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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

COALITION FOR ICANN TRANSPARENCY, INC., a Delaware Corporation, Plaintiff, v. VERISIGN, INC., a Delaware Corporation; INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California Corporation, Defendants.	Case No. 05-4826 (RMW) PVT **PLAINTIFF'S CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS CFIT'S FIRST AMENDED COMPLAINT** **DATE: JUNE 9, 2006** **Time:** 9:00 a.m. **Ctrm:** 6 Honorable Ronald M. Whyte

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I. INTRODUCTION AND OVERVIEW

Defendant VeriSign, Inc. ("VeriSign") is the sole source of .COM domain names. First Amended Complaint, ¶25. Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") was created to bring competition to the market for the registration of domain names by, among other things, creating competition within and for the market for .COM domain names and capping the price which VeriSign could charge for those .COM domain names. *Id.* at ¶¶ 30, 33-34, 60. In contravention of its mandate to create competition in the domain name registration market, ICANN instead has conspired with VeriSign to extract hundreds of millions of dollars from the relevant domain name registration markets for ICANN and VeriSign's joint benefit. *Id.* at ¶¶ 88-91, 99-100. Name Intelligence, Inc., an independent analyst covering the domain name registration market, has estimated that .COM registration fees paid to VeriSign and ICANN will rise from $21,213,582.00 per month in October, 2005 (under VeriSign's current price-capped contract) to $71,986,416.48 per month by October, 2010 (under the new contract at issue here). In 2012, just six years from now, estimates are that VeriSign's .COM business will generate over a billion dollars in revenue each year, almost five times higher than in the most recent year.[1] This windfall is made possible by the ICANN-VeriSign conspiracy to leave VeriSign artificially insulated from market forces and immune from competition (*Id.* at ¶¶ 82-84), allowing ICANN and VeriSign to extract monopoly rents from registrars and registrants, including Plaintiff's member companies and supporters, in staggering amounts calculated in the hundreds of millions of dollars annually. *Id.* at ¶¶ 99, 100.

Equally troubling to the pricing issues, ICANN and VeriSign have conspired to cannibalize markets in which vigorous competition now exists by moving those markets from a multiple-sourced model involving domain name registrars (in competition with each other) to a single-source model provided exclusively by VeriSign. *Id.* at ¶¶ 48-50, 92-98, 108-112. Again contrary to its mandate to create competition, ICANN is abusing its power, in conspiracy with VeriSign, to

[1] Jay Westerdal, President and CEO of Name Intelligence, Inc., sent this comment to the public mailing list of ICANN-Accredited Registrars in ICANN's Registrar Constituency. Jay Westerdal, [registrars] VeriSign COM Prices and Stats (Oct. 25, 2005) <http://gnso.icann.org/mailing-lists/archives/registrars/msg03494.html >.

consolidate registrar-level competitive markets, in which Plaintiff's member companies participate, into a single registry-level market monopolized by VeriSign. *Id.* at ¶¶ 92-98.

By their conspiracy, ICANN will enable VeriSign to extract registration fees from registrars and registrants far in excess of what those services would bring if .COM registry services were subject to competition. *Id.* at ¶¶ 88-91. ICANN will enable VeriSign to consume currently competitive markets, ending entire lines of business for some companies and putting others out of business entirely. *Id.* at ¶¶ 49-50, 95-96. In exchange, VeriSign will become ICANN's principal source of funding, providing millions of dollars of excess fees to ICANN each year, allowing ICANN, together with its staff and their salaries, to grow at an unprecedented (and unwarranted) rate. *Id.* at ¶¶ 99-101.

Incredibly, against these and other well-pleaded facts, ICANN and VeriSign contend that this antitrust case can be resolved in their favor on a motion to dismiss. In their motions, both Defendants rely heavily on a counter-recital of facts to argue that they are entitled to judgment as a matter of law. Indeed, ICANN spends close to one-third of its brief raising factual issues in dispute and seeking the admission of additional facts by way of judicial notice. Both Defendants also rely on the peculiar argument that because they contend that the contracts at issue are "revisions" to existing contracts (a disputed fact), the "revisions," regardless of their anticompetitive effects, cannot be the basis for antitrust claims. Finally, both Defendants allege that Plaintiff and its member companies and individual supporters (whose identities and contact information have been supplied to Defendants in response to "expedited discovery") lack standing to bring the present suit. Each of these arguments fails.

