Jeffrey A. LeVee (State Bar No. 125863)
jlevee@JonesDay.com
Eric P. Enson (State Bar No. 204447)
epenson@JonesDay.com
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2300
Telephone: +1.213.489.3939
Facsimile: +1.213.243.2539

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NAME.SPACE, INC.,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

Case No. CV 12-8676-PA

Assigned for all purposes to the Honorable Percy Anderson

MEMORANDUM IN SUPPORT OF DEFENDANT ICANN'S MOTION TO DISMISS COMPLAINT

[Notice of Motion and Motion to Dismiss Complaint; Request for Judicial Notice and [Proposed] Order Filed, Served and Lodged Concurrently Herewith]

Hearing Date: Feb. 11, 2013
Hearing Time: 1:30 p.m.
Hearing Location: 312 N. Spring St.

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INTRODUCTION

Through agreements with the United States Government, defendant Internet Corporation for Assigned Names and Numbers ("ICANN") is tasked with coordinating the Internet's domain name system ("DNS"), which permits Internet users to find websites within the DNS network. These agreements also provide ICANN with the responsibility of approving new top level domains ("TLDs") in the DNS, such as .com, .net and .org. ICANN is a not-for-profit public benefit corporation, and because of its unique role in the DNS, its bylaws specifically forbid it from competing with the companies that it authorizes to operate TLDs.

For over a decade, Plaintiff name.space, Inc. ("name.space") has run an "alternative internet" that is not connected to the DNS and can only be accessed through use of special software. In its alternative internet, name.space claims to operate a multitude of TLDs based on generic words such as .art, .book, .home and .sucks. In 2000, name.space applied to ICANN to operate these generic word-based TLDs in the DNS, but ICANN did not approve name.space's application.

Now, as ICANN is considering the historic introduction of hundreds of new TLDs, name.space has charged ICANN with various antitrust, trademark and unfair competition claims seeking to block any new TLD in the DNS that may overlap with the TLDs name.space offers in its alternative internet. Rather than preparing to compete with these new TLDs if they are approved by ICANN, name.space has brought this action to stifle new competitive entry. Although name.space's Complaint is long, it is short on factual allegations and is based on a complete misapprehension of antitrust, trademark and competition law.

First and foremost, name.space's entire Complaint is barred by a release of ICANN that name.space executed in its 2000 application. Specifically, name.space acknowledged that it had "no legally enforceable right" in any TLD and released and forever discharged ICANN from "any and all claims" relating to name.space's application or ICANN's "establishment or failure to establish a new TLD." Yet

name.space alleges that its injury flows directly from "ICANN's refusal to delegate name.space's gTLDs to the DNS" in 2000, and each of name.space's claims is premised on an alleged "establishment or failure to establish" new TLDs, bringing name.space's claims well within the scope of the release.

Even if the release did not bar name.space's claims, every one of its claims is otherwise defective. For example, name.space charges ICANN with a conspiracy in violation of the antitrust laws, but name.space alleges no facts plausibly suggesting the existence of this conspiracy, its members or its terms. Name.space also alleges that ICANN is a monopolist, but this claim fails because ICANN is legally incapable of monopolizing the alleged "TLD registry market," a market in which it does not compete. Name.space further claims that it has trademark rights in 482 TLDs and that these rights will be violated "if and when" ICANN approves competing TLDs delegated under the same names, but the Complaint makes clear that ICANN has not yet approved any new TLDs for use in commerce, meaning name.space's trademark claims are not ripe. Name.space alleges claims for tortious interference with its business relationships but offers no facts regarding these relationships or ICANN's acts designed to disrupt the relationships. Finally, name.space asserts an unfair competition claim against ICANN, but that claim is dependent on – and fails with – name.space's other causes of action.

In short, name.space's claims fail to satisfy well-worn pleading standards. Name.space has not alleged facts sufficient to state a claim against ICANN, and its Complaint should therefore be dismissed.

SUMMARY OF NAME.SPACE'S COMPLAINT

The Internet's Domain Name System – The Internet is succinctly described as "an international network of interconnected computers." *Reno v. ACLU*, 521 U.S. 844, 849 (1997). Each computer and server has a unique identity, known as an Internet Protocol address ("IP address"), consisting of a series of numbers. (Compl. ¶ 20.) Because series of numbers can be difficult to remember, the founders of the

Internet created the Domain Name System ("DNS"), which converts numeric IP addresses into easily-remembered domain names that permit users to find specific websites, such as "google.com" or "uscourts.gov." (*Id.* ¶ 17.) When a computer user requests a domain name associated with a particular website, that request is sent to a DNS server, which looks up the IP address assigned to that domain name and permits a connection between the requesting computer and the website. (*Id.* ¶ 22.) The end result is that this Court's website can be found at "cacd.uscourts.gov," rather than through entry of a string of numbers, which is how computers on the network actually know it.

The ".com" and ".gov" referenced in these examples are known as "Top Level Domains" or "TLDs." (*Id.* at ¶ 23.) The letters immediately to the left of the last "period" or "dot" are known as the Second Level Domain, such as "google" or "uscourts." (*Id.*) The letters to the left of the Second Level Domain (if any) are known as the Third Level Domain, such as the "cacd" used in this Court's website address. (*Id.*)

"Generic" TLDs, or "gTLDs," are operated for the entire Internet community. Generic TLDs include .com, .net and .org. "Sponsored" TLDs, or "sTLDs," such as .museum, are operated for the benefit of a defined community. (*Id.* ¶ 29.) In addition, there are "country-code" TLDs, such as .uk, which are operated by or on behalf of sovereign nations. (*Id.*) Currently, there are 22 gTLDs and sTLDs, and approximately 250 country code TLDs resolving in the DNS. (*Id.*)

ICANN's Mandate and Operations – ICANN is a California not-for-profit public benefit corporation. (*Id.* ¶ 19.) Prior to ICANN's formation in 1998, the United States government, via contractual arrangements with third parties, operated the DNS. (*Id.* ¶ 35.) ICANN was formed in 1998 as part of the U.S. Government's commitment to privatize the Internet so that administration of the DNS would be in the hands of those entities that actually used the Internet as opposed to governments. (*Id.* ¶ 36.) Pursuant to agreements with the U.S. Department of Commerce, ICANN

