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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. 5:05-CV-04826 (RMW) NOTICE OF MOTION AND MOTION OF VERISIGN, INC. TO DISMISS FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF Date: June 9, 2006 Time: 9:00 a.m. Courtroom: 6

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on June 9, 2006 at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Ronald M. Whyte, located at 280 South First Street, San Jose, California 95113-3008, defendant VeriSign, Inc. ("VeriSign") will move, and hereby does move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for dismissal of the action in favor of VeriSign and against plaintiff Coalition for ICANN Transparency, Inc. ("CFIT") with respect to all purported claims in the First Amended Complaint ("FAC"), for failure to state a claim upon which relief can be granted.

RELIEF SOUGHT

VeriSign's motion is made on the ground that VeriSign is entitled to judgment as a matter of law on each and every purported claim for relief alleged in the FAC. VeriSign's Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the Request for Judicial Notice and attachments thereto, CFIT's Complaint and FAC, and such other or further showing as may be made at or before a hearing on this motion.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether CFIT has standing on behalf of its members to assert each of its purported claims against VeriSign in the FAC.

2. Whether CFIT has properly pleaded any legally cognizable claims against VeriSign in the FAC.

3. Whether the FAC should be dismissed with prejudice.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

The purported "Coalition for ICANN Transparency" seeks to challenge under the antitrust laws the terms of an existing contract between VeriSign and co-defendant ICANN for the continued operation of the .net top-level domain ("TLD") and a proposed contract for the continued operation of the .com TLD registry (the "Registry Agreements"). The .net contract already has been reviewed and *approved by the Department of Commerce* ("DOC"), and the proposed .com contract must be

reviewed and *approved by DOC prior to taking effect.* VeriSign (or its predecessor) always has served as the operator of the .net and .com TLDs, and the new registry contracts are merely the latest in a series of agreements between VeriSign and ICANN for the operation of those registries -- all of which were likewise approved by the DOC and acknowledged in the original Complaint to be pro-competitive and legal. (First Amended Compl. ¶¶ 66-68.)

The claims in the FAC are insufficient as a matter of law on the same grounds that the original Complaint was insufficient, including express grounds upon which this Court relied in its February 28, 2006 Order granting defendants' Motions for Judgement on the Pleadings ("Order"). Indeed, the FAC ignores clear instructions this Court gave to CFIT in the event plaintiff intended to amend its original Complaint, including what CFIT must plead to state a legally sufficient claim. More specifically, despite this Court's admonition that CFIT must plead "with specificity" the facts supporting its standing to bring these claims on behalf of others, CFIT has not done so. Instead, the FAC merely repeats the same allegations included in the original Complaint and adds the names of two entities CFIT claims are members (both of which in all likelihood will be precluded on grounds of *res judicata* from asserting any claims), without pleading any other facts. As CFIT's counsel has elsewhere admitted, these allegations do not provide fair notice to defendants of who is bringing these claims, nor do these allegations otherwise provide any *facts* supporting plaintiff's standing.[1]

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[1] CFIT's counsel, commenting outside this Court on the same vague description of CFIT's membership as contained in the FAC, had this to say:

> Calling itself "a group of individuals, organizations and companies concerned about the lack of visibility into the activities and operations of the internet governing body," CFIT will surely inspire a CFIT-CFIT, or, the "Coalition for Increased Transparency on the Coalition for ICANN Transparency." *Nowhere on the site does CFIT disclose who formed it, who is funding it, or who has joined the "coalition."*
>
> Whois reflects that cfit.info, the organization's primary site, is registered to Jason Eberstein, of the DC lobbying firm of Trammell and Company. The address for CFIT and Trammell and Company are the same.
>
> *** What I can't understand is why they would choose to make the lobbying effort about "transparency" while failing to disclose their own names. C'mon folks, it's warm out here in the sun. (Request for Judicial Notice ("RFJN"), Ex. C (Bret Fausett, "From Behind the Irony Curtain," icann.Blog, Nov. 23, 2005, http://blog.lextext.com/blog/icann/_archives/2005/11. (emphasis altered from original)).)