In this Consolidated Opposition to both ICANN and VeriSign's Motions to Dismiss, the Coalition For ICANN Transparency ("CFIT") will demonstrate that:

- Plaintiff and its member companies have standing to bring the claims now before the Court;
- The claims alleged by CFIT under the antitrust laws, including the Sherman and Cartwright Acts, are well-pleaded; and
- The relevant markets and harm to the Plaintiff are defined with sufficient

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specificity to withstand a motion to dismiss; and,

- The arguments raised by ICANN and VeriSign are inappropriate for resolution on a motion to dismiss, as they raise factual defenses and do not require resolution of the matter in their favor as a matter of law.

For these reasons and those stated more fully below, the Defendants' motions should be denied.

II. ARGUMENT

A. All Factual Allegations In The Complaint Must Be Accepted As True

The standards applicable to Rule 12(b)(1) and 12(b)(6) motions are well-known to this Court and will not be restated here.

Against those standards, Defendants' fact-based arguments must fail. For its part, ICANN seeks judicial notice of hundreds of pages of contracts, addenda, exhibits and Memoranda of Understanding, all of which it asks this Court to interpret in its favor. After asking this Court to accept its apostolic interpretation of the judicially noticed documents as true, it further asks the Court to draw inferences both from those documents and the Complaint, all in ICANN's favor. VeriSign similarly takes issue with CFIT's facts, including the ultimate issue of whether a market in fact exists for .COM registry services and expiring domain names. Such issues cannot be resolved at this stage of the case.

As the Court reviews the Defendants' motions, it will quickly realize that these are not motions to dismiss, but fact-intensive motions more appropriate for summary judgment or trial. By way of example, VeriSign makes the following factual contentions (which CFIT disputes) in the following places in its brief: p. 18, n. 17; p. 20, ll. 11-15; p. 21, n.19; p. 21, ll. 1-5; p. 25, ll. 1-4; p. 22, ll. 6-8; p. 23, n.21; and p. 24, n.22.[2]

[2] VeriSign asks the Court to construe the following contested facts in its favor: The pricing terms in the proposed 2006 .com Registry Agreement are not substantively different from those under the 2001 Agreement (p. 18, n.17); the concept of a rebid should VeriSign propose an increase above maximum price provisions still exists under the new Registry Agreements and the proposed renewal at a higher price cannot be a predatory act (p. 20, ll. 11-15); the change in the renewal provisions in the new Registry Agreement is not material and is not a predatory act (p. 20 ll. 8-9); a January 26, 2004 letter from ICANN to VeriSign sets forth conditions that VeriSign could not possibly meet with the proposed CLS that is described in the FAC (p. 21, n.19); the introduction of CLS would require a future approval of the service by ICANN (p. 21, n. 19); the addition of certainty—the intervention of a neutral arbitrator before the registry can be forfeited—obviously cannot be a predatory act under antitrust laws (p. 21, ll. 1-5); the provision in the Registry Agreements for the review and approval of new registry services is the same in all new Registry Agreements entered into by ICANN (p. 25, ll. 1-4); the changes reflected in the registry *[footnote continued on next page]*

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ICANN, for its part, makes the following factual contentions (which CFIT disputes) in the following places in its brief: p. 2, ll. 22; p. 2, ll. 23-27; p. 2, l. 28-p. 3, l. 2; p. 3, ll. 3-4; p. 3, ll. 17-20; p. 7, ll. 19-24; p. 7, l. 27-p.8, l. 2; p. 11, ll. 21-26; p. 11, l. 28-p.12, l. 3; p. 12, l. 4; p. 12, ll. 17-19; p. 12, ll. 22-p.13, l. 1; and p. 15, ll. 21-24.[3] Additionally, the entire section in ICANN's brief regarding whether ICANN acted with specific intent to monopolize necessarily requires a fact-based analysis that is inappropriate at the 12(b)(6) pleading stage. (ICANN Mot., pp. 17-20.)

The above examples are merely illustrations of the score of factual contentions which Defendants ask this Court to adjudicate and interpret in their favor at a stage of pleading that requires this Court to accept all factual allegations in CFIT's Complaint as true.

Agreements and the alleged threat to introduce new services do not constitute a violation of the antitrust laws (p. 22, ll. 6-8); the CLS is procompetitive and it cannot be said of CLS that it "only makes sense if it eliminates competition" (p. 23, n. 21); and the provisions addressing the introduction of new services merely make explicit the procedures and timetable to be followed and do not change the criteria to be considered from that established in the 2001 Registry Agreements (p. 24: fn. 22.)