1 has been vested with the sole responsibility for coordinating the DNS and ensuring
2 its continued security, stability and integrity. *Id.*
3 ICANN fulfills its coordination role in a number of ways. For example,
4 ICANN enters into contracts with and monitors each "registry," which are the
5 companies that operate the TLDs. (*Id.* ¶ 37.) In addition, ICANN accredits and
6 monitors "registrars," which are the companies that contract with consumers and
7 businesses to obtain rights to use second-level domain names in the TLDs, such as
8 yahoo.com and NPR.org. (*Id.* ¶ 27.)
9 Pursuant to its agreements with the U.S. Government, as name.space alleges,
10 "ICANN has the exclusive authority to determine whether to introduce new TLDs
11 into the Internet's current architecture." (*Id.* ¶ 37.) "ICANN also has the exclusive
12 authority to determine what companies will operate as registries for these TLDs."
13 (*Id.*) ICANN is required to perform these functions "exclusively for charitable,
14 educational, and scientific purposes within the meaning of § 501(c)(3) of the
15 Internal Revenue Code of 1986 . . . ." (ICANN's Request for Judicial Notice
16 ("RJN"), Ex. A, Art. 3.) In addition, ICANN must act "through open and
17 transparent processes that enable competition and open entry in Internet-related
18 markets." (RJN, Ex. A at Art. 4.) But ICANN does not "compete" in the DNS; its
19 Bylaws specifically restrict it from acting as a registry or registrar in competition
20 with the entities affected by ICANN's policies. (RJN, Ex. B at Art. I, § 2.)
21 **Name.space's Operations –** In 1996, name.space created an "alternative
22 internet," which was not linked in any way to the DNS managed by ICANN; and
23 name.space acted as the registry for the TLDs resolving in its internet. (Compl.
24 ¶¶ 32-34.) Users can access name.space's TLDs by installing special software on
25 their computers to bypass the DNS. (*Id.* ¶¶ 33-34.) By name.space's own
26 admission, it was "effectively unable to compete" with the DNS registries "because
27 name.space's TLDs were not on the Root and therefore segregated from the
28 majority of the global Internet." (*Id.* at ¶ 34.) In other words, "name.space's TLDs

were by default not universally resolvable on the Internet, thereby eliminating any chance of name.space competing" with the DNS registries. (*Id.*) According to name.space's estimation, "for 99.9% of the world, the Root is the Internet." (*Id.*)

ICANN's Continual Expansion of the DNS – One of ICANN's core missions is to create competition within the DNS. (RJN, Ex. A at Art. 4; RJN, Ex. B at Art. I, § 2.6.) In furtherance of this mission, in 2000, ICANN accepted applications for new TLDs. (Compl. ¶¶ 45-48.) On October 6, 2000, name.space submitted an application to ICANN to operate 118 TLDs ("2000 Application"). (*Id.* ¶ 50.) In its 2000 Application, name.space acknowledged in writing that it had "no legally enforceable right" in any new TLD or the approval of any new TLD. (RJN, Ex. C at ¶ B12.) In addition, name.space released and forever discharged ICANN "from any and all claims and liabilities relating in any way to" its 2000 Application or ICANN's "establishment or failure to establish a new TLD." (*Id*. at ¶ B14.2) ICANN approved seven new TLDs in 2000 but did not select any of the TLDs that name.space requested. (Compl. ¶¶ 53-55.)

In 2004, ICANN accepted applications for sponsored TLDs. Name.space did not apply. In 2012, ICANN opened another round of applications for new TLDs ("2012 Application Round"). (*Id.* ¶ 62.) In connection with the 2012 Application Round, ICANN published a comprehensive guidebook and required a $185,000 application fee for each TLD requested. (*Id.* ¶¶ 64, 67.) ICANN offered a one-time $86,000 reduction in the application fee for applicants that had applied in the 2000 round but whose TLDs were not selected. (*Id.* ¶ 70.) Again, name.space did not apply. (*Id.*) But numerous other entities did, requesting hundreds of new TLDs; some of those applications contain the same letters as the TLDs name.space is using in its alternative internet. (*Id.* ¶¶ 87-88.) ICANN, however, has not yet approved any TLDs in connection with the 2012 Application Round. (*Id.* ¶ 89.)

Name.space's Claims Against ICANN – In its Complaint, name.space asserts antitrust, trademark and unfair competition claims against ICANN. First,

1 name.space asserts that ICANN has violated federal and California antitrust laws by
2 conspiring with unidentified members of ICANN's own Board of Directors to
3 structure the 2012 Application Round in a way that excludes name.space from
4 launching in the DNS the TLDs it sought in its 2000 Application. (*Id*. ¶¶ 97, 98,
5 116.) Name.space also asserts that ICANN has unilaterally monopolized the "TLD
6 registry market" and prevented name.space from competing in this market. (*Id*.
7 ¶¶ 109-113.) Name.space then claims that it has statutory and common law
8 trademark rights in the TLDs it applied for in 2000 and that ICANN has violated
9 these rights by permitting "competing TLD registries" to apply for identical TLDs
10 in the 2012 Application Round. (*Id*. ¶¶ 123-24, 136, 154.) Name.space closes its
11 Complaint by alleging that ICANN has engaged in unfair competition and
12 tortiously interfered with name.space's business simply by accepting applications
13 from "competing TLD registries" for TLDs name.space sought in its 2000
14 Application. (*Id*. ¶¶ 145-147, 160-63, 167-170.)
15 Despite the length of name.space's Complaint, its factual allegations fall well
16 short of stating any claims against ICANN.
17

ARGUMENT

18 To survive a motion to dismiss, a plaintiff must allege facts sufficient "to
19 raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550
20 U.S. 544, 555 (2007). A complaint cannot rely on mere "labels and conclusions,"
21 and "a formulaic recitation of the elements of a cause of action will not do." *Id*.
22 Instead, the elements of each claim must be alleged in more than vague and
23 conclusory terms: a complaint must contain enough factual "heft" to "show[] that
24 the pleader is entitled to relief." *Id*. Plausibility is the key: plaintiffs must offer
25 factual allegations that "nudge their claims across the line from conceivable to
26 plausible." *Id*. at 570; *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009) ("A claim has
27 facial plausibility when the plaintiff pleads factual content that allows the court to
28 draw the reasonable inference that the defendant is liable for the misconduct

alleged."). A plaintiff must plead facts "plausibly suggesting" the existence of illegal conduct, and courts must evaluate the plausibility of the allegations "in light of common economic experience." *Twombly*, 550 U.S. at 546, 565. But a court need not accept as true legal conclusions or unwarranted factual inferences, even if "couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

The Supreme Court has directed courts – particularly in antitrust cases – to apply these standards rigorously to prevent a "largely groundless claim" from imposing the enormous burden and expense of discovery on litigants and courts. *Twombly*, 550 U.S. at 557-58. In particular, the Supreme Court has "counsel[ed]" lower courts "against sending the parties into discovery when there is no reasonable likelihood that the plaintiff[] can construct a claim from the events related in the complaint." *Twombly*, 550 U.S. at 558; *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). This admonition is particularly apt here, as set forth below.