Similarly, despite this Court's clear admonitions that CFIT must show that registered and unregistered domain names are not reasonably interchangeable in order to plead an "expiring names registration market," CFIT has not plead a single fact supporting such a market definition.

Equally fundamental, the FAC's allegations of conduct violative of the Sherman and Cartwright Acts misapprehend basic principles of antitrust law. The gravamen of the claims in the FAC is that (i) VeriSign, an alleged monopolist, intends to increase its prices and offer new services in markets in which it does not now compete, and (ii) the approved July 2005 .net Registry Agreement and the proposed 2006 .com Registry Agreement represent a failure by ICANN properly to regulate VeriSign, ICANN's alleged function under the Memorandum of Understanding ("MOU") executed between the Department of Commerce and ICANN.[2] The FAC does not allege that VeriSign acquired its alleged monopoly unlawfully and, to the contrary, admits that "there can be only one registry operator." (FAC ¶ 35.) Nor does the FAC allege concerted action between VeriSign and a competitor. Contrary to such a claim, the FAC specifically alleges that ICANN serves a regulatory function pursuant to a U.S. Government mandate to establish and implement "DNS policy and the terms, including licensing terms, applicable to new and existing gTLDs and registries." (FAC ¶ 57.)

CFIT's claims have no basis in antitrust law. First, the FAC is based on the mistaken premise that the setting of a particular price by an alleged monopolist is a violation of the antitrust laws. To the contrary, it is well established that "mere monopoly pricing is not a violation of the Sherman Act." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 710 (2002). "[S]etting a high price may be a use of monopoly power, but it is not itself anticompetitive." *Alaska Airlines, Inc. v. United*

[2] The FAC alleges that ICANN's conduct constitutes a violation of the MOU because "ICANN intentionally abdicated its responsibility under the MOU to support competition." FAC ¶ 98. Indeed, the very provisions of the Registry Agreements that are alleged to violate the antitrust laws also are alleged to violate the Memorandum of Understanding between the DOC and ICANN (FAC ¶¶ 61-65, 84-98). The FAC ignores the fact, however, that the Registry Agreements must be approved by DOC. If DOC agreed with CFIT, it is extremely unlikely that DOC would have approved the .net agreement or would approve the .com agreement and, in any event, DOC's approval of these registry agreements would preclude any claim that they violate the MOU to which only DOC and ICANN are parties.[3] VeriSign believes that a more complete factual record will demonstrate that some or all of CFIT's claims also are barred under the *Noerr-Pennington* doctrine. Among other things, the FAC seeks to enjoin ICANN and VeriSign from securing government approval of the Registry Agreements or thereafter performing the agreements as approved.

Airlines, Inc., 948 F.2d 536, 548-49 (9th Cir. 1991) (quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979)). To the same effect, the threat that an alleged monopolist may use its competitive advantage to enter new markets does not state an antitrust violation. "[T]he anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in a second market." *Id.* at 548.

At bottom, unilateral action, even by an alleged monopolist, is not a violation of the antitrust laws absent specific predatory conduct. "Government regulation, as opposed to treble damages and criminal liability under the Sherman Act, is generally thought to be the appropriate remedy for the difficulties posed by natural monopolies." *Id.* As a result, the "Supreme Court has consistently held that there must be 'predatory' conduct to attain or perpetuate a monopoly to be liable." *Id.* No such allegations are made here.