[3] ICANN asks the Court to construe the following contested facts in its favor: The Extension will not change the fact that the original Registry Agreements create competitive conditions and an Extension of the sole source contract cannot possibly anticompetitive (p. 2, ll. 17-22); the Extension Agreement merely raises the price cap by a relatively small amount and is procompetitive (p. 2, ll. 23-27); the change in price structure in the *new* Registry Agreements is "small" (p. 2, l. 28-p. 3, l. 2); the Extension Agreement clarifies and maintains VeriSign's right to seek permission from ICANN to offer various services related to the operation of the .com registry (p. 3, ll. 3-4); the Extension Agreement cannot take effect without the approval of the United State Department of Commerce which has not occurred (p. 3, ll. 17-20); VeriSign has not yet proposed implementing the CLS to ICANN and if it did, it would be required to go through the entirety of the process established by the Extension for consideration of such services (p. 7, ll. 19-24); the facts are that both the 2005 .net and 2006 .com Agreements provide for payment of fees to ICANN as did the 2001 .com and .net Agreements, as do all other registry agreements that ICANN has entered into with TLD operators (p. 7, l. 27-p. 8, l. 2); the new provisions create no substantive change to the Registry Agreements and certainly none that would support an antitrust claim (p. 11, ll. 21-26); the 2006 .com Extension defers to an arbitrator to determine VeriSign's compliance with essential terms—while the 2001 Agreements left this determination to ICANN, the fact that an independent third party rather than ICANN itself makes this judgment does not render the Agreements anticompetitive (p. 11, l. 28-p. 12, l. 3); under the old and new agreements, what constitutes breach encompasses essentially the same conduct (p. 12, l. 4); in all ways relevant and material, the 2001 .com and 2006 .com Registry Agreements are effectively the same and there has been no change in competitive conditions resulting from the new Registry Agreements (p. 12, ll. 17-19); the MOU is a policy document and does not establish prescriptive rules for competitive conduct—it is nothing more than a statement of mutual intentions (p. 12, ll. 22-p. 13, l. 1); and it is inconceivable that an agreement requiring ICANN to determine if significant competition issues are raised and if so to refer them to antitrust enforcement agencies can fairly characterize ICANN as "swearing off" review much less provide the basis for antitrust liability (p. 15, ll. 21-24).

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B. The Complaint's Allegations Establish That CFIT Has Associational Standing To Bring Claims On Behalf Of Its Members

As the Supreme Court has held, "when standing is challenged on the basis of the pleadings, we 'accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.'" *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). That standard is met here. The Complaint's allegations, construed in CFIT's favor, are sufficient to meet the standing factors of *Hunt v. Washington*, 432 U.S. 333, 343 (1977): that (1) CFIT's members would otherwise have standing to sue in their own right; (2) the interests this suit seeks to protect are germane to CFIT's purposes; and (3) neither the claims asserted nor relief requested requires participation of each of CFIT's individual members. To the extent Defendants believe that they are entitled to factually-based relief dependent on the identity of Plaintiff's member companies and supporters, the identities of those companies have been provided to Defendants in discovery. At issue here, however, on these motions to dismiss is simply whether Defendants are adequately apprised of the claims brought against them and whether Plaintiff has adequately alleged the harm that would befall it, its members and supporters.

CFIT's members would have antitrust standing in their own right if they alleged sufficiently direct and non-speculative injuries that are of the type the antitrust laws were intended to forestall. *See Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986). The Complaint alleges facts demonstrating that the alleged injuries are of the type the antitrust laws were intended to forestall and that CFIT's members will be directly injured as a result of Defendants' anticompetitive acts. Defendants simply ignore these allegations in arguing that CFIT lacks standing.

