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INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MANWIN LICENSING INTERNATIONAL S.A.R.L., a Luxembourg limited liability company (s.a.r.l.), and DIGITAL PLAYGROUND, INC., a California corporation,

Plaintiffs,

v.

ICM REGISTRY, LLC, d.b.a. .XXX, a Delaware limited liability corporation, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California nonprofit public benefit corporation, and DOES 1-10,

Defendants.

Case No. CV11-9514 PSG (JCGx)

Assigned for all purposes to
The Honorable Philip S. Gutierrez

DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Request for Judicial Notice and [Proposed] Order Filed Concurrently Herewith]

Date: April 2, 2012
Time: 1:30 p.m.
Courtroom: 880 Roybal Federal Bldg.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") will and hereby does move the Court to dismiss the Plaintiffs' Complaint. This motion shall be heard on April 2, 2012, at 1:30 p.m., or as soon thereafter as it may be heard, in the courtroom of the Honorable Philip S. Gutierrez, United States District Judge, United States District Court, 880 Roybal Federal Building, 255 East Temple Street, Los Angeles, California 90012.

This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that ICANN cannot, as a matter of law, be liable under the antitrust laws with respect to the conduct alleged in the Complaint because ICANN does not engage in "trade or commerce." This motion is further made on the grounds that Plaintiffs fail adequately to allege a relevant product market, as required for both their Section 1 and Section 2 antitrust claims. Finally, this motion is made on the grounds that ICANN cannot be found to have monopolized the alleged relevant product markets, as ICANN is not alleged to—and cannot—compete or participate in either market.

ICANN's motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, the complete files and records in this action, including Plaintiffs' Complaint, oral argument of counsel, and such other and further matters as this Court may consider.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on January 4, 2012.

Dated: January 20, 2012

JONES DAY

By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee
Attorneys for Defendant ICANN

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Internet Corporation for Assigned Names and Numbers ("ICANN"), a non-profit public benefit corporation, does not sell Internet domain names, it does not register Internet domain names, and it certainly is not an Internet pornographer. ICANN does not make or sell anything, it does not participate in any market, and its Bylaws expressly forbid it from participating in any of the markets referenced in the Complaint. Yet, ICANN somehow finds itself as a named defendant in an antitrust case, accused of restraining trade and, even more far-fetched, accused of monopolizing two separate markets for pornographic domain names.

Whether or not Plaintiffs have properly asserted antitrust claims against ICM Registry, LLC ("ICM")—and, as ICM explains in its concurrently-filed Rule 12 motion, those claims are defective as to ICM—Plaintiffs' claims against ICANN cannot stand. From the moment ICANN was formed to this day, one of ICANN's core values has been to create competition within the Internet's domain name system (DNS). The conduct that is at issue here is ICANN's decision to award ICM the authority to proceed with the new ".XXX" top level domain (TLD) registry.[1] In other words, the conduct that is at issue is ICANN's decision to help create additional competition within the Internet's DNS. That decision, which ICANN made unilaterally and, as Plaintiffs concede, only following years of ICANN rejections of ICM proposals (and a variety of adversary proceedings within the ICANN dispute resolution structure), is not an act that is subject to challenge under the antitrust laws.

ICANN's activities in administering the DNS cannot violate the antitrust

[1] Within each Internet domain name, the alphanumeric field to the right of the last period or "dot" is the TLD. Compl. ¶ 20. In addition to the newly-established .XXX, other examples of TLDs include .COM and .ORG. *Id*. at ¶ 2. The entity responsible for operating a particular TLD database (which includes all of the registrations in that particular TLD) is called the "registry operator" or "registry." *Id*. at ¶ 23.

laws as a matter of law. Antitrust defendants must be market participants that at least have the capacity to conspire to set prices, or monopolize markets; they must be actually involved in the trade or commerce that is the subject of the lawsuit. By contrast, ICANN does not (and cannot under its Bylaws) participate in any way in any of the markets that may exist that involve the DNS, or TLD registries or registrars;[2] ICANN's decision to allow the creation of a new TLD such as .XXX is not an action that could even conceivably result in a finding that ICANN has restrained trade or monopolized a market.

The dispute between Plaintiffs and ICM is a garden variety business dispute that does not appear to implicate the antitrust laws in any respect. This, as described below, explains why Plaintiffs have not identified any viable antitrust product market that could be dominated in any respect by ICM. Plaintiffs claim to be upset with the manner in which ICM is operating the new .XXX registry, but since Plaintiffs already operate (by their own admission) some of the most successful pornographic websites on the Internet, websites that will continue to operate irrespective of anything ICM might do, what the Plaintiffs are really complaining of is the potential competition that their websites may face from the operation of .XXX. Complaints about an increase in competition cannot violate the antitrust laws, but even if the decisions that ICM has made as to how it will operate the new .XXX registry could somehow be imagined to raise legitimate antitrust issues, that does not and cannot create antitrust exposure for ICANN.

This action should be dismissed against ICANN at the Rule 12 stage because ICANN cannot—as a matter of law—be liable under the antitrust laws with respect to the matters alleged in the Complaint.

[2] Registries (or Registry Operators) (like ICM) generally do not deal directly with prospective domain name owners or "registrants" (like Plaintiffs) themselves—instead generally separate companies called registrars accredited by ICANN sell TLD domain name registrations to registrants. Compl. ¶ 23.