Second, an agreement between ICANN and VeriSign to raise the existing cap on VeriSign's prices, or to strengthen the automatic renewal provisions of the registry agreement, or to adopt streamlined policies for its review and approval of new registry services, is not an unlawful conspiracy in restraint of trade. ICANN is the alleged government-designated regulatory body and not a competitor of VeriSign or plaintiff. Given that plaintiffs allege that ICANN has the power to regulate VeriSign's conduct in each of these areas, the FAC represents nothing more than an attempt, under the guise of the antitrust laws, to use this Court to second guess ICANN's actions in its regulatory role. Such claims are inconsistent with antitrust policy. As the Ninth Circuit has observed, "'judicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us.'" *Id.* at 548 (quoting *Berkey Photo, 603 F.2d at 294*).

Indeed, the FAC inconsistently, but repeatedly, seeks to second guess alleged oversight decisions of ICANN -- despite relying on a series of agreements among the DOC, ICANN and VeriSign that expressly require U.S. government approval before those very oversight decisions can become effective. Thus, either the actions upon which the FAC is based can never occur, or the FAC

uses the pretext of the Sherman Act to complain about nothing more than a threat of bad decision-making by the U.S. government.

Finally, the earlier Order of this Court was clear and specific as to what plaintiff must allege in order to plead a legally sufficient claim under the antitrust laws. Plaintiff's failure to follow this Court's earlier admonitions is tantamount to an admission that plaintiff is unable to plead a legally sufficient claim. As a consequence, the FAC should be dismissed with prejudice. [3]

II. THE NATURE OF THE CLAIMS IN THE FAC

The FAC admits that CFIT is an association formed for the sole purpose of bringing this action. (FAC ¶ 7.) The only allegation regarding the identity or standing of the plaintiff is the conclusory assertion that "CFIT's members include Internet domain name registrars, registrants, and back order service providers, including but not limited to Pool.com, Inc. ("Pool.com") and R. Lee Chambers Company, LLC" ("Chambers"). CFIT's membership is not otherwise identified or described. These are precisely the same uncertain allegations that this Court's earlier Order found insufficient to establish standing, except that the FAC adds the names of two members of the association. The FAC makes no other allegations, however, concerning Chambers and no legally significant allegations regarding Pool.com.[4]

According to the allegations in the FAC, ICANN is an oversight body and not a competitor of VeriSign or CFIT. Pursuant to the MOU between ICANN and DOC, ICANN has oversight responsibilities with respect to the DNS, including to ensure the stability and security of the DNS, and to promote competition. Among other activities, "[u]nder the MOU, ICANN exclusively awards the generic and country code TLD registry agreements, including the registry agreements for the .com and .net TLDs." (FAC ¶ 62.) These responsibilities allegedly include establishing policy for the DNS as well as the terms of specific registry agreements. (FAC ¶ 57.)

[4] Plaintiff's motivation in bringing these claims in the name of an "association" is transparent. Both Pool.com and Chambers are responsible for having previously, and unsuccessfully, brought other litigation attacking VeriSign's proposed Wait List Service ("WLS") that was dismissed with prejudice. CFIT expressly alleges in the FAC that CLS is only a "modified and expanded" version of WLS. (FAC ¶ 95.)

VeriSign (or its predecessor Network Solutions, Inc.) has always served as the registry operator for the .com and .net TLDs pursuant to a Cooperative Agreement, currently between VeriSign and the DOC. (FAC ¶ 53, 57.) As the FAC admits, there can be only one registry operator for each TLD for technical reasons. (FAC ¶ 35.) Under the Cooperative Agreement, VeriSign is obligated to recognize ICANN's oversight responsibilities by entering into a registry agreement with ICANN, the terms of which must be approved by DOC. (FAC ¶ 57.) Further, any material amendment to the .com or .net registry agreements requires the approval of DOC. (RFJN, Ex. B (Mem. of Understanding, Am. 3, § I.1); FAC ¶57.) In fact, the 2005 .net Agreement already has been approved by the DOC, and the proposed 2006 .com Registry Agreement must be approved by DOC before becoming effective. (*See* RFJN, Ex. C (Mem. of Understanding, Am. 3, § I.1).)