I. Name.space Released ICANN Of All The Claims Asserted In Its Complaint.

As set forth below, name.space's Complaint suffers from a number of pleading shortcomings. But the Court can easily dismiss the entire Complaint on a single ground: in its 2000 Application, name.space released ICANN of all the claims asserted in its Complaint. A written release extinguishes any claim covered by its terms. *Skrbina v. Fleming Cos., Inc.*, 45 Cal. App. 4th 1353, 1366 (1996). Further, "a general release can be completely enforceable and act as a complete bar to all claims (known or unknown at the time of the release) despite protestations by one of the parties that he did not intend to release certain types of claims." *San Diego Hospice v. Cnty. of San Diego*, 31 Cal. App. 4th 1048, 1053 (1995) (citing *Winet v. Price*, 4 Cal. App. 4th 1159, 1173 (1992)). As a complete bar to recovery, any claims covered by a release must be dismissed with prejudice. *Grillo v. State of Cal.*, 2006 WL 335340, at *7-8 (N.D. Cal. Feb. 14, 2006).

In its 2000 Application, name.space expressly "release[d] and forever discharge[d] ICANN … from any and all claims and liabilities relating in any way

1 to (a) any action or inaction by or on behalf of ICANN in connection with this
2 application or (b) the establishment or failure to establish a new TLD." (RJN, Ex.
3 C ¶ B14.2.) The prospective nature of name.space's release was reinforced by its
4 representation that "it has no legally enforceable right … to the delegation in any
5 particular manner of any top-level domain ***that may be established*** in the
6 authoritative DNS root." (*Id.* ¶ B12 (emphasis added).) The release and related
7 waiver provisions were a central component of name.space's 2000 Application,
8 comprising a fifth of that document's terms. They state in straightforward language
9 that, in return for ICANN's consideration of its 2000 Application, name.space
10 would not sue ICANN for establishing or failing to establish any TLD in the root,
11 whenever that may occur.

12 But with this suit, name.space seeks to assert claims arising from its 2000
13 Application that were released over a decade ago. In fact, its 2000 Application is
14 central to name.space's entire Complaint. (Compl. ¶¶ 4-7, 43, 45-57, 67-73. 75, 90.)
15 In describing its injury, for example, name.space alleges that "ICANN's refusal to
16 delegate name.space's gTLDs to the DNS under its 2000 Application has enabled
17 and induced 2012 applicants to apply for delegation of those gTLDs as part of the
18 2012 Application Round." (*Id.* ¶ 90.) Likewise, every claim is directly related to
19 ICANN's "establishment or failure to establish" new TLDs. (RJN, Ex. C ¶ B14.2.)
20 Name.space's antitrust claims, for instance, flow directly from ICANN's failure to
21 establish the TLDs name.space sought in its 2000 Application. (Compl. ¶¶ 75 ("As
22 a result of the 2012 Application Round's procedural and financial barriers created
23 by ICANN, name.space was unable to participate in the 2012 Application Round ,
24 and continues to seek delegation of its 118 gTLDs from its 2000 Application."); 94-
25 118.) Similarly, the trademark, unfair competition, and tortious interference claims
26 all anticipate – and are dependent on – the establishment of new TLDs in the DNS
27 that would "cause disruption to name.space's existing services and to the content on
28 its network." (*Id.* ¶¶ 91, 119-172.) In short, each of name.space's claims center on

TLDs "that may be established" by ICANN – TLDs that name.space expressly represented it had no legally enforceable right to when it released any and all claims related to their establishment.

Moreover, when it executed the 2000 Application with its release, name.space had already asserted some of the legal claims it now asserts against ICANN. Shortly before name.space submitted the 2000 Application, the Second Circuit affirmed the dismissal of name.space's antitrust claims against Network Solutions, Inc., the entity that administered the DNS prior to ICANN, for an alleged antitrust conspiracy similar to the one alleged here. *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 579 (2d Cir. 2000); *see also* Compl. ¶¶ 32-36 (discussing the transition of DNS management from Network Solutions to ICANN). In light of its prior litigation history and the clear terms of the release, name.space cannot contend that it lacked knowledge of the claims released in the 2000.

Accordingly, the 2000 Application and its release bars name.space's entire Complaint. And because name.space cannot plead around the release, its Complaint should be dismissed with prejudice. *Grillo*, 2006 WL 335340, at *7-8.

II. Name.space Has Not Alleged Facts Plausibly Suggesting A Violation Of Section 1 Of The Sherman Act Or The Cartwright Act.

In its First and Third Claims for Relief, name.space asserts that ICANN engaged in a conspiracy to set artificially high application fees in the 2012 TLD Application Round in order to deter name.space from entering the TLD registry market. (Compl. ¶¶ 97, 116.) Name.space's Complaint, however, is wholly devoid of facts plausibly suggesting such a conspiracy. To the contrary, the few facts alleged in the Complaint demonstrate that such a conspiracy is not plausible.