II. FACTUAL BACKGROUND

A. Background on 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, 117 S. Ct. 2329, 2332, 138 L. Ed. 2d 874 (1997). Each computer connected to the Internet has a unique identity, established by its unique Internet Protocol address ("IP address"). Compl. ¶ 17. An IP address consists of a series of numbers. *Id*. Because those numbers are hard to remember, the founders of the Internet created the Domain Name System ("DNS") to allow those numbers to be converted into names such as "weather.com" or "uscourts.gov." *Id*. at ¶ 18. In these examples, ".COM" and ".GOV" are known as the "Top Level Domain" or "TLD." *Id*. at ¶ 20. The letters immediately to the left of the last "period" or "dot" are known as the Second Level Domain (weather or uscourts); the letters to the left of the Second Level Domain are known as the Third Level Domain (for example, the "cacd" in the website to the Central District's main Internet page located at cacd.uscourts.gov). *Id*.

TLDs can either be "unsponsored" or "sponsored." *Id*. at ¶ 21. The most common "unsponsored" TLDs are ".COM" and ".NET"; there are no restrictions as to who can acquire a domain name subscription in "unsponsored" TLDs. *See generally id*. By contrast, a "sponsored" TLD is operated by an organization that has a sponsor that is typically an entity representing a narrower group or industry, such as ".MUSEUM" which is operated for the benefit of museums throughout the world and is not available to persons who are not in the museum industry. *Id*. .XXX is a "sponsored" TLD.

B. Background on ICANN.

Prior to ICANN's formation in 1998, the United States government, via contractual arrangements with third parties, operated the DNS. *Id*. at ¶ 24. ICANN was formed in 1998 as part of the U.S. Government's commitment to "privatize" the Internet so that the administration of the DNS would be in the hands of those

entities that actually used the Internet as opposed to governments. *Id*. at ¶ 25. ICANN signed its first agreement with the Department of Commerce (DoC) in 1998. Since that time, ICANN has signed numerous subsequent contracts with the DoC which have conferred upon ICANN the authority and responsibility to coordinate the DNS in the public interest by, among other things, promoting competition and consumer choice in the DNS marketplace. In addition, ICANN has entered into agreements with the registry operators for TLDs. *Id*.

Consumers do not contact registries directly in order to purchase a domain name registration. Instead, consumers (or "registrants") may obtain the contractual right to use second-level domain names through companies known as "registrars." *Id*. at ¶ 23. ICANN operates the accreditation system that has produced an extremely competitive registrar marketplace, with hundreds of accredited registrars. Registrants buy domain name registrations through these registrars (or their agents), which in turn register those names with the appropriate TLD registry. *Id*.

ICANN's Articles of Incorporation ("Articles") provide that it shall be a nonprofit public benefit corporation organized under California law to be operated "exclusively for charitable, educational, and scientific purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986 . . . ." *See* ICANN's Request for Judicial Notice ("RJN"), filed concurrently herewith, Ex. A, Art. 3. Article 3 of the Articles further provides:

> In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment

> of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

Id. (emphasis added); *see also* Compl. ¶ 26.

Article 4 of the Articles provides:

> 4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

RJN, Ex. A at Art. 4.

Section 1 of ICANN's Bylaws sets forth ICANN's overall mission. Specifically, ICANN:

> 1. Coordinates the allocation and assignment of the

> three sets of unique identifiers for the Internet, which are (a) Domain names (forming a system referred to as "DNS"); (b) Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and (c) Protocol port and parameter numbers.
>
> 2. Coordinates the operation and evolution of the DNS root name server system.
>
> 3. Coordinates policy development reasonably and appropriately related to these technical functions.

RJN, Ex. B at Art. I, § 1.

Article II, Section 2 of the Bylaws sets forth an important restriction on ICANN's activities:

> ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN. Nothing in this Section is intended to prevent ICANN from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

Id. at Art. II, § 2 (emphasis added).

To summarize:

1. ICANN is a nonprofit public benefit corporation organized under California law.
2. ICANN's primary purpose is to coordinate the operation of the DNS.
3. ICANN's Bylaws prohibit it from operating as an Internet registry or registrar. ICANN does not

> sell anything or make anything; its functions are noncommercial and in support of the public interest.

C. ICANN's Expansion of the DNS.

As noted above, one of ICANN's core values in support of its mission is to create competition within the DNS. *See* RJN, Ex. A at Art. 4 ("The Corporation shall operate . . . through open and transparent processes that enable competition and open entry in Internet-related markets."); RJN, Ex. B at Art. I, § 2.6 ("Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."). In furtherance of this mission, in 2000, ICANN accepted applications for new TLDs—any entity was free to apply—and ultimately approved seven new TLDs. Compl. ¶ 30 (also alleging that ICANN rejected ICM's application for the .XXX TLD in 2000).