The FAC alleges both that the 2005 .net and 2006 .com Registry Agreements on their face constitute violations of the antitrust laws and that specific threatened actions, including the introduction of CLS, would violate the antitrust laws. On that basis, the FAC seeks to enjoin the Registry Agreements from being implemented.

III. ARGUMENT

A complaint fails under Federal Rule of Civil Procedure 12(b)(6) if it either does not allege a cognizable legal theory or alleges insufficient facts under a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990). While the Court must assume the truth of all properly pleaded allegations of fact, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). When deciding a Rule 12(b)(6) motion to dismiss, a district court may consider documents attached to the complaint and documents not attached but referred to in the complaint, if they form the basis of the plaintiff's claim, and may assume their contents are true for purposes of the motion. *See United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003).

A. The FAC Does Not Cure Any of the Defects in Standing

Like the original Complaint, the FAC maintains that CFIT does not claim any injury in its own right, only alleged harm to its members. (FAC, ¶ 7; Order at 11.) Consequently, to maintain this action on behalf of its members, CFIT must satisfy the bases for associational standing that, "(a)

its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333, 343 (1977). The FAC contains no allegations showing these prerequisites are met.

In granting VeriSign's prior motion for judgment on the pleadings, the Court specifically held that disclosure of CFIT's members was necessary, not only for standing purposes, but also to allow VeriSign "to find out as early as possible" whether "this case involves *res judicata*" issues, particularly in light of prior unsuccessful "antitrust and state law claims" filed by "several plaintiffs, including R. Lee Chambers Company LLC." (Order at 13.) CFIT has failed to provide adequate disclosure of its members in accordance with the Court's previous Order.

Moreover, CFIT has compounded the standing problem, and heightened concerns about the application of *res judicata*, by listing only two CFIT members in its amended pleading -- the very same R. Lee Chambers Company that previously and unsuccessfully sued VeriSign and ICANN, and Pool.com, Inc., the parent company to plaintiffs in the prior cases against VeriSign and ICANN.[5] Since those two identified "members" seemingly "would not have standing to sue in their own right because their claims would be precluded by *res judicata*," *Newton v. Southern Wood Piedmont Co.*, 163 F.R.D. 625, 635 (S.D. Ga. 1995), they would "have no standing to confer upon [CFIT] as a representative of their claims." *Id. See also Adkins v. Rumsfeld*, 370 F. Supp. 2d 426, 433 (E.D. Va. 2004); *City of Chicago v. Shalala*, 1998 WL 164889 (N.D. Ill. 1998) (same).

[5] As the Court previously noted, "defendants have faced similar claims before." (Order at 13.) Documents filed with the Court show that both R. Lee Chambers and Pool.com were involved in previously dismissed actions, entitled *Registersite.com v. Internet Corporation for Assigned Names and Numbers*, Case Nos. CV04-1368 ABC (C.D. Cal.) and SC082479 (Cal. Superior Ct.) and *Dotster, Inc. v. Internet Corporation for Assigned Names and Numbers*, 296 F. Supp. 2d 1159 (C.D. Cal. 2003). (*See* Decls. of Laurence Hutt and Sean Morris in Support of VeriSign's Opposition to *Ex Parte* Application for TRO.) Those cases related to WLS, which CFIT contends is a predecessor version of CLS. (FAC ¶ 95.) While adjudication of the *res judicata* defense may need to await further factual development, CFIT's reliance only on members whose claims likely will be barred, especially in light of the lack of factual allegations relating to these members or standing more generally, should be insufficient in costly antitrust litigation to meet "the price of entry, even to discovery." (Order at 13 (quoting *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999)).)

Finally, as explained more fully below, the FAC not only fails to identify the members of the association as the Court directed, but it also ignores the Court's direction to allege specific facts establishing the standing of its members consistent with the requirements of *Hunt*.

1. The FAC Does Not Contain Particularized Allegations Showing That Any Of Its Members Has Standing

The Court dismissed CFIT's original Complaint, finding CFIT's "associational standing" was insufficiently pleaded, because its *membership* was "shrouded in mystery" and the complaint contained only "a single cryptic reference about its members' identities." (Order at 13.) In doing so, the Court relied on its recognized authority to require "'further particularized allegations of fact deemed supportive of plaintiff's standing.'" *Id.* at 12 (quoting *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). This Court-imposed requirement was not limited simply to listing the name of one or two of its members; rather, CFIT needed to allege the qualitative *factual* circumstances establishing each of the elements of associational standing, including *harm* to the association's members, so the Court could *evaluate* the propriety of CFIT's standing to maintain this action.[6]

To establish standing, the identified members of CFIT must have suffered:

> an "injury-in-fact" to a legally protected interest that is both "concrete and particularized" and "actual or imminent," as opposed to "'conjectural' or 'hypothetical.'" Second, there must be a causal connection between their injury and the conduct complained of. Third, it must be "likely" - not merely "speculative" - that their injury will be "redressed by a favorable decision."

San Diego Cnty Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996).

The FAC fails to allege facts sufficient to establish CFIT's standing to bring this action. Indeed, where the original Complaint alleged that "[m]embers of CFIT include certain Internet

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[6] *See* Order at 12 (citing *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 51 (D.D.C. 1998)) (dismissing complaint where plaintiff "can point to no identifiable member or members *for which the Court can evaluate harm* . . . or allege *facts sufficient to establish the harm* to that member") (emphasis added) (citations and quotations omitted); *Maine Ass'n of Indep. Neighborhoods v. Comm'r, Maine Dep't of Human Servs.*, 747 F. Supp. 88, 92 (D. Me. 1990) (dismissing organization's complaint where it did not identify affected member "nor identify any of the *factual circumstances supporting her claim to be subject to*" the challenged regulation) (emphasis added).

domain name registrars, registrants, back order service providers, and other Internet stakeholders" (Compl., ¶ 7), the FAC simply adds the phrase "including but not limited to Pool.com, Inc. ('Pool.com') and R. Lee Chambers Company, LLC (hereinafter referred to as 'CFIT's Supporters')." (FAC, ¶ 7.) Allegations of *likely* harm to *these two members* of CFIT, as well as allegations of any *causal connection* between the 2006 .com Agreement that CFIT seeks to enjoin and any harm to these members, are nowhere to be found in the FAC. Furthermore, there are no factual allegations at all with respect to the standing of any other members of CFIT.

With respect to the so-called "Expiring Names Registration Services Market," the FAC avers only that Pool.com is a "back order service provider" and that VeriSign's proposed Central Listing Service ("CLS") will "exclud[e] all other back order service providers." (FAC, ¶¶ 49, 110, 112.)[7] However, the FAC fails to supply the essential "causal connection" between the execution and implementation of the 2006 .com Agreement and a launch of CLS. This omission is fatal, and it is not in the least rectified by allegations regarding the effect of CLS *if* and *when* it is launched. *See San Diego Cnty*, 98 F.3d at 1126, 1130 (standing denied where alleged economic injury was not fairly traceable to the challenged statute). The 2006 .com Agreement does not itself approve CLS, render CLS more likely to be approved, or empower VeriSign to propose CLS. (*See* n.19, *infra*.) To the contrary, CLS could be proposed with or without execution of the 2006 .com Registry Agreement. The Agreement merely establishes a concrete procedure for ICANN's evaluation of *any* new service. Furthermore, the FAC contains no averment of any harm whatsoever to R. Lee Chambers from a future launch of CLS; Chambers is never even mentioned in the FAC after paragraph 7, other than in

[7] These bare allegations fail to make out a "case or controversy" involving the proposed CLS service. As noted below (n. 19, *infra*.), CLS is not authorized in the 2006 .com Registry Agreement but, rather, if proposed by VeriSign after that agreement becomes effective, would be subject to the detailed approval process set forth in the agreement. *Warth*, 422 U.S. at 516 (association lacked standing to seek prospective relief where it failed to allege any specific project of a member being pursued or thwarted; case or controversy requires "the existence of . . . injury to its members of sufficient immediacy and ripeness to warrant judicial intervention"); *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (citations and quotations omitted). The FAC alleges, on information and belief, only that "VeriSign intends to launch CLS as soon as possible." (FAC ¶ 95.)

a conclusory boilerplate allegation inserted at the end of each purported claim for relief. The FAC does not even identify the kind of business Chambers is in.[8]

With respect to the alleged "Domain Name Registration Market," there are no averments at all of any "likely" harm to these members of CFIT; neither identified member of CFIT is mentioned *at all* in the FAC's allegations relating to this supposed market. (*E.g.*, FAC ¶¶ 102-107.) As explained in *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), "standing is not dispensed in gross" -- harm based on one type of conduct does not confer a right to complain about other conduct.[9]

In short, CFIT's new "standing" allegations do not come close to constituting the particularized factual showing required by law and by this Court's prior Order. *See Warth*, 422 U.S. at 501-02 ("If, after this opportunity [to amend standing allegations], the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed").

2. The FAC Does Not Establish the Claims are Germane to CFIT's Purpose

The original complaint failed to satisfy the second prong of the *Hunt* test, because it contained no allegation of CFIT's purpose, and thus no allegation that this action is germane to CFIT's purpose. *Hunt*, 432 U.S. at 343. In the FAC, CFIT alleges only that it was formed for the purpose of pursuing this lawsuit. (FAC ¶ 7.) An action cannot be germane to an association's purpose, however, if the requested relief will provide a clear benefit to some of the association's members but a clear detriment to other members. *Retired Chicago Police Ass'n v. City of Chi.*, 76 F.3d 856, 864 (7th Cir. 1996) ("A direct, detrimental effect to some members' interests constitutes a conflict of interest in the associational standing context.").

In this instance, the FAC does not delineate how the broad swath of "Internet stakeholders" CFIT purports to represent, including registrars, registrants, "back order providers," and others, share

[8] Each claim for relief in the FAC ends with the purely conclusory allegation that defendants' conduct "will continue to cause adverse and anticompetitive injury to consumers and to the business and property of Internet stakeholders and to CFIT's Supporters, including Pool.com and R. Lee Chambers Company LLC." (FAC, ¶¶ 118, 126, 136, 143, 153, 162.)

[9] Furthermore, with respect to registration fees, the 2006 .com Agreement, by its terms, does *not* mandate any future price increases, nor does the FAC explain how any increases that *may* be implemented in the future will damage these two CFIT members, especially inasmuch as registrars and back order service providers set their own prices that they charge registrants. Any claim of harm to these members is thus doubly speculative. *San Diego County*, 98 F.3d at 1126.

the same or even a parallel economic interest in the relief sought with respect to any of the alleged relevant markets. To the contrary, the FAC clearly reveals that the proposed CLS service will benefit some registrars, who will receive 90% of the proceeds of domain names successfully auctioned through CLS, while making those auctioned domain names unavailable to a different segment of CFIT's membership, the "back order service providers." (FAC, ¶ 96.) CFIT's claims could thus have a direct detrimental effect on some of CFIT's purported members. *See, e.g., Md. Highways Contractors Ass'n, Inc. v. Md.*, 933 F.2d 1246, 1253 (4th Cir. 1991) (conflict precluded standing where some members would be benefited by the challenged statute). The FAC also says nothing about the differing interests of "internet stakeholders" in the alleged Domain Name Registry Services market. Therefore, CFIT's express averments in the FAC negate its ability to satisfy the second prong of the *Hunt* associational standing test.[10]

3. CFIT's Claims Require Participation of Individual Members

The FAC fails to meet the third prong of the *Hunt* test – that neither the claims asserted nor the relief requested requires the participation of individual members of the association. *Hunt*, 432 U.S. at 343. Contrary to *Hunt*, CFIT's claims *will* require participation of its members to prove antitrust injury, which is an inherently individualized question. *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1381 (7th Cir. 1987); *Fin. & Sec. Prods. Ass'n v. Diebold, Inc.*, 2005 WL 1629813, at *3, n.3 (N.D. Cal. July 8, 2005) ("[E]stablishing antitrust injury involves complex questions of fact that will likely require proof from individual members.").

Moreover, the FAC alleges VeriSign's proposed CLS service will exclude or entirely displace back order service providers. (FAC, ¶¶ 110, 112.) Whether this is the result of VeriSign's alleged

[10] *Associated Gen. Contractors of Calif., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1408-09 (9th Cir. 1991), previously cited by CFIT, is not to the contrary. First, the court in that case did not consider whether direct economic conflicts among association members apparent on the face of the pleading preclude standing under the "germaneness" prong of the standing test. Rather, the Court's analysis focused entirely on the separate "individual participation" facet of *Hunt*. *Id.* at 1406. Second the court in *Associated Gen.* was concerned that, in a continuing, multi-purpose association with diverse membership, unanimity among the members could not be required lest the association never have standing to bring suit. *Id.* at 1409. Here, in contrast, the Court is faced with a one-purpose association. (FAC, ¶7.) Given such a narrow associational focus, requiring an absence of overt conflicts should be paramount, if the association is actually purporting to represent is members.

conduct, or the natural effect of a lack of diversification or a poor business model on the part of current "back order service providers," proving this allegation will require the participation of individual members in this lawsuit. Associational standing consistently has been rejected in analogous cases that required individualized economic proof to establish the elements of a claim.[11] The same proof concerns exist here. Since individual participation is necessary to establish the alleged effect of the 2006 .com Registry Agreement or the CLS service on varied Internet stakeholders, the third prong of the *Hunt* test cannot be satisfied, and the case should be dismissed for lack of standing.[12]

4. Prudential Considerations Also Require Dismissal of CFIT's FAC

CFIT fails to satisfy "prudential" standing concerns. Prudential standing considers whether the plaintiff is the proper party to bring the lawsuit. *Calif. Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327, 331 (C.D. Cal. 1996). These judicially-imposed prudential limits on the exercise of federal jurisdiction include "a general prohibition on 'raising another person's legal rights,' a preference for the resolution of 'generalized grievances' in the representative branches, and the 'requirement that a plaintiff's complaint fall within the zone of interests protected' by the pertinent law." *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985). It is well-established that an association must satisfy *both* Article III constitutional standing requirements embodied by the *Hunt* test *and* prudential standing requirements.[13]

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[11] *See Rent Stabilization Ass'n of City of N.Y. v. Dinkins*, 5 F.3d 591, 596-97 (2d Cir. 1993) (takings challenge to rent control law required financial inquiry of landlord to determine margin and efficient operation, failing third prong of *Hunt* test); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. and Rehab. Servs.*, 958 F.2d 1018, 1023 (10th Cir. 1992) (claim for injunctive relief challenging reimbursement rates for Medicare providers required proof of detrimental effect on efficiently operated providers and thus individual participation of members).

[12] The fact that CFIT seeks only injunctive relief, and not damages, does not overcome the hurdle of the third prong of the *Hunt* test. *Hunt*, 432 U.S. at 343 (standing is proper only "if neither the *claim* asserted *nor* the *relief* requested requires the participation of individual members") (emphasis added). Indeed, several courts have held, particularly in antitrust cases, that whether or not injunctive relief alone is sought, if individual participation of members is required, associational standing fails. *See, e.g., Kan. Health Care*, 958 F.2d at 1023; *Sw. Suburban*, 830 F.2d at 1381 (associational standing denied under third prong of *Hunt* test in antitrust case seeking injunctive relief