A. Name.space fails to allege facts plausibly suggesting a conspiracy.

Section 1 of the Sherman Act and California's Cartwright Act forbid "contracts, combinations or conspiracies" between separate economic actors that unreasonably restrain competition. 15 U.S.C. § 1; Cal. Bus. & Prof. Code § 16720;

1 *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012);
2 *Cnty. Of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1165 (9th Cir. 2001)
3 (noting that analysis of the Cartwright Act "mirrors the analysis under" Section 1
4 because the Cartwright Act "was modeled after the Sherman Act."). "[T]o allege
5 an agreement between antitrust co-conspirators, the complaint must allege facts
6 such as a 'specific time, place, or person involved in the alleged conspiracies' to
7 give a defendant seeking to respond to allegations of a conspiracy an idea of where
8 to begin." *Kendall*, 518 F.3d at 1047 (quoting *Twombly*, 550 U.S. at 565 n.10). ***In***
9 ***short, the complaint must "answer the basic questions: who, did what, to whom***
10 ***(or with whom), where, and when?"*** *Id.* at 1048 (emphasis added).
11 Although name.space liberally uses the word "conspiracy," its only
12 allegation on the topic is utterly conclusory: "ICANN's creation of the 2012
13 Application Round, its announcements regarding the 2012 Application Round and
14 the rules ICANN adopted were the result of an unlawful series of agreements
15 between ICANN and its co-conspirators, some of whom had already left ICANN
16 and some of whom were in the ICANN organization when the 2012 Application
17 Round was decided and announced, but thereafter left ICANN." (Compl. ¶ 65.)
18 From there, name.space lists nine regularly scheduled meetings of ICANN's Board
19 and alleges, "on information and belief," that "ICANN and the co-conspirators
20 entered into and furthered their conspiracy" during these meetings. (*Id.* ¶ 66.)
21 These assertions, however, completely lack the factual content necessary to
22 state a claim for relief under Section 1 and the Cartwright Act. In particular:
23 • Name.space does not identify who within ICANN entered into the alleged
24 agreements;
25 • It does not identify the ICANN Board members with whom ICANN
26 allegedly conspired;
27 • It does not identify what was discussed during the ICANN Board meetings or
28 who was present when the alleged agreements were reached;

- It does not say if the alleged agreements were explicit or tacit, written or oral;
- It does not allege facts regarding the terms of the alleged agreements; and
- It does not offer any facts relating to the manner in which the alleged conspiracy was carried out.

Courts have repeatedly rejected precisely these types of conclusory and amorphous conspiracy allegations. In *Twombly*, the Supreme Court rejected a similarly-vague allegation that the defendants had "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Twombly*, 550 U.S. at 551. In *Kendall*, the Ninth Circuit ruled that conspiracy allegations were insufficient where the plaintiff merely alleged that the defendants "knowingly, intentionally and actively participated in an individual capacity in the alleged scheme" to fix prices because it was "nothing more than a conclusory statement." *Kendall*, 518 F.3d at 1048. A year later, the Ninth Circuit again affirmed dismissal of Section 1 claims, in *William O. Gilley Enterprises, Inc. v. Atl. Richfield Co.*, because the complaint "does not clearly assert which individual agreement or agreements constitute" the unlawful conspiracy. 588 F.3d 659, 669 (9th Cir. 2009).[1]

[1] District courts are in accord. In *Prime Healthcare Servs., Inc. v. Service Employees International Union*, the court found that "'a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality' for purposes of Section 1 of the Sherman Act." 2012 U.S. Dist. LEXIS 123865, *16-17 (S.D. Cal. Aug. 30, 2012) (quoting *Twombly*, 550 U.S. at 557). Likewise, in *Mediostream, Inc. v. Microsoft Corp.*, 2012 U.S. Dist. LEXIS 67963, *13-14 (N.D. Cal. April 23, 2012), the Northern District rejected allegations that Microsoft repeatedly "agrees with" or "convinces" manufacturers to reject competing media platforms because they failed to identify "whether such agreements are written, oral or tacit, when they were executed, who made the decisions, or with which [manufacturers] such agreements were made." And in *In re Nat. Assoc. of Music Merchs., Musical Instruments & Equipment Antitrust Litig.*, allegations that the defendants "key decision-makers met at trade shows and summits," like name.space's list of ICANN Board meetings, were insufficient "because all they show is that Defendants' decision-makers had the opportunity to communicate or meet to reach agreements, or to enter into a conspiracy – not that

Name.space's allegations are no different. It has "pleaded only ultimate facts, such as conspiracy, and legal conclusions. [It] failed to plead the necessary evidentiary facts to support those conclusions." *Kendall*, 518 F.3d at 1047-48.[2]

B. The few facts name.space does allege demonstrate that a conspiracy is not plausible.

The facts name.space does include in its Complaint demonstrate that name.space has failed to "nudge [its] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. First, to the extent name.space is alleging a conspiracy between ICANN and its own Board of Directors, such a "conspiracy" is not actionable as a matter of law. As the Supreme Court held in its landmark decision of *Copperweld v. Independence Tube*, "officers of a single firm are not separate economic actors pursuing separate economic interests . . . officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." 467 U.S. 752, 769 (1984). "Simply put, a single corporate entity cannot agree, combine or conspire with its own officers, directors, employees, or its affiliates and subsidiaries to supply the collaborative element of a Sherman Act Violation." *Curry v. Steve's Franchise Co.*, 1984 U.S. Dist. LEXIS 21798, *13 (D. Mass. Nov. 21, 1984); *Williams v. 5300 Columbia Pike Corp.*, 891 F. Supp. 1169, 1174 (E.D. Va. 1995) ("It is well-settled that a corporation cannot conspire with its wholly-owned subsidiary or with its officers and directors.")

Second, the alleged conspiracy is implausible because it makes no sense. It defies logic that ICANN would enter into an "unlawful series of agreements" during its own Board meetings, as name.space alleges, when the notices of, agendas

(continued…)

they did." 2012 U.S. Dist. LEXIS 118827, *30-31 (S.D. Cal. Aug. 17, 2012).

[2] In Paragraph 95 of the Complaint, name.space makes vague reference to a conspiracy between ICANN "Verisign, Affilias and the select few other companies that operate as TLD registries." This claimed conspiracy, to the extent it is different from the alleged Board member conspiracy, also is deficient under the *Twombly* pleading standards for the same reasons.

for, reports considered at, and the minutes of each meeting are publicly posted on ICANN's website, as required by ICANN's Bylaws. (RJN, Ex. B at Art. III, §§ 2, 4, 5, 6); *Goldstein v. Bank of Am., N.A.*, 2010 WL 1252641, *4 (W.D.N.C. Jan. 19, 2010) (dismissing complaint where the defendants' participation in the alleged conspiracy "would make no sense.") Moreover, since ICANN "has the exclusive authority to determine what companies will operate as registries for these TLDs," (Compl. ¶ 37), there was no reason for ICANN to join a conspiracy to keep name.space out of the "TLD registry market" if in fact ICANN wished to do so. *Brusnon Commc'ns, Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550, 564 (E.D. Pa. 2002) (dismissing antitrust claims where the plaintiff offered "no logical reason" for the defendant to enter in the alleged conspiracy). In addition, name.space does not explain why ICANN would have offered it (and all others who applied in 2000) an $86,000 reduction in the 2012 application fee if ICANN was secretly conspiring to block name.space from applying in the first place. (Compl. ¶ 70.)