Defendants claim CFIT lacks standing because it cannot establish that this suit is germane to its purpose. (VeriSign Mot. at 10-11.) The germaneness test is "undemanding." *See Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998) (*citing Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)). All that is required is a "mere pertinence between litigation subject and organizational purpose." *Id.* Defendants are well aware that

CFIT's purpose is to challenge the conduct alleged in the Complaint.[4] Defendants are not entitled to have this suit dismissed merely because the Complaint does not allege CFIT's purpose. Indeed, in *Appraisers Coalition v. Appraisal Institute*, 845 F. Supp. 592, 600 (N.D. Ill. 1994), the court rejected this very argument: "Given that no 'profound' conflict here exists, and given that the Coalition's membership came together to help prosecute this case, the germaneness test is satisfied. The Court will not deny the Coalition standing for a failure to plead its purpose." *Id.* at 600-01. Indeed, Plaintiff's complaint, its website, and the timing of this action illustrate that Plaintiff's member companies and supporters came together at this time and for this purpose precisely because the ICANN-VeriSign agreements negatively impacted their businesses and presence on the Internet. To hold that this action is not germane to the organization's purpose, or to otherwise hold that the organization is not a proper plaintiff, would be to ignore both the well-pleaded facts and the reality of the harm alleged.

Furthermore, Defendants ignore the many cases holding that associations can maintain antitrust claims for injunctive relief because such claims do not require participation by each member of the association. *See, e.g.*, *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991); *Mission Hills Condominium Ass'n M-1 v. Corley*, 570 F. Supp. 453, 458 (N.D. Ill. 1983); *The Appraisers Coalition*, 845 F. Supp. at 601; *Nat'l Office Mach. Dealers Ass'n v. Monroe, The Calculator Co.*, 484 F. Supp. 1306, 1307-08 (N.D. Ill. 1980); *DeGregio v. Segal*, 443 F. Supp. 1257, 1265 n.13 (E.D. Pa. 1978).[5]

[4] CFIT maintains a website at www.cfit.info. The website contains information about its mission and goals, including its lobbying efforts against the proposed .com agreement. The website is continuously updated.

[5] Defendants' authority is readily distinguishable. In *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979), individual participation was required due to "actual and potential conflicts" that were "too obvious to make the association an appropriate vehicle to litigate the claims of its members." *Id.* at 691. The court treated the motion to dismiss in that case as a summary judgment motion. *Id.* at 686. In *Southwest Suburban Board of Supervisors v. Beverly Area Planning Association*, 830 F.2d 1374, 1381 (7th Cir. 1987), also a summary judgment case, the allegations were inherently personal in nature – defendants allegedly "harassed, threatened, annoyed and attempted to intimidate plaintiffs and their members . . ."

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C. The Complaint Alleges Antitrust Injury Proximately Caused By Defendants And Intended To Be Prevented By The Antitrust Laws

Defendants argue that CFIT's antitrust claims fail because the Complaint does not adequately allege antitrust injury. Disputing allegations that must be accepted as true, and relying on irrelevant cases that do not address pleading standards, Defendants argue that the antitrust injury alleged in the Complaint is "not the type of injury the antitrust laws were intended to prevent." ICANN further argues that the injury alleged in the Complaint was not proximately caused by ICANN. All of these arguments fail.

1. The Antitrust Laws Were Intended To Prevent Defendants' Anticompetitive Conduct Alleged in the Complaint

To plead antitrust injury, CFIT must allege facts demonstrating that the alleged injury "is of the type the antitrust laws were intended to prevent." *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 372 (9th Cir. 2003). Courts hold that the antitrust laws were designed to prevent and remedy unlawfully elevated prices and elimination of competition and competitors from the market – which is precisely what CFIT alleges here. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) ("Any combination which tampers with price structures is engaged in an unlawful activity."); *Thompson*, 934 F.2d at 1571 (finding it "beyond dispute" that association's members could allege "antitrust violations which force them to pay excessive fees"); *Pinhas*, 894 F.2d 1024, 1032 (9th Cir. 1989) (defendants' conspiracy to prevent doctor's attempts to provide lower-priced services was antitrust injury because it "could conceivably injure competition by allowing other similar doctors to charge higher prices"); *Glen Holly Entm't, Inc.*, 352 F.3d at 374 (finding antitrust injury resulting from agreement that "detrimentally changed the market make-up and limited consumers' choice to one source of output"); *Amarel*, 102 F.3d at 1502 (noting previous decisions holding that "a competitor of an alleged attempted monopolist had standing where it was either driven out of business or suffered reduced profits because of the alleged anticompetitive acts of the attempted monopolist."); *Rebel Oil Co., Inc.*, 51 F.3d at 1433 ("Of course, conduct that eliminates rivals reduces competition."); *In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1466 (C.D. Cal. 1988) ("Injury caused by supra-competitive pricing is the type of injury which the antitrust laws were intended to

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prohibit.").