In 2004, ICANN again accepted applications—again from anyone who wanted to apply—but this time only for sponsored TLDs. *Id*. at ¶ 31. Co-defendant ICM submitted an application for .XXX to be a sponsored TLD. Plaintiffs did not. ICM's application became the subject of considerable controversy between ICM and ICANN, with ICANN initially rejecting the application in March 2007. Ultimately, ICM initiated an Independent Review Proceeding—a special proceeding to review decisions of the ICANN Board of Directors that is available pursuant to ICANN's Bylaws.[3] ICM claimed that ICANN had approved the application for .XXX in June 2005, and ICANN claimed that it had not made a final decision on, and ultimately rejected, ICM's application. *Id*. at ¶ 40. Following a hearing in 2009, the Independent Review Panel declared 2-1 that ICANN had, in fact, awarded ICM the .XXX sponsored TLD in June 2005

[3] ICANN's Bylaws provide that "[a]ny person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action." RJN, Ex. B at Art. IV, § 3.2. The Independent Review Proceeding that follows is a non-binding proceeding.

and should not have "changed its mind" thereafter. *Id*. ICANN's Board accepted certain portions of that declaration, and in March 2011, voted to approve the .XXX TLD. ICANN thereafter entered into a registry agreement with ICM. *Id*. at ¶ 42.

As noted, there were no restrictions in 2000 or 2004 as to who could submit an application for a TLD. Neither of the Plaintiffs asserts that it has ever filed an application for a TLD.

D. Summary of Plaintiffs' Claims.

Plaintiffs assert six antitrust claims against ICANN and ICM. The thrust of the claims is that Plaintiffs do not like the way in which ICM is rolling out the .XXX TLD, claims that, for the most part, have nothing to do with ICANN. Plaintiffs also allege that ICANN conspired with ICM and agreed to approve the .XXX TLD "without competition from any other adult-content TLD" in violation of Section 1 of the Sherman Act. Compl. ¶ 84(a) (Plaintiffs' First Cause of Action). Plaintiffs further allege that ICANN conspired with ICM in "permitting" ICM to operate the .XXX TLD in an anticompetitive manner. *Id*. at ¶ 84(d).

Plaintiffs' second and third causes of action allege that ICANN has monopolized or attempted to monopolize two different alleged product markets, including: (a) the market for "permanent blocking and other defensive registrations in the .XXX TLD" (Compl. ¶ 90), and (b) "the incipient market for the affirmative registration of domain names in the .XXX TLD and in any other potential future TLDs having names connoting (or intended predominately for) adult content." Compl. ¶ 100. As explained below, ICANN does not participate in either "market," and these are not proper antitrust markets in all events.

Plaintiffs' fourth and fifth causes of action restate the foregoing claims under California's antitrust statute, the Cartwright Act. Compl. ¶¶ 113, 119. And Plaintiffs' sixth cause of action alleges that the same conduct violates California's Unfair Competition Law. Compl. ¶¶ 123-125.

If Plaintiffs' claims were permitted to move beyond this motion to dismiss,

ICANN would demonstrate that the claims against ICANN are false. One of ICANN's core values in support of its mission is to create competition, and the introduction of the .XXX TLD is expected to do just that. Indeed, the thrust of Plaintiffs' complaint is that Plaintiffs are concerned that .XXX will create competition for them. Most significantly, the notion that substituting anyone else for ICM would change the competitive landscape in any way is clearly wrong; whether ICM, Manwin or another, there would still be a single operator of the .XXX registry.

More relevant for purposes of this motion, however, is that none of Plaintiffs' antitrust claims against ICANN are viable because: (1) ICANN does not engage in "trade or commerce," and therefore cannot, as a matter of law, be liable under the antitrust laws with respect to the conduct alleged; (2) Plaintiffs' relevant market definitions are facially untenable; and (3) ICANN does not participate in either of the markets it is alleged to have monopolized.

III. ARGUMENT

A. Plaintiffs' Allegations Against ICANN Fail Because ICANN's Conduct Does Not Involve Trade Or Commerce.

By its terms, the Sherman Act only applies to contracts, combinations or conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. As explained below, Plaintiffs' allegations against ICANN fail to allege—and cannot allege—that ICANN's conduct involved trade or commerce. As a result, Plaintiffs' claims against ICANN must be dismissed in their entirety.

1. The Legislative History Of The Sherman Act Makes Clear It Was Not Intended To Reach Noncommercial Conduct.

The legislative history of the Sherman Act demonstrates that Congress did not intend to subject noncommercial operations of nonprofit institutions to antitrust

scrutiny.[4] Senator Sherman repeatedly stressed that the Act would target "business combination" rather than noncommercial organizations such as the "Farmers' Alliance." 21 Cong. Rec. 2562 (1890); *see also id*. at 2658-59 (the Act is targeted at "combination(s) or arrangement(s) made to interfere with interstate commerce . . . ."). And he explicitly disavowed an interpretation of the bill that would regulate "a combination, not of a business character," that might have incidental effects on trade or commerce. 20 Cong. Rec. 1458-59. This history explains the intention of Congress, embodied in the "trade or commerce" requirement, to limit the Act's reach to conduct that is fundamentally commercial, and to exclude conduct that is motivated by noncommercial objectives.[5]

It is a core principle of statutory interpretation that courts should identify the intent of the drafters and apply the statute consistent with that intent. *See, e.g., NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123, 108 S. Ct. 413, 421, 98 L. Ed. 2d 429 (1987) ("On a pure question of statutory interpretation, our first job is to try to determine congressional intent . . . ."); *Lewis v. Grinker*, 965 F.2d 1206, 1215 (2d Cir. 1992) ("[W]e can never forget that what we are searching for is Congressional intent."). The Sherman Act is no exception, and the Supreme Court repeatedly has relied on the principle of original intent in applying the Act's "trade or commerce" limitation. *See, e.g., Parker v. Brown*, 317 U.S. 341, 351, 63

[4] Because California's Cartwright Act is patterned after the Sherman Act, the "trade or commerce" limitation applies with equal force to Plaintiffs' claims under both antitrust statutes. *Marin Cnty. Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (1976) (Courts interpreting California's Cartwright Act properly consider federal authority interpreting the Sherman Act because the Cartwright Act is patterned after the Sherman Act; *see Redwood Theatres, Inc. v. Festival Enters., Inc.*, 200 Cal. App. 3d 687, 694 (1988) ("federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act").