In sum, the Complaint is devoid of facts that are necessary to plead an antitrust conspiracy, and those few facts that are alleged actually demonstrate that a conspiracy is not plausible. Accordingly, name.space's Section 1 and Cartwright Act claims should be dismissed.

III. Name.space Has Not Alleged Facts Plausibly Suggesting That ICANN Has A Monopoly In Violation Of Section 2 Of The Sherman Act.

Name.space's Second Claim for Relief alleges that ICANN has monopolized the "TLD registry market" through its control of the DNS and by charging high fees in the 2012 Application Round. (*Id.* ¶ 113.) Section 2 of the Sherman Act prohibits the unlawful acquisition or maintenance of monopoly power in a relevant market through anticompetitive conduct. 15 U.S.C. § 2; *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 998 (9th Cir. 2010). This offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as

1 distinguished from growth or development as a consequence of a superior product,
2 business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S.
3 563, 570-571 (1966). In other words, "[t]o safeguard the incentive to innovate, the
4 possession of monopoly power will not be found unlawful unless it is accompanied
5 by an element of anticompetitive ***conduct***." *Verizon Commc'n, Inc. v. Law Offices*
6 *of Curtis V. Trinko*, LLP, 540 U.S. 398, 407 (2004) (emphasis in original). Here,
7 name.space's Section 2 claim fails as a matter of law because ICANN is legally
8 incapable of monopolizing the "TLD registry market," a market in which it does
9 not compete, and ICANN has not acquired monopoly power, in any market,
10 through exclusionary conduct.

11 **A. ICANN is incapable of monopolizing the "TLD registry market."**

12 "The gravamen of a Section 2 claim is the deliberate use of market power ***by***
13 ***a competitor*** to control price or exclude competition." *Mercy-Peninsula*
14 *Ambulance, Inc. v. Cnty. of San Mateo*, 791 F.2d 755, 759 (9th Cir. 1986)
15 (emphasis added). "It is axiomatic in antitrust law that [a] defendant may not be
16 found liable under the Sherman Act for monopolizing or attempting or conspiring
17 to monopolize a market unless that defendant is a competitor in the relevant market
18 and his conduct creates a dangerous probability that he will gain a dominant share
19 of the market." *Transphase Sys. v. S. Cal. Edison Co.*, 839 F. Supp. 711, 717 (C.D.
20 Cal. 1993). "Simply put, in order to be liable for inflicting antitrust injury under
21 Section 2, a defendant must compete in the affected market." *Universal Grading*
22 *Serv. v. eBay, Inc.*, 2012 U.S. Dist. LEXIS 2325,*26-27 (N.D. Cal. Jan. 9, 2012)
23 (dismissing Section 2 claim where the defendant did not compete in the allegedly-
24 monopolized markets); *JES Props., Inc. v. USA Equestrian, Inc.*, 2005 U.S. Dist.
25 LEXIS 43122, *55 (M.D. Fla. May 9, 2005) (same); *Berlyn, Inc. v. The Gazette*
26 *Newspapers*, 223 F. Supp. 2d 718, 733 (D. Md. 2002) (same).

27 Name.space alleges that ICANN has monopolized the "TLD registry market,"
28 but ICANN does not compete in this market, as the Complaint acknowledges.

1 (Compl. at ¶¶ 2, 19, 36-37.) Indeed, ICANN's Bylaws forbid ICANN from
2 operating a TLD registry or competing with the entities that operate such registries.
3 (RJN, Ex. B at Art. I, § 2.)
4 The Ninth Circuit and the Central District have dismissed similar Section 2
5 claims where the alleged monopolist did not compete in the relevant market. In
6 *Mercy-Peninsula*, for example, an ambulance company sued the San Mateo county
7 claiming that it monopolized the health care provision market by selecting
8 ambulance companies other than the plaintiff to provide services in the alleged
9 market, which is no different from name.space's theory of exclusion. *Id*. at 756.
10 The Ninth Circuit affirmed dismissal of the Section 2 claim because, like ICANN
11 and the TLD registry market, "the county is not a competitor in the health care
12 provision market and cannot be charged with having used market position to
13 exclude competition." *Id*. at 759. Similarly, in *Portney v. CIBA Vision Corp.*, 593
14 F. Supp. 2d 1120, 1122 (C.D. Cal. 2008), the defendant, a seller of contact lenses,
15 filed a Section 2 claim against the plaintiff, the holder of various contact lens
16 patents. Although the plaintiff was not in the business of selling contact lenses, the
17 defendant alleged that the plaintiff was seeking to extract patent royalties that
18 would allow him to control prices in that market. *Id*. at 1128. The court rejected
19 this claim, holding that it could find "no legal authority" for the proposition that the
20 plaintiff could monopolize a market in which the plaintiff "is not a competitor and
21 possesses no market share." *Id*. at 1129.
22 Numerous courts have reached the same conclusion. *Orthopedic Studio v.*
23 *Health Ins. Plan*, 1996 U.S. Dist. LEXIS 10321, *14 (E.D.N.Y. Feb. 9, 1996)
24 ("Because the plaintiff and HIP are not competitors in the relevant market for the
25 manufacturing, fitting, servicing and repairing of artificial limbs, the plaintiff
26 cannot allege a claim [against HIP] under Section 2 of the Sherman Act."); *Ball*
27 *Memorial Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 603 F. Supp. 1077, 1087 (S.D. Ind.
28 1985), *aff'd*, 784 F.2d 1325 (7th Cir. 1986) ("Blue Cross/Blue Shield cannot, as a

1 matter of law, monopolize or attempt to monopolize the hospital services industry
2 because Blue Cross/Blue Shield has never and does not now compete in that
3 market.”). They have reached this conclusion even where the non-participant
4 defendant has some influence over the relevant market, as ICANN has here. In
5 *Olde Monmouth Stock Transfer Co. v. Depository Trust & Clearing Corp.*, 485 F.
6 Supp. 2d 387, 392-93 (S.D.N.Y. 2007), for instance, where the defendant was not a
7 competitor in the “stock transfer market, but had the ability to select companies to
8 serve this market,” the court found that there is “no legal authority for the
9 proposition that market power under Section 2 of the Sherman Act encompasses
10 ‘influence’ by a non-competitor over the relevant market.” A similar “influence”
11 theory was rejected in *Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920, 926-
12 27(2d Cir. 1980), where the court held that a monopolist in one market could not
13 monopolize an adjacent market if it did not compete in that market. Name.space’s
14 monopolization theory is just as deficient as those rejected by other courts.