The Complaint is replete with allegations establishing antitrust injury. Defendants' ignore many of these allegations, dispute others, and even add new facts of their own to counter them. But on these motions, Defendants allegations must be accepted as true, and must be construed in CFIT's favor.

a. CFIT's Allegations Of Antitrust Injury In The .Com And .Net Registration Markets Are Sufficient

The Complaint clearly alleges antitrust injury and harm to competition in the .com and .net registration markets. ICANN's concessions in the 2006 .com and 2005 .net Agreements give VeriSign monopoly control over the .com and .net Domain Name Registration Markets through, among other things, the perpetual renewal provisions, which virtually guarantee that VeriSign will not have to periodically bid for control over the registries. FAC ¶¶ 69, 70, 72, 82, 85-86. The prospect of competitive bidding constrains VeriSign even while it controls the registry, since price gouging might lead ICANN to reopen the registry to competing bids at the end of the contract. *Id.* ¶ 82. 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 renewal of the 2001 .net Agreement, and had to lower its fees. *Id.* ¶ 69, 70.

Like the 2001 .net Agreement, the 2001 .com Agreement should be put out for competitive bidding in 2007 when its current term expires because VeriSign breached the 2001 .com Agreement (by, among other things, launching the Wait List Service (the precursor to the Central Listing Service)) and has proposed to increase prices. FAC ¶¶ 62, 84, 89-91, 95. However, Defendants have conspired to eliminate VeriSign's need to put the 2006 .com Agreement out for competitive bidding, and to virtually guarantee that VeriSign will never again have to competitively bid for the Agreement. *Id.* ¶¶ 85-87.

Moreover, ICANN's agreement to grant VeriSign a perpetual monopoly permits VeriSign to extract supra-competitive prices from consumers transacting business with the registries. *Id.* 3, 83, 88-91, 99-100. CFIT's members and other participants in the .com and .net domain name registration markets will pay ICANN and VeriSign's supra-competitive prices: registrars will pay

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the excessive fees to VeriSign and ICANN when registering domain names; if the registrar passes the fees on, registrants will pay the excessive fees to obtain a domain name. *See id.* ¶¶ 88-91. Under the 2006 .com Agreement, the fees automatically increase, again without any competitive bidding requirement. *Id.* ¶ 91. Beginning in 2007, *all* price controls on VeriSign's .net registry fee will be eliminated. ICANN shares in the monopoly profit generated from this arrangement. *Id.* ¶¶ 99-101. Moreover, through the 2005 Agreements, ICANN has abdicated its mandate to assure competitive and nondiscriminatory conditions exist (*id.* ¶¶ 85-87.) even though VeriSign has already demonstrated its intent to undermine the competitive and nondiscriminatory balance in the .net and .com domain name registration markets by, *inter alia*, introducing fee-based services such as "IDN" (international domain name) and "ConsoliDate" without ICANN's consent. *Id.* ¶ 105. The antitrust injury is clear, as registrants will have to pay more, and ICANN and VeriSign will share in the monopoly profits.

b. CFIT's Allegations Of Antitrust Injury In The Expiring Names Registration Services Market Are Sufficient

The market for back order services within the Expiring Names Registration Services Market is extremely competitive, and the services have been well-received by consumers. FAC ¶¶ 49-50. However, as the Complaint clearly alleges, Defendants have conspired to (1) leverage VeriSign's contractual registry monopolies into adjacent and downstream markets (including back order pooling services), and (2) destroy and completely transform the highly developed, functioning, and competitive marketplace for back order pooling services. *Id.* ¶¶ 84, 93-96, 108-112.

The 2006 Agreements' change in the definition of "Registry Services" allows VeriSign to implement CLS, which Defendants have already agreed will occur. *Id.* ¶¶ 110-112. CLS will supplant the back order services provider industry, reflecting Defendants' agreement to eliminate all competition for back order service providers and to share between themselves the monopoly profits that VeriSign will take by implementing CLS. *Id.* ¶¶ 99-101. The back order pooling services, an entire line of highly competitive commerce, will be wiped out overnight only to be

replaced with VeriSign's auction monopoly. *Id.* ¶¶ 108-112. The fees charged to CFIT members and other participants in the Expiring Names Registration Market for registering expiring .com or .net domain names will increase in perpetuity without competitive bidding. *Id.* ¶¶ 94, 103,107, 111.