[5] Judge Bork has observed that the "trade or commerce" limitation in the Sherman Act was intended to eliminate noncommercial conduct from the purview of the Act based on the understanding in 1890 that, given the restrictions placed on federal power by the Commerce Clause, Congress did not have the constitutional authority to regulate noncommercial activity. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7, 31-33 (1966); *see also* 2D Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 262 ("The drafters [of the Sherman Act] never intended to condemn properly defined noncommercial activities.").

S. Ct. 307, 313, 87 L. Ed. 315 (1943) ("There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.'") (citations omitted); *Apex Hosiery Co v. Leader*, 310 U.S. 469, 489, 60 S. Ct. 982, 992, 84 L. Ed. 1311 (1940) (In determining whether it applies to union activity, the Sherman Act should be interpreted "in the light of its legislative history and of the particular evils at which [it] was aimed.").

2. Courts Have Consistently Declined To Extend The Antitrust Laws To Noncommercial Conduct Undertaken By Non-Profit Organizations.

The Supreme Court has confirmed that the antitrust laws were intended to regulate commercial activity, not noncommercial conduct undertaken by a nonprofit organization, which is all the Plaintiffs' allegations about ICANN describe. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 214 n.7, 79 S. Ct. 705, 710 n.7, 3 L. Ed. 2d 741 (1959); *Apex Hosiery Co.*, 310 U.S. at 493. Indeed, antitrust claims have been rejected even where noncommercial activity has some incidental effect on commerce.

In *Apex Hosiery Co. v. Leader*, the United States Supreme Court held that the Sherman Act does not regulate labor union strikes aimed at blocking interstate shipments of products. 310 U.S. at 512-13. The Court explained that "[t]he history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the act was designed to prevent restraints of trade which had a significant effect on such competition." *Id*. at 493 n.15. "The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's*, 359 U.S. at 214 n.7.

The Ninth Circuit has underscored the principle that noncommercial activities of non-profit organizations are not subject to the antitrust laws. In

Dedication & Everlasting Love to Animals (DELTA) v. Humane Soc'y of United States, 50 F.3d 710 (9th Cir. 1995), DELTA, an animal rights group, alleged that the Humane Society had unlawfully attempted to maintain monopoly power over the animal rescue "market" by instigating governmental disciplinary action against DELTA and causing service providers to discriminate against DELTA. *Id*. at 711. The Ninth Circuit held that the solicitation of contributions by a nonprofit organization was indisputably not "trade or commerce" and thus the defendant's actions were not encompassed by the Sherman Act. *Id*. at 712. Accordingly, while a "non-profit organization, it is true, may engage in commercial activity, and this activity will then be subject to the Sherman Act," when non-profit entities engage in wholly noncommercial activities, such conduct "do[es] not constitute trade in the sense of the common law," and is thus exempt from antitrust liability. *Id*. at 713; *see also Nat'l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 620-21 (7th Cir. 1992) (The Sherman Act "did not intend to reach every activity that might affect business," but rather "was intended to prevent business competitors from making restraining arrangements for their own economic advantage."), *rev'd on other grounds*, 510 U.S. 249 (1994).

Relying on parallel principles, noncommercial decisions made by educational institutions have been held not to be "trade or commerce" within the scope of the Sherman Act. In *Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colleges and Secondary Schs., Inc.*, 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970), the court held that the Sherman Act did not apply to noncommercial activities of a non-profit educational corporation that accredited colleges. Marjorie Webster Junior College challenged a denial of accreditation, arguing that the denial impeded its ability to attract students. *Id*. at 656. The court flatly refused to apply the Sherman Act to noncommercial educational activities:

> the proscriptions of the Sherman Act were "tailored . . . for the business world," not for the noncommercial

> aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.

Id. at 654 (citations omitted); *see also Apex Hosiery*, 310 U.S. at 493 (The Sherman Act is limited to "restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market").[6]

3. The Decisions At Issue Here Are At The Core Of ICANN's Charitable (Noncommercial) Mission For The Public's Benefit.

Plaintiffs' claims against ICANN focus on two alleged "restraints:" (1) ICANN's approval of the .XXX TLD; and (2) ICANN's decision to enter into a registry agreement with ICM for the operation of the .XXX TLD. Neither of these decisions involves commercial activity. Instead, each goes to the heart of ICANN's charitable, noncommercial purpose.

As the Complaint acknowledges, ICANN is engaged in "charitable and public" activities intended to "lessen[] the burdens of government and promot[e] the global public interest in the operational stability of the Internet." Compl. ¶ 26; *see also* RJN, Ex. A at Art. 3. In particular, ICANN has "overall authority to manage the DNS," including "determining what new TLDs to approve, choosing registries for existing or newly approved TLDs, and contracting with the registries to operate the TLDs," activities that governmental agencies or scientific institutions had previously performed.[7] Compl. ¶¶ 24-25; *see also id.* at ¶ 26 (describing

[6] It is true that educational institutions may engage in commercial conduct, and such activity will be subject to antitrust scrutiny, but the noncommercial aspects of the liberal arts do not constitute "trade or commerce" within the purview of the antitrust laws.