15 **B. ICANN has not engaged in exclusionary conduct.**

16 Even if ICANN could somehow monopolize a market it does not compete in,
17 name.space’s Section 2 claim would still fail because ICANN has not engaged in
18 exclusionary conduct to acquire or maintain its “monopoly.” Name.space alleges
19 that ICANN is a monopolist because “ICANN alone has the power to determine
20 what companies will operate as registries for TLDs,” and ICANN adopted a high
21 application fee for the 2012 Application Round. (Compl. ¶¶ 109, 113, 7.) These
22 actions, however, do not amount to exclusionary conduct, as a matter of law.

23 First, while ICANN may have the sole authority to designate TLDs and
24 select TLD registry operators within the DNS, ICANN did not acquire this power
25 through exclusionary conduct. To the contrary – and as name.space concedes in its
26 Complaint – ICANN obtained the sole authority to delegate TLDs and select
27 registries through “its agreements with the U.S. government.” (*Id.* ¶ 37.) Put
28 simply, ICANN did not conduct its operations to unlawfully acquire the authority to

1 designate TLDs and select registries; thus, this authority does not support
2 name.space's monopoly claim because the Sherman Act does not punish firms
3 whose monopoly position has been "thrust upon" them. *United States v. Aluminum*
4 *Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945); *Alaska Airlines Inc. v. United*
5 *Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991) ("The Sherman Act also has not
6 been interpreted to penalize natural monopolies. A firm that creates a valued
7 service or product should not be punished with treble damages and criminal
8 sanctions merely because the firm finds itself to be the holder of a natural
9 monopoly."); *Credit Chequers Info. Servs. v. CBA, Inc.*, 1999 U.S. Dist. LEXIS
10 6084, *36-38 (S.D.N.Y. Apr. 28, 1999) (ruling that monopoly power was an
11 "academic question" because "forces external to [the defendants] created any
12 monopoly power they have in" the relevant market); *Standfacts Credit Servs. v.*
13 *Experian Info. Solutions, Inc.*, 294 Fed. Appx. 271, 272 (9th Cir. 2008) (same).
14 Second, even if ICANN had some sort of monopoly, its setting of the TLD
15 application fee in order to cover the costs associated with review of the applications
16 could not violate the Sherman Act because the charging of high – or even supra-
17 competitive – fees is not an act of exclusionary conduct, as a matter of law. The
18 Supreme Court and every appellate court to address the issue have held
19 unequivocally that a monopolist (assuming ICANN is one) can charge whatever
20 price it wants without violating the antitrust laws. *Trinko*, 540 U.S. at 407; *Alaska*
21 *Airlines*, 948 F.2d at 548-49; *Williamsburg Wax Museum, Inc. v. Historic Figures,*
22 *Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987) ("imposition of a high price is not, in and
23 of itself, an anticompetitive act."). As the Supreme Court found in *Trinko*, "[t]he
24 mere possession of monopoly power, and the concomitant charging of monopoly
25 prices, is not only not unlawful; it is an important element of the free-market
26 system." *Trinko*, 540 U.S. at 407.
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IV. Name.space Has Not Alleged Facts Plausibly Suggesting That It Has Suffered An "Antitrust Injury."

In the event this Court is not already persuaded to dismiss all of name.space's antitrust claims, there is yet another reason to do so – name.space has failed to allege that it has suffered an "antitrust injury." The antitrust laws "were enacted for 'the protection of competition, not competitors.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Thus, "antitrust injury" is an element of every private antitrust claim. *Brantley*, 675 F.3d at 1197. The element of antitrust injury requires a plaintiff to allege facts demonstrating that its injury stems from an "anti-competitive aspect of the practice under scrutiny" and "that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." *Atl. Richfield*, 495 U.S. at 342-44 (1990). Accordingly, courts have found antitrust injury to be lacking where a plaintiff failed to allege facts demonstrating an injury to competition as a whole, or where a plaintiff's injury arose from increased competition. Here, name.space's allegations of injury encompass both of these shortcomings.

First, while name.space has alleged that it has been precluded from entering the TLD registry market, causing it to lose "millions of dollars in potential revenue" (Compl. ¶¶ 104,105), name.space has not alleged any facts demonstrating that the market as a whole has become less competitive due to this alleged exclusion. To the contrary, name.space's allegations demonstrate that there are numerous competitors in the alleged TLD registry market seeking to launch new TLDs via ICANN's 2012 Application Round. (Compl. ¶¶ 29 (indicating the approximately 275 TLDs currently resolving in the DNS), 88 (alleging that at least 189 applications in the 2012 Application Round seek approval of TLDs parallel to those allegedly used by name.space); 10 (same).) If, in fact, name.space has suffered an injury, it is injury limited to itself, which courts have found is not an antitrust injury.