D. CFIT Has Stated Claims Under The Sherman Act And The Cartwright Act

Defendants' challenges to CFIT's antitrust claims ignore page after page of factual allegations that easily satisfy the pleading requirements. Defendants argue that (1) CFIT's Section 1 conspiracy allegations are inadequate; (2) CFIT's Section 2 conspiracy allegations are inadequate; (3) the Complaint fails to allege a relevant market; and (4) the Complaint fails to allege an anticompetitive effect or harm to competition. (ICANN Mot. at 13-21; VeriSign Mot. at 7-16.) These arguments all fail.

"[T]he complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws." *Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir. 1987). It is improper to dismiss a Section 2 claim where the complaint alleges (1) the existence of a combination or conspiracy, (2) an overt act in furtherance of the conspiracy, and (3) the specific intent to monopolize a relevant market. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 927 (9th Cir. 1980) (reversing district court's dismissal of plaintiff's conspiracy to monopolize claim, where complaint alleged that defendants "conspired to monopolize with the requisite specific intent and …[that one defendant] had market power."). The complaint contains allegations sufficient to satisfy each of these elements. (Compl. ¶¶ 2, 3, 71, 80-98, 99-101, (combination/conspiracy); *Id.* ¶¶ 3, 80-93 (overt act); *Id.* ¶¶ 2, 3, 80-84, 88-91, 103-112 (intent to monopolize).) The Complaint also specifically alleges the existence of the 2006 .net and .com Agreements, which alone would be sufficient for pleading purposes to state a Section 2 claim. *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1174 (9th Cir. 1988) (requisite act in a conspiracy claim may be the agreement itself).

1. The Complaint Identifies Relevant Markets

It is clear from Defendants' motions that they disagree with CFIT's market definitions. This disagreement, however, is not sufficient reason for the Court to conclude that CFIT has

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failed to allege relevant product markets and to grant judgment on the pleadings. It is, in fact, evidence that there are significant and material factual issues in dispute that will need to be decided on a full factual record. *Rebel Oil*, 51 F.3d at 1435 (definition of relevant market is question of fact that cannot ordinarily be decided as a matter of law); *Twin City Sportservice, Inc. v. Finley & Co.*, 676 F.2d 1291,1299 (9th Cir. 1982) (definition of relevant market is basically fact question dependent upon special characteristics of industry involved).

a. CFIT Has Met The Pleading Standard For Alleging Relevant Product Markets

It is sufficient for a plaintiff to identify product markets (1) that include all products reasonably interchangeable and (2) that are plausible. *See Pinnacle Sys., Inc. v. XOS Techs., Inc.*, No. C-02-03804-RMW, 2003 WL 21397845, at *7 (N.D. Cal. May 19, 2003) (denying motion to dismiss where allegations of relevant market were "at least plausible," and therefore sufficient to survive pleading challenge). CFIT's definitions meet both of these standards. FAC ¶¶ 11-16. Defendants' assertions that the definitions do not include all products reasonably interchangeable and are implausible ignore the allegations in the Complaint and misrepresent the law.

CFIT's Complaint contains numerous facts supporting its allegation that other TLDs are not reasonably interchangeable for .com and .net. CFIT alleges – and ICANN admits – that other common domain names, such as .gov and .edu, are not even available for general commercial or networking purposes. FAC ¶¶ 39-47; ICANN Answer ¶ 20. CFIT alleges that .com and .net domain names are the dominant TLDs, .com being the dominant domain name for commercial purposes and .net the dominant name for networking purposes. *Id.* CFIT also alleges that .com and .net are at the top of the industry and that .com domain names are essential for a vast majority of businesses. In other words, there are no adequate substitutes for a name in the .com TLD. CFIT also alleges that back order services are a robust and competitive business, used by consumers to register valuable domain names (*id.* ¶ 49) and that the market for back order services is extremely competitive. *Id.* ¶¶ 49-50, 92-98, 103-112.

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Observation of the domain name industry as it exists today suggests that all domain names are not, in fact, reasonably interchangeable.[6] As CFIT alleges, the price VeriSign and ICANN together charge for the registration of .net domain names recently fell by more than 30% while the price of .com remains constant (and under the new agreement would increase), suggesting a lack of cross-elasticity of demand between the .net and .com TLDs. FAC ¶¶ 40-47. If the Court accepts CFIT's allegations as true, as it must, CFIT has adequately identified relevant markets.

b. CFIT's Market Definitions Are Consistent With VeriSign's Definitions In Other Litigation

CFIT's relevant market allegations are more than sufficient to satisfy the notice pleading standard under Fed. R. Civ. P. 8(a)(2). In fact, both Defendants are intimately familiar with CFIT's proposed markets. VeriSign's First Amended Complaint (VeriSign FAC) in *VeriSign, Inc. v. Internet Corp. for Assigned Names and Numbers*, Case No. CV 04-1292 (AHM) (C.D. Cal. July 14, 2004), alleges strikingly similar relevant markets in support of its Sherman Act claim against ICANN.[7] (RJN, Ex. A.) VeriSign alleged a relevant product market for "[t]he operation of TLD registries." (VeriSign FAC ¶¶ 120, 170.) VeriSign admits that its "revenue from .com registrations is a function of the desirability of second level domain names in the .com gTLD as compared with other TLDs." (*Id.* ¶ 122.) VeriSign also alleged "a relevant product market for the provision of services for the secondary domain name market, including the provision of domain name 'backorder' and similar services" (*id.* ¶ 106), as well as a "relevant product market for the provision of Web address directory assistance services," which "include various services designed

[6] VeriSign's own domain name portfolio suggests companies view domain names in other TLDs as complements rather than substitutes: VeriSign owns VeriSign.com, VeriSign.biz, VeriSign.net, VeriSign.info, VeriSign.org, and a similar domain name in a variety of country code TLDs. Many, if not most, other large corporations, similarly own domain names in multiple TLDs. In addition, there are significant sunk costs, especially for companies that have marketed their .com names (such as amazon.com or wine.com) that make it extremely unlikely that companies would give up their .com names and attempt to use a domain name in another TLD as a substitute. These are factual questions that cannot be resolved now.

[7] In VeriSign's appeal to the Ninth Circuit it is arguing that its Sherman Act claim, which the District Court dismissed, should stand based on the very same relevant markets it now asks this Court to declare insufficient as a matter of law. (RJN Ex. B (VeriSign Brief on Appeal) at 65-66) (arguing that FAC defines relevant markets, including the secondary domain name market, the operation of TLD registries, and the market for the provision of web address directory assistance services).)

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to help Internet users locate a pre-determined website." (*Id.* ¶ 140.) Given these allegations, Defendants cannot credibly argue now that they do not have fair notice of CFIT's claims.

2. The Complaint's Allegations Adequately Allege Injury To Competition

Defendants' arguments that CFIT has failed to allege an anticompetitive effect/harm to competition likewise fail. Anticompetitive behavior includes "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.3 (1985) (citing 3 Areeda & Turner, *Antitrust Law*, ¶ 626b at 78 (1978)). CFIT has clearly alleged that Defendants are engaging in activities that will tend to impair the opportunities of rivals and that do not further competition. The mere fact that Defendants do not agree that these activities will impair the opportunities of rivals does not render the allegations themselves insufficient. For example, CFIT made numerous allegations regarding material differences between the 2001 and the 2006 .com Registry Agreements. FAC ¶¶ 80-98. These allegations show that Defendants are engaging in activities that will tend to impair the opportunities of rivals. Defendants dismiss these allegations, as if they did not exist, by falsely claiming that the differences between the 2001 and the 2006 Agreements are not material.

a. ICANN's Responsibility To Assure Competition

The 2001 Agreements obligated ICANN to "promote and encourage robust competition." FAC ¶ 77. As a result of this obligation, ICANN previously challenged VeriSign's launch of the SiteFinder service and planned WLS service. FAC ¶¶ 94, 104. The 2006 Agreements dispense with this obligation to promote and encourage robust competition. *Id.* ¶ 80. Instead, the new agreements merely require ICANN to refer the issue to the appropriate governmental competition authority if ICANN determines that a proposed registry service "might raise significant competition issues." *Id.* ¶ 93, 94. After such referral, ICANN has no further responsibility and VeriSign has no further obligation to ICANN with respect to any competition issues. (*Id.*) Regardless of whether ICANN's abdication of its responsibility to assure competition is in fact a material change or not, and CFIT contends that it is, there can be no question that CFIT has

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alleged that Defendants are engaging in activities that will tend to impair the opportunities of rivals.

b. VeriSign Wrongfully Allowed Perpetual Renewal

Under the 2001 .com Agreement, ICANN could submit the .com contract for competitive bid if it determined VeriSign was in material breach, failed to serve the Internet community, was not qualified, or charged prices in excess of that permitted by the agreement. FAC ¶ 69-72; VeriSign RJN, Ex. C at 88 (2001 .com Agreement, § 25).) Under the 2005 .com Agreement, an arbitrator or court must reach a "final decision" that VeriSign is in breach, and VeriSign must refuse to comply with that decision for ten days before ICANN can submit the contract for competitive bidding. FAC ¶¶ 93, 94, 98.

Defendants' argument that this is an insignificant change is not only inappropriate because this is a Rule 12(b)(6) motion to dismiss, where CFIT's allegations must be accepted as true, but also is ridiculous on its face. The requirement that an arbitrator or court issue a "final order" declaring VeriSign to be in material breach eliminates ICANN's ability to timely respond to VeriSign's anticompetitive behavior. Indeed, by the time a "final order" could be obtained from an arbitrator, the agreement's term will likely have automatically renewed.

c. VeriSign Wrongfully Permitted To Charge Supra-Competitive Prices

As CFIT alleged in its Complaint, the current .com agreement limits VeriSign to a maximum $6.00/year charge for registration, renewal or transfer of a .com domain name, and ICANN to a $.025 "registry-level transaction fee." FAC ¶ 78. Similarly, the 2001 .net Agreement limited VeriSign's fees to $4.25/year and ICANN's registry-level transaction fee to $0.25. *Id.* ¶ 91. CFIT further alleged that under the 2006 .com Agreement, VeriSign's .com registry fee is set to increase automatically annually by seven percent beginning January 1, 2007, and ICANN's registry-level transaction fee will also increase. *Id.* ¶ 90. Under the 2005 .net Agreement, ICANN's registry-level transaction fee tripled – from $0.25 to $0.75. *Id.* ¶ 91. Moreover, as alleged by CFIT, beginning in 2007, all price controls on VeriSign's .net registry fee will be eliminated. *Id.* ¶ 91.

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Defendants dispute that there will be an annual price increase because the new agreements do not *require* a price increase – they only permit it. This, however, is a dispute regarding a factual issue; it is not an argument that CFIT has not made sufficient allegations regarding supra-competitive pricing.

d. VeriSign Wrongfully Permitted To Monopolize Downstream And Adjacent Markets

The harm to competition threatened by these changes in the new Agreements is obvious, and even were it not so, the Complaint spells out the threatened harm to competition in detail. VeriSign's argument that there will be no harm to competition because CLS itself will be a competitive service is not relevant. (VeriSign Mot. at 21-24.) To the contrary, the Complaint's allegations that CLS threatens to harm competition by eliminating a highly competitive back order services pooling industry (FAC ¶¶ 108-112), and other adjacent markets, must be accepted as true.

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III. CONCLUSION

While it is clear that ICANN and Verisign take issue with the facts alleged by CFIT, that is not sufficient to require dismissal of a well-pleaded complaint. Their pleadings may have been an attempt to "educate the Court" about the defenses that they each plan to raise at trial, but the issues before the Court are just that: issues for trial. ICANN's new facts raised by judicial notice, its novel interpretations of contracts, and its revisionist history of the genesis of the Verisign contract are not sufficient to dismiss CFIT's complaint. If anything, the Defendants' pleadings underscore the infirmity in their own arguments and demand that the case proceed through discovery and trial.

For these reasons, the Court should deny each Defendant's motion and set a date for them to answer CFIT's First Amended Complaint. In the event that the Court believes that any argument of either Defendant has merit, CFIT respectfully requests the right to replead one additional time.[8]

The issues raised by CFIT are important and ultimately will benefit domain name consumers around the world.

Respectfully submitted,

Dated: May 17, 2006

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[8] Should the Court determine that the Complaint suffers from any defect, leave to amend should be granted. *See* William W. Schwarzer, et al ., Cal. Prac. Guide Fed. Civ. Procedure Before Trial § 9:332 (Rutter Group 2003) ("Although Rule 12(c) does not mention leave to amend, courts have discretion to grant a Rule 12(c) motion with leave to amend (and frequently do so where the motion is based on a pleading technicality)."). Federal policy strongly favors determination of cases on their merits and amendments to pleadings should be allowed with "extreme liberality." *In re VeriSign Corp. Securities Litigation*, No. C 02-02270 JW, 2005 WL 2893783, at *7 (N.D. Cal. Nov. 2, 2005) (quoting *United States v. Webb*, 655 F.2d 977 (9th Cir. 1981)). Given the change of counsel and a trial date set far into 2007 (December, 2007), leave to amend is warranted and will not prejudice either Defendant.