[7] One of ICANN's core purposes is to create competition within the DNS. *See* Compl. ¶ 26 (quoting Article 3 of ICANN's Articles, which defines ICANN's mission in this regard to include "performing and overseeing functions related to

ICANN's charitable and public work as "performing and overseeing functions related to coordination of the internet domain name system ('DNS'), including … determining the circumstances under which new top-level domains are added to the DNS root system") (citing Article 3, ICANN's Articles). ICANN is a nonprofit organization created to perform these functions solely for the public benefit, not for any commercial purpose. *Id* at ¶ 6 (describing ICANN's creation for the public purpose of administering the DNS). Such activities are inherently noncommercial.

ICANN's decision to approve the .XXX TLD falls squarely within ICANN's public "duties" to "determine[] what new TLDs to approve … and contract[] with the registries"—here, ICM—"to operate the [new] TLD[]." Compl. ¶ 25. The decision to approve the .XXX TLD—and the ensuing contract with ICM to operate the .XXX registry—were plainly not "business and commercial transactions" covered by the Sherman Act (*Apex Hosiery*, 310 U.S. at 493) because they did not arise from "commercial objectives" on ICANN's part, only wholly public and charitable ones (*Klors*, 359 U.S. at 214 n.7). *See also Selman v. Harvard Med. Schl.*, 494 F. Supp. 603, 621 (S.D.N.Y 1980) (antitrust laws only govern "restraints to free competition in business and commercial transactions which tend[] to restrict production, raise prices or otherwise control the market") (quoting *Apex Hosiery*, 310 U.S. at 493).

Plaintiffs' Complaint is devoid of any allegation that ICANN harbored any commercial objective or sought (much less received) any economic advantage from approving ICM's application for the .XXX TLD. ICANN is itself barred from acting as a TLD registry or registrar so it could never engage in the commercial activities fostered by the exercise of its public duties. *See* RJN, Ex. B at Art. II, § 2

(continued…)

the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system").

("ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN.").

Courts have consistently declined to extend the antitrust laws to behavior that is clearly motivated by noncommercial objectives. *See, e.g., Scheidler*, 968 F.2d at 621 (The Sherman Act "did not intend to reach every activity that might affect business," but rather "was intended to prevent business competitors from making restraining arrangements for their own economic advantage.") (emphasis added); *Donnelly v. Boston College*, 558 F.2d 634, 635 (1st Cir.), *cert. denied*, 434 U.S. 987 (1977) (observing that an antitrust challenge to exclusionary admissions criteria established by a group of law schools seemed "otherwise deficient since defendants' law school activities do not have 'commercial objectives.'").

While Plaintiffs baldly assert that ICANN approved the .XXX registry contract because "ICM promised ICANN significant financial payments, likely to amount to millions of dollars, under the .XXX registry contract" (Compl. ¶ 45), that allegation does not describe a commercial motive. ICANN would receive the same fees, as the Complaint itself concedes, regardless of who the registry operator is. Compl. ¶ 48 ("[t]he contracts between ICANN and TLD registries generally provide for the registry to pay fees to ICANN"); *see also Marjorie Webster*, 432 F.2d at 655 (absence of commercial motive behind accreditation decision makes it "an activity distinct from the sphere of commerce"). The fees collected are used by ICANN to carry out its missions. Put another way, that allegation does nothing more than describe the mechanism by which ICANN's charitable work is funded. Compl. ¶ 23 (describing registrars as selling domains and paying fees to registries "for the TLDs [which] in turn pay fees to ICANN, periodically (e.g., quarterly) on a per-registration or per-renewal basis."). Accordingly, that allegation does not describe commercial activity for Sherman Act purposes because it, too, does not describe ICANN "receive[ing] direct economic benefit as a result of any *reduction*

*in competitio*n in the market." 2D Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 262a (describing rule court's general apply to distinguish nonprofits' commercial and noncommercial conduct); *see also Delta*, 50 F.3d at 714 (alleged restraint involving charitable donations was not commercial even though such donations benefited the charity). Indeed, any fees generated to ICANN come from just the opposite—an increase in competition—which is apparently the crux of Plaintiffs' concerns.

The absence of any economic motivation in its decisions to grant or not grant the right to operate a TLD—whether to ICM or anyone else—demonstrates that ICANN is not involved in "trade or commerce" for purposes of the antitrust laws. In *Missouri v. Nat'l Org. for Women*, the Eighth Circuit held that the Sherman Act did not forbid a boycott of Missouri convention facilities organized by women's groups to protest that State's failure to ratify the proposed Equal Rights Amendment to the U.S. Constitution. Despite the substantial adverse effects of the boycott on commercial activities in Missouri, the court found that the objective of the challenged conduct "is not one of profit motivation" and that "the crux of the issue is that NOW was politically motivated to use a boycott." *Missouri v. Nat'l Org. for Women*, 620 F.2d 1301, 1312, 1314 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980); *see also Proctor v. Gen. Conference of Seventh-Day Adventists*, 651 F. Supp. 1505, 1524 (N.D. Ill. 1986) (The Sherman Act does not apply to alleged restraints imposed by religious organizations upon the sale of their religious literature because "Congress intended the Sherman Act to apply to business combinations with commercial objectives.").