1 For example, in *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812 (9th Cir. 1988),
2 although the plaintiff alleged that it was driven from the market by its competitors,
3 the Ninth Circuit affirmed the dismissal of its antitrust claims for a failure to state
4 an antitrust injury because "it is injury to the market or to competition in general,
5 not merely injury to individuals or individual firms that is significant," and the
6 plaintiff's own allegations showed that competition was thriving. *Id*. at 812-813.
7 Likewise, in *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, the Ninth Circuit
8 found that the plaintiff's foreclosure from the market was not an injury to
9 competition because it was not "unreasonably disruptive of market functions such
10 as price setting, resource allocation, market entry, or output designation." 884 F.2d
11 at 504, 508 (9th Cir. 1989). And in *Verisign, Inc. v. Internet Corp. for Assigned*
12 *Names and Numbers*, 2004 U.S. Dist. LEXIS 29965, *16-20 (C.D. Cal. May 18,
13 2004), the Central District of California ruled that antitrust claims brought against
14 ICANN by the operator of the .COM and .NET TLDs were unsustainable because
15 competition amongst TLDs was "vigorous" and the plaintiff had "not alleged
16 anything more than injury to its own business."
17 Second, name.space's real gripe is that it may face ***increased*** competition in
18 the TLD registry market, which obviously does not amount to an antitrust injury.
19 Name.space's antitrust claims are premised on its fear that the TLDs its operates in
20 its alternative internet may have to compete with similar TLDs in the DNS. (*Id*. at
21 ¶¶ 73 ("ICANN knowingly and willingly created the application process for the
22 2012 Application Round without adequate safeguards in place to protect the 2000
23 applicants' rights in their proposed or already operating TLDs."), 90 (noting that
24 this refusal "has enabled and induced 2012 applicants to apply for delegation of
25 [name.space's] gTLDs as part of the 2012 Application Round.").) This is not an
26 antitrust injury because the injury, if any, will be caused by increased competition.
27 *S. Cal. Inst. of Law v. TCS Educ. Sys.*, 2011 U.S. Dist. LEXIS 39827, *27-29 (C.D.
28 Cal. Apr. 5, 2011) (ruling that the plaintiff did not suffer an antitrust injury from

increased competition because it is not "conduct of the type the antitrust laws were intended to prevent."); *ECOS Electronics Corp. v. Underwriters Labs., Inc.*, 743 F.2d 498, 502-503 (7th Cir. 1984) (ruling that antitrust injury was lacking where the plaintiff was merely complaining that its competitor received UL certification, but the plaintiff had not).

Like the plaintiff in *Verisign*, name.space's "Complaint seems to be based on the unstated assumption that ICANN has a duty to help it compete more effectively," but there is no antitrust injury where, like here, the theory of injury "depends on and arises out of the fact that [name.space] has vigorous competitors who will be able to compete more vigorously." *Verisign*, 2004 U.S. Dist. LEXIS 29965, at *20.

V. Name.space Has Not Alleged Facts Plausibly Suggesting Trademark Infringement Or Common Law Unfair Competition.

In its Fourth, Fifth and Seventh Claims for Relief, (Compl. ¶¶ 119-143; 150-158), name.space asserts claims for statutory and common law trademark infringement and common law unfair competition alleging that trademark rights name.space has in "482 gTLDs – such as .now, .power, .space and .sucks, to name a few – ***would be*** infringed by competing gTLDs delegated under the same name." (Compl. ¶ 86 (emphasis added).) But, as name.space's Complaint concedes, ICANN has not yet approved any new TLDs for use in commerce, meaning that name.space's trademark claims are not ripe for adjudication.[3]

[3] Although name.space has asserted trademark rights in ***482 generic TLDs*** , the law is clear that name.space does not have any interests in its alleged TLDs that are worthy of trademark protection. But the Court need not reach this issue now because of ICANN's other challenges to name.space's trademark claims. In the event this litigation proceeds beyond this initial challenge, ICANN will file an early motion to resolve the trademark claims based, in part, on Ninth Circuit and Central District decisions finding that TLDs are generic when used in connection with domain name registry services and are not entitled to trademark protection. *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1047 (9th Cir. 1999); *Image Online Design, Inc. v. Core Ass'n*, 120 F. Supp. 2d 870, 878, 880 (C.D. Cal. 2000) ("Not once has any court imputed trademark rights to a gTLD."). Indeed, name.space even concedes in its Complaint that the United States Patent and Trademark Office ("PTO") refuses to recognize TLDs as source identifiers worthy of trademark protection. (Compl. ¶¶ 83-85.) And the Trademark Manual of Examining Procedure ("TMEP") expressly instructs the PTO's Examining

Under Article III of the Constitution, the party invoking federal jurisdiction must establish the existence of an actual case or controversy. *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1228 (9th Cir. 1998). In trademark infringement matters, the Ninth Circuit has held that a party engages in activity that could constitute infringement when the party manifests "specific acts of alleged infringement or an immediate capability and intent to produce an allegedly infringing item." *Sweedlow, Inc. v. Rohm & Haas Co.*, 455 F.2d 884, 886 (9th Cir. 1972). Claims that rest upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all" are insufficient to meet Article III's justiciability requirement. *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Here, name.space seeks an advisory opinion about what the law would be upon a hypothetical infringement of its alleged trademarks.[4]

Name.space's trademark claims contain a series of speculative assumptions amounting to a conclusion that name.space's 482 gTLDs "***would be infringed*** by competing gTLDs delegated under the same name," (Compl. ¶ 86, emphasis added), "***if and when*** ICANN delegates a TLD on the DNS that is identical with a TLD that currently resolves on the name.space network . . . ." (*Id.* ¶¶ 9, 10 (emphasis added).). No act of infringement has been pled, and no defined threat of

(continued…)

Attorneys to refuse registration of a mark "composed solely of a TLD for 'domain name registry services' (e.g., the services of registering .com domain names)." TMEP § 1215.02(d). The reason for this mandate is simple, "TLDs generally serve no source identifying function and, thus, are not trademarks." *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1174 (Fed. Cir. 2004); *the Dot Commc'ns Network LLC*, 2011 WL 6099688, *6 (T.T.A.B. Nov. 22, 2011) (rejecting an assertion of trademark rights in a .music TLD). In addition, and if need be, ICANN will demonstrate in its early motion that it has not used any name.space trademarks in interstate commerce, a prerequisite for trademark infringement, and that ICANN has no liability for alleged contributory infringement.

[4] This portion of ICANN's Motion to Dismiss is brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

infringement has been pled. All that has been alleged is remote speculation about what might happen at some point in the future. This is not enough to meet the justiciability requirement set forth in Article III.

An analogous Ninth Circuit decision dictates dismissal of name.space's claims. In *Sweedlow*, a patent holder brought an infringement action seeking a judgment that the defendant's plastic manufacturing plant, which was still under construction, would infringe upon the plaintiff's patents when placed in operation. 455 F.2d at 885. The Ninth Circuit affirmed dismissal of the claim as unripe, ruling that the plaintiff improperly sought an advisory opinion "that ***if and when*** defendant completes the plant now under construction, assuming there are no material changes in the intervening period, the present acts not only threaten, but in fact constitute an infringement of plaintiff's patents." *Id*. (emphasis added).

