fact that some individual or entity has registered a domain name implies that it has a value that

6 an unregistered name does not. VeriSign contends that bare allegations that some domain names

7 sell for high prices "is not at odds with . . . *Smith*," because it "acknowledged that 'one given

8 individual domain name may be far more valuable than others,' but 'products need not be entirely

9 fungible to be considered part of the same relevant market.'" Rep. Supp. Mot. Jud. Plead. at 10:12-

10 15 (quoting *Smith*, 135 F. Supp. 2d at 1169). At the same time, however, price disparities are

11 relevant for grouping commodities into relevant markets, *see E.I. du Pont de Nemours & Co.*, 351

12 U.S. at 404, and CFIT's new allegations could potentially differentiate the alleged Expiring Names

13 Registration Services Market from domain names in general. The court thus dismisses this claim

14 with leave to amend.

15   **3.   Business and Professions Code Section 17200**

16   CFIT brings claims under California Business and Professions Code section 17200 ("UCL").

17 Compl. ¶¶ 129-33. The UCL prohibits unfair competition, including "any unlawful, unfair or

18 fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Until recently, "any person

19 acting for the interests of itself, its members, or the general public" could sue under the UCL.

20 *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1011 n.3 (2005). The term

21 "person" includes associations. *See* Cal. Bus. & Prof. Code § 17201 ("[a]s used in this chapter, the

22

_____

23   [7]   For example, the court bolstered its key determination that adequate alternative
    domain names are always available by noting that "while the number of 'expired' names in NSI's
24 database is undisputedly substantial in a raw sense, it represents approximately .05% of all domain
    names under registration." *Smith*, 135 F. Supp. 2d at 1170.

25

26   [8]   Before the hearing on this matter, CFIT filed an amended complaint as an exhibit to a
    request for leave to amend. The court expresses no view whatsoever on this complaint's legal
    sufficiency. In addition, pursuant to CFIT's request at oral argument, the court will not deem this
27 proposed amended complaint controlling. CFIT deserves an opportunity to amend after receiving
    this order and attending oral argument.

28

1 term person shall mean and include natural persons, corporations, firms, partnerships, joint stock

2 companies, associations and other organizations"). In November 2004, California voters approved

3 Proposition 64, which curtails private representative actions under the UCL. The statute no longer

4 contains language about "any person acting for the interests of . . . its members" and now bestows

5 standing only on "any person who has suffered injury in fact and has lost money or property . . . ."

6 Cal. Bus. & Prof. Code § 17204. In addition, Proposition 64 amended section 17203, which

7 authorizes injunctive relief, to provide that "[a]ny person may pursue representative claims or relief

8 on behalf of others only if the claimant meets the standing requirements of [s]ection 17204 and

9 complies with [s]ection 382 of the Code of Civil Procedure." Cal. Bus. & Prof. Code § 17203.[9]

10 Defendants contend that Proposition 64 abolished associational standing under the UCL.

11   The California Supreme Court has explained that a court construing a statute must start with

12 its plain meaning and only examine extrinsic sources if necessary to resolve an ambiguity:

> [W]e first examine the words of the respective statutes: 'If there is no ambiguity in
> the language of the statute, then the Legislature is presumed to have meant what it
> said, and the plain meaning of the language governs. Where the statute is clear,
> courts will not interpret away clear language in favor of an ambiguity that does not
> exist.' If, however, the terms of a statute provide no definitive answer, then courts
> may resort to extrinsic sources, including the ostensible objects to be achieved and
> the legislative history.

17 *People v. Coronado*, 12 Cal. 4th 145, 151 (1995) (quoting *Lennane v. Franchise Tax Bd.*, 9 Cal. 4th

18 263, 268 (1994)). At the same time, however, a court may disregard "[t]he literal meaning of the

19 words of a statute . . . to avoid absurd results . . . ." *County of Sacramento v. Hickman*, 66 Cal. 2d

20 841, 849, n.6 (1967).

21   CFIT argues that Proposition 64 could not have eliminated associational standing under the

22 UCL because the explanation of the initiative that voters approved was comparatively narrow,

23 stating only that "[i]t is the intent of the California voters in enacting this act to prohibit private

24 attorneys from filing lawsuits for unfair competition where they have no client who has been injured

25 in fact under the standing requirements of the United States Constitution." Cal. Bus. & Prof. Code §

26 _____

27   [9]   California Code of Civil Procedure section 382 sets forth requirements for class
actions.

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17203 (Historical and Statutory Notes). But the statute's plain language effects a broader change. CFIT cannot explain why Proposition 64 removed the section giving standing to "any person acting for the interests of . . . its members" and replaced it with language requiring a plaintiff *personally* to have suffered "injury in fact" and "lost money or property." Cal. Bus.& Prof. Code § 17204. "[M]aterial changes in the phraseology of statutes normally demonstrate an intent by the lawmakers to change the meaning." *Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1053 (1998) (holding that the Legislature's deletion of words "entered into on or after the effective date of this section" from statute forbidding restrictive covenants meant that all restrictive covenants, whenever formed, were void). The fact that the UCL now expressly limits "representative claims or relief on behalf of others" to certain forms of class actions also belies CFIT's argument. *See* Cal. Bus. & Prof. Code § 17203.[10] Associational standing is a "representative claim": the organizational plaintiff has no claim itself. *See Warth*, 422 U.S. at 511 (referring to associational standing as "representational standing"). Therefore, because the UCL no longer permits associational standing, and because CFIT does not claim to have any other form of standing, the court dismisses its UCL cause of action without leave to amend.

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[10]   In *Bank of America, N.A. v. Miller*, 2005 WL 2086099 (E. D. Cal. 2005), the plaintiff, Miller, founded Consumers Against Unfair Business Practices ("CAUBP"). CAUBP sued Bank of America under the UCL. In light of Proposition 64, however, CAUBP conceded that it was an improper plaintiff because "the organization itself has no account with the Bank and therefore cannot claim to have suffered an injury in fact." *Id.* at *1. CFIT correctly notes that CAUBP's concession means that the court did not actually adjudicate the issue. Although this is true in a legalistic sense, CAUBP's concession also reinforces this court's sense that the plain meaning of the UCL as amended does not permit associational standing.

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III. ORDER

For the foregoing reasons, the court

(1) denies VeriSign's motion to dismiss,

(2) grants defendants' motion for judgment on the pleadings with ten days leave to amend

except for CFIT's UCL claim,

(3) grants defendants' motions for judgment on the pleadings on CFIT's UCL claim with

prejudice,

(4) vacates the March 24 hearing date on CFIT's motion for leave to file an amended

complaint, and

(5) permits defendants twenty days from CFIT's amendment to file a response.

DATED: 2/28/06   /s/ Ronald M. Whyte
                                               RONALD M. WHYTE
                                               United States District Judge

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   Dated: 2/28/06   _____DOH_____
16   **Chambers of Judge Whyte**

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PROOF OF SERVICE

2

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844.

4
On November 22, 2006 I served the following document(s) described as:

5

6
DEFENDANT VERISIGN, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT; AND

7

8
DECLARATION OF ANGEL L. TANG IN SUPPORT OF DEFENDANT VERISIGN, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

9

10
☒   by placing true copies thereof enclosed in sealed envelopes addressed as follows:

11

12
☒   **BY MAIL** I placed such envelope with postage thereon prepaid in the United States Mail at 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. Executed on November 22, 2006 at Los Angeles, California.

13

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15

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☐   **BY PERSONAL SERVICE** I caused such envelope to be delivered by hand to the office of the following addressee. Executed on November 22, 2006 at Los Angeles, California.

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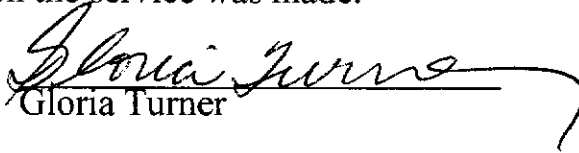
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☒ **ELECTRONICALLY** I am employed in the County of Los Angeles and am an employee of the law firm of Arnold & Porter LLP. On November 22, 2006, I served the above-referenced documents by electronic service through EFC/Pacer Website for the Northern District of California. Executed on November 22, 2006 at Los Angeles, California

☐ **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Gloria Turner
Gloria Turner

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