The United States Supreme Court aptly summarized this rule in *FTC v. Superior Court Trial Lawyers' Ass'n*, 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 851 (1990). There, the Supreme Court held that the antitrust laws forbade lawyers from collectively refusing to accept court-appointed cases unless the hourly rate of compensation was increased. The Court emphasized the commercial motives

underlying the concerted activity: "the un-denied objective of their boycott was an economic advantage for those who agreed to participate," and "their immediate objective was to increase the price that they would be paid for their services." 493 U.S. at 426, 427. The lawyers' for-profit business motivation distinguished their illegal combination from lawful collective boycotts undertaken to achieve noncommercial purposes, where the participants seek "no special advantage for themselves." *Id*. at 426 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

Here, the absence of any commercial purpose to ICANN's decision to grant ICM the right to operate a new TLD is fatal to Plaintiffs' claims.

B. ICANN's Decision To Award The Right To Operate The .XXX TLD To ICM Was Unilateral, Not Bilateral, And Therefore Not Within The Purview Of Section 1 Of The Sherman Act Or The Cartwright Act.

Plaintiffs' conspiracy claims should also be dismissed because Plaintiffs challenge ICANN's wholly unilateral decision to award ICM the right to operate the .XXX TLD, not bilateral conduct prohibited by Section 1 of the Sherman Act or the Cartwright Act. *See* Compl. ¶¶ 81-88, 110-115, 116-121 (alleging a conspiracy between ICANN and ICM in violation of Section 1 of the Sherman Act and the Cartwright Act).[8] For a claim to be actionable under Section 1, Plaintiffs must identify a "conspiracy" or other concerted activity—Section 1 claims may not be predicated on wholly unilateral conduct. 15 U.S.C. § 1. Unilateral conduct is actionable only under Section 2 of the Sherman Act. *See D.A. Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1453 (9th Cir. 1983); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. Of Podiatric Surgery, Inc.*, 185 F.3d 606, 619 (6th Cir. 1999) ("In order to have a § 1 violation, there must be an agreement, as § 1 does not encompass unilateral conduct, no matter how

[8] Because California's Cartwright Act is patterned after the Sherman Act, the concerted action requirement applies with equal force to Plaintiffs' claims under both antitrust statutes. *Marin Cnty. Bd. of Realtors, Inc.*, 16 Cal. 3d at 925.

anticompetitive.").

Here, Plaintiffs challenge as a Section 1 violation ICANN's approval of ICM as the .XXX registry operator and ICANN's imposition of operating terms pursuant to the .XXX registry contract. ICANN's conduct vis-à-vis registries in these respects, however, is unilateral and cannot form the basis for Section 1 liability. ICANN unilaterally recommends registry operators. *See* Compl. ¶ 25 (Pursuant to a series of agreements with the United States Government, "ICANN's duties include determining what new TLDs to approve, choosing registries for existing or newly approved TLDs, and contracting with the registries to operate the TLDs.") (emphasis added). The contract between ICANN and ICM (as the registry operator) is simply the enforceable legal mechanism that ICANN chooses to set the operating terms for the .XXX TLD.

Under such circumstances, ICANN's decision to approve ICM to operate the .XXX TLD and enter into a registry contract with ICM are unilateral actions outside the purview of Section 1. *See, e.g., D.A. Richards*, 704 F.2d at 1453 (affirming dismissal of Section 1 claim against non-profit organization on ground that challenged decision of accepting only certain kinds of examination information from veterinarians was "unilaterally made," despite plaintiff's allegations of contacts with independent entities); *Suzuki of W. Mass., Inc. v. Outdoor Sports Expo., Inc.*, 126 F. Supp. 2d 40, 45-48 (D. Mass. 2001) (deeming unilateral the implementation of priority dealer rule through entering contracts with individual boat dealers); *Chase v. Northwest Airlines Corp.*, 49 F. Supp. 2d 553, 560-65 (E.D. Mich. 1999) (deeming unilateral the implementation of ticket-sale policy through agreements with travel agents). ICANN's implementation of its exclusive power to approve ICM to operate the .XXX TLD and the terms of ICM's operation through execution of a registry contract is plainly unilateral under these precedents.

C. Plaintiffs Fail To Define A Relevant Product Market.

Plaintiffs' conspiracy and monopolization claims should be dismissed for the

additional reason that the Complaint "fail[s] to identify an appropriately defined product market." *Tanaka v. Univ. of South Cal.,* 252 F.3d 1059, 1063 (9th Cir. 2001); *see also Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044 n.3 (9th Cir. 2008) (same relevant market requirement applies to conspiracy, monopolization and attempted monopolization claims).

Plaintiffs' pleadings must "identify the markets affected by Defendants' alleged antitrust violations." *Big Bear Lodging Ass'n v. Snow Summit Inc.*, 182 F.3d 1096, 1104 (9th Cir. 1999); *see also Newcal*, 513 F.3d at 1044 ("plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market"). In order to do so, the Complaint must describe a product market that "encompass[es] the product at issue as well as all economic substitutes for the product." *Id.* at 1045. Neither the alleged "permanent blocking and other defensive registrations in the .XXX TLD" (Compl. ¶ 82) (".XXX defensive registration market"), nor the "market for affirmative registrations in TLDs intended for adult content" (*Id*. at ¶ 102) ("adult content TLD market"), passes this test.

1. The .XXX Defensive Registration Market Is Not A Properly Defined Relevant Market.

According to the Complaint, "there is no reasonable substitute for [.XXX "defensive"] registration"—*i.e.,* registration of a .XXX domain name to "prevent or block [its] use by others" (Compl. ¶¶ 55-56)—because registering that name under a different TLD (such as .COM or .NET) does not prevent use of the .XXX domain with the same name. *Id*. at ¶ 56. That conclusory allegation does not describe a relevant market of .XXX defensive registrations; on the contrary, it suggests that each individual domain name in .XXX is itself a relevant market, a proposition that no other court has accepted. *See Smith v. Network Solutions, Inc.,* 135 F. Supp. 2d 1159, 1169 (N.D. Ala. 2001) (rejecting proposed market definition because "[t]aken to its logical conclusion, Plaintiff[s'] argument implies that each individual domain name is a relevant market unto itself"); *Coalition for ICANN Transparency Inc. v.*

VeriSign ("CFIT"), 611 F.3d 495, 508 (9th Cir. 2010) ("we agree … that a market should not be defined in terms of a single domain name").

The result should be the same here. As the Ninth Circuit has made clear, individual consumers' "strictly personal preference[s]" cannot define the boundaries of a relevant market as a matter of law.[9] *Tanaka*, 252 F.3d at 1063; *Formula One Licensing B.V. v. Purple Interactive Ltd.*, No. C00-2222-MMC, 2001 WL 34792530, at *3 (N.D. Cal. Feb. 6, 2001) (dismissing claims because plaintiff "defined a product market in terms of one or more trademarks").

In *Weber v. Nat'l Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000), a professional domain name dealer registered "jets.com" and "dolphins.com" with Network Solutions Incorporated ("NSI"). The National Football League ("NFL") attempted to get NSI to transfer the domain names to the New York Jets and the Miami Dolphins. NSI placed the names on hold and barred the plaintiff from selling them. The plaintiff sued the NFL, among others, under Section 2 of the Sherman Act, describing the relevant product markets as "the demand for the domain names 'jets.com' and 'dolphins.com.'" *Weber*, 112 F. Supp. 2d at 673. The court rejected these definitions, reasoning that the infinite number of potential domain names made the proper market "domain names in general." *Id*. at 673-74. Because the plaintiff did not allege that the defendants had monopolized this broader market, the court dismissed his claim. *Id*. at 674.[10]

2. The Market For Affirmative Registrations In Adult Content TLDs Does Not Yet Exist And Thus Is Not Properly Defined.

Plaintiffs' alleged market for "'affirmative registrations' of names … within TLDs connoting … adult content" (Compl. ¶ 59) is facially unsustainable because it

[9] Even if there were a market for .XXX blocking registrations, the Complaint itself alleges that there are substitutes for purchasing such registrations—name holders "not willing or able to purchase annual registrations for defensive purposes" can resort to legal action to block use of the names. Compl. ¶ 70.

[10] Moreover, the logical extension of Plaintiffs' allegations is that with the creation of any new TLD, a separate product market for each individual defensive registration in the new TLD is born. That cannot be the law.

is wholly speculative and conclusory. To start, the only allegation offered in the Complaint to support this definition is the single, unsupported contention that "registering … in other generic TLDs may not easily be substituted for registration in the .XXX," because "XXX" is "unique[ly]" associated with adult content. Compl. ¶ 59 (emphasis added). Plaintiffs cannot base the boundaries of a relevant market on the conclusory assertion that other TLDs are not "adequate substitute[s]" for adult-themed ones, "especially when it is undisputed that [unsponsored TLDs] possess [nearly all] of the relevant characteristics" that adult content-specific TLDs possess.[11] *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1351 (Fed. Cir. 2011); *Smith*, 135 F. Supp. 2d at 1169 (merely showing that some demand exists for certain class of domain names is insufficient to describe a relevant market).

Moreover, the Complaint does not even contend that there is an existing affirmative adult-content TLD market. *See* Compl. ¶¶ 59-61. Rather, it merely asserts that ICM is "attempting to establish" a "separate market" for adult-content TLDs. *Id.*; *see also id.* at ¶¶ 100, 103, 117 (describing this market as "incipient"). Mere predictions about hypothetical, future markets—unsupported by factual allegations in the Complaint—cannot sustain Plaintiffs' burden to plead facts

[11] According to the Complaint, the only unique characteristic that .XXX possesses to distinguish it from other unsponsored TLDs are the three "Xs" in its TLD extension. Compl. ¶¶ 59-61. The Complaint concedes that adult content is ubiquitous on other unsponsored TLDs, suggesting that other TLDs provide reasonably interchangeable alternatives for distribution/viewing of this material. Indeed, "the single most popular free adult video website on the internet" is Plaintiff Manwin's own "YouPorn.com." Compl. ¶ 1 (emphasis added). The Complaint alleges no technological or other barriers to switching sites between TLDs (either by website owners or website users). Indeed, if anything, the Complaint alleges that the "adult entertainment industry"—the presumed consumers of adult content-specific affirmative TLD registrations—prefers other unsponsored TLDs, such as .COM or .NET because they are not adult content-specific. *See, e.g.*, Compl. ¶¶ 30, 43 (citing concerns by the adult entertainment industry that .XXX addresses could be more easily censored than .COM addresses). All of this plainly contradicts Plaintiffs' proposed relevant market. *Newcal*, 513 F.3d at 1045; *United States v. Continental Can Co.*, 378 U.S. 441, 449-456, 84 S. Ct. 1738, 12 L. Ed. 953 (1964) (glass bottles and metal cans are reasonable substitutes for one another even though they have different advantages and disadvantages to customers).

defining an actual relevant market. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 , 167 L. Ed. 2d 929 (2007) ("factual allegations must be enough to raise a right to relief above the speculative level"); *Cf. FTC v. Lundbeck*, 650 F.3d 1236, 1241 n.3 (8th Cir. 2011) (court need not credit a hypothetical relevant market based on conjecture).[12]

Ultimately, the notion that ICM (much less ICANN) is violating the antitrust laws with respect to some new markets associated with the .XXX TLD is truly absurd. The .XXX TLD is just now coming into existence with content accessible through domain names that might compete against (among others) the Plaintiffs' content accessible through domain names in the .COM TLD. Plaintiffs are upset about having to compete against the domain names in the .XXX TLD, and thus have filed suit seeking to shut down the entire TLD. The entire thrust of Plaintiffs' Complaint is that domain names in the .XXX TLD will be competing against other names in the world of Internet pornography, which makes a farce out of the notion that any individual TLDs—or even all of the names in the .XXX TLD—possibly could constitute a separate relevant antitrust product market that could be the subject of a viable claim under the Sherman Act.

D. Plaintiffs' Monopolization Claims Also Fail Because ICANN Is Not A Participant In The Markets It Is Alleged To Have Monopolized.

In Plaintiffs' second and third causes of action, Plaintiffs assert monopolization and attempted monopolization claims against ICANN under Section 2 of the Sherman Act, 15 U.S.C. § 2, both in the market for: (a) "permanent blocking and other defensive registrations in the .XXX TLD" (Compl. ¶ 90), and (b) "the incipient market for the affirmative registration of

[12] Nor can the contention that ICM and ICANN "have a dangerous probability of acquiring monopoly power in that incipient" market satisfy Plaintiffs' burden with respect to that element of its attempted monopolization claim. *Korea Kumho Pretrochemical v. Flexsys Am. LP,* No. C07-01057-MJJ, 2008 WL 686834, at *9 (N.D. Cal. March 11, 2008) (dismissing attempted monopolization claim over "formulaic recitation" of dangerous probability of success element).

domain names in the .XXX TLD and in any other potential future TLDs having names connoting (or intended predominately for) adult content." Compl. ¶ 100. Even assuming the product markets were properly defined, ICANN cannot be found to have monopolized such markets, as ICANN is not alleged to—and cannot—participate in either.

Monopolization requires proof that the defendant: (1) possesses monopoly power in the relevant market; and (2) has acquired, enhanced, or maintained that power by the use of exclusionary conduct. *Verizon Communs. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004). The elements of attempted monopolization are: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power"; and (4) causal antitrust injury. *McGlinchy v. Shell Chem. Co*., 845 F.2d 802, 811 (9th Cir. 1988). Here, while Plaintiffs allege that ICM maintains monopoly power in the relevant markets, Plaintiffs admit that ICANN does not participate in—let alone maintain monopoly power in—either market:

- "ICM has a complete monopoly in the market for the sale of .XXX TLD blocking or defensive registration services through registrars. No other company or entity can or does provide such services." Compl. ¶ 58 (emphasis added).
- "ICM currently has a complete monopoly in TLDs that have a name connoting adult content. There are currently no other TLDs beside .XXX with names that connote adult content. No other company or entity besides ICM currently can or does provide, through registrars, affirmative registrations in TLDs that connote adult content."

Compl. ¶ 60 (emphasis added).[13]

In short, Plaintiffs do not allege that ICANN is a participant in either of the alleged relevant product markets (and ICANN is not). Even if Plaintiffs meant to say that ICANN's decisions can affect competition in some markets, it does not afford ICANN with "market power," which must at a minimum rest on actual participation in those markets. *See, e.g., Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434, 1444 (9th Cir. 1995), cert. denied, 516 U.S. 987, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1995) (market power may be shown in two ways, both of which require participation in the relevant market); *see Bahn v. NMR Hosp., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985) (the "injured party [must] be a participant in the same market as the alleged malefactors.").

Plaintiffs' monopolization and attempted monopolization claims as to ICANN therefore fail as a matter of law because ICANN is not a competitor or a participant in either of the alleged relevant product markets. *Tanaka*, 252 F.3d at 1064; *McGlinchy*, 845 F.2d at 812-13.

E. Plaintiffs' UCL Claim Fails.

Claims alleging illegal practices under California's Unfair Competition Law ("UCL") fail if the underlying predicate violation is not established. *See Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001). In addition, "[i]f 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' toward consumers." *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001); *see also Cel-Tech Comms., Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 183 (1999) (holding that conduct the Legislature has determined to be lawful under

[13] ICANN's Bylaws confirm ICANN's inability to operate as either a registry or a registrar. RJN, Ex. B at Art. II, § 2.

the Cartwright Act cannot, as a matter of law, be "unfair" under the UCL). Because Plaintiffs can neither present nor obtain any evidence that ICANN's alleged conduct constitutes "trade or commerce," or that ICANN participates in either of the markets it is alleged to have monopolized, each of Plaintiffs' antitrust claims and their UCL claim fail and should be dismissed as a matter of law.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs' Complaint should be dismissed.

Dated: January 20, 2012

JONES DAY

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