A similar result is warranted here because the mere act of accepting applications for new TLDs is not a present or past act of infringement since the TLDs have not yet been used in commerce by anyone, as required. *Rosenfeld v. Twentieth Century Fox Film*, 2008 WL 4381575 (C.D. Cal. Sept. 25, 2008). Thus, the notion that ICANN might approve new TLDs that may overlap with name.space's TLDs is, at this time, speculative. (Compl. ¶¶ 9, 10.) And assuming any granted applications do overlap with any of name.space's alleged TLDs, the questions of whether those TLDs will be used by the registry operators for registry services that compete with name.space, and whether name.space will have any trademark rights, much less trademark rights superior to those registry operators, calls for pure conjecture at this time.

VI. Name.space Has Not Alleged Facts Plausibly Suggesting That ICANN Has Tortiously Interfered With Name.space's Business Interests.

To state a claim for tortious interference with contract, a plaintiff must plead facts demonstrating: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts designed

1 to induce breach or disruption of the contract; (4) actual breach or disruption; and
2 (5) resulting damage." *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg.*
3 *Corp.*, 525 F.3d 822, 825-26 (9th Cir. 2008) (dismissing interference claim where
4 the plaintiff failed to establish that the defendant's "action was designed to
5 accomplish interference.") The essence of the claim is the existence of a legally
6 binding contract that was breached or disrupted by the defendant's intentional act.
7 *Beck v. Am. Health Group, Int'l, Inc.*, 211 Cal. App. 3d 1555, 1566-67 (1989).
8 In its Eighth Claim for Relief, name.space asserts that ICANN has interfered
9 with name.space's customer contracts "by permitting ***prospective*** TLD registries,
10 including name.space's competitors, ***to apply*** for delegation to the DNS of the same
11 gTLDs that are the subject of name.space's existing customer contracts." (Compl.
12 ¶ 162 (emphasis added).) This conclusory claim, however, fails because
13 name.space has not alleged any facts identifying: (i) the relevant contracts; (ii) an
14 actual disruption of these contracts; (iii) ICANN acts "designed to induce breach"
15 of these contracts; or (iv) the resulting damage to name.space. *Semi-Materials Co.,*
16 *Ltd. v. SunPods, Inc.*, 2012 U.S. Dist. LEXIS 128584, *17 (N.D. Cal. Sept. 10,
17 2012) (dismissing interference claim because the plaintiff "has not identified any of
18 Defendants' intentional acts designed to induce a breach, actual disruption of the
19 contractual relationship, or damages."); *Michaluk v. Vohra Health Servs., P.A.*,
20 2012 U.S. Dist. LEXIS 129454, *19-21 (E.D. Cal. Sept. 10, 2012) (same); *PNY*
21 *Techs., Inc. v. SanDisk Corp.*, 2012 U.S. Dist. LEXIS 55965, *45-46 (N.D. Cal.
22 Apr. 20, 2012) (same). Moreover, name.space fails to explain how the mere
23 acceptance of ***applications*** to operate TLDs linked to the DNS has actually caused
24 name.space to breach contracts with its customers in its alternative internet. *Haag v.*
25 *Countrywide Bank, F.S.B.*, 2012 U.S. Dist. LEXIS 69592, *15 (D. Nev. May 18,
26 2012) (dismissing interference claim where actual disruption "was not plausible").
27 Name.space's Ninth Claim for Relief for tortious interference with
28 prospective economic advantage is likewise deficient. (Compl. ¶¶ 167-172.) To

state such a claim, a plaintiff must plead facts demonstrating: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Pardi v. Kaiser Permanente Hosp., Inc.*, 389 F.3d 840, 852 (9th Cir. 2004) In addition, a plaintiff must allege facts demonstrating that the defendant's conduct was wrongful ***beyond*** the alleged act of interference, meaning violative of some law, statute or regulation. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003).

As with its interference with contract claim, name.space fails to allege basic facts identifying its economic relationships, ICANN's knowledge of those relationships, ICANN's intentional acts "designed" to disrupt these relationships, or actual disruption and damage to name.space. *Semi-Materials*, 2012 U.S. Dist. LEXIS 128584 at *14-16. In addition, name.space does not allege any facts demonstrating that ICANN's alleged conduct was wrong beyond the alleged interference. Nor can it, in that all of name.space's other Claims for Relief have failed. *SC Mfg. Homes, Inc. v. Liebert*, 162 Cal. App. 4th 68, 92-93 (2008) (dismissing intentional interference claims where plaintiff failed to establish that the alleged conduct also violated the antitrust laws).

VII. Name.space Has Not Alleged Fact Plausibly Suggesting That ICANN Has Engaged In Unfair Competition.

In its Sixth Claim for Relief, name.space asserts that ICANN has violated California's Unfair Competition Law ("UCL"). (Compl. ¶¶ 145-147.) The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Here too, name.space has failed to state a claim.

First, the allegation that ICANN has engaged in "unlawful" business practices by violating the antitrust and trademark laws fails because name.space's

claims under those statutes are deficient. *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 866-67 (2001) (dismissal of a Cartwright Act claim required dismissal of an "unlawful" UCL claim premised on the same alleged violation); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 374 (2001) (same). Second, because name.space cannot support its antitrust claims, name.space is foreclosed from repackaging those allegations as an "unfair" business practice based on the same allegedly anticompetitive conduct. *Chavez*, 93 Cal. App. 4th at 375 ("If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason – because it unreasonably restrains competition and harms consumers – the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' towards consumers."). Finally, because name.space has not alleged any facts suggesting that ICANN engaged in deceptive conduct or that name.space ***actually relied on*** such conduct, name.space has not stated a "fraudulent" UCL claim. *In re Tobacco II Cases*, 46 Cal. 4th 298, 312, 326 (2009) (a business practice is "fraudulent" under the UCL if a "reasonable consumer" is "likely to be deceived" by the conduct and the plaintiff "actually relied on" such conduct).

CONCLUSION

For the foregoing reasons, ICANN respectfully requests that name.space's entire Complaint be dismissed pursuant to Rule 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure.

Dated: November 30, 2012

JONES DAY

By: /s/ Eric P. Enson
Eric P. Enson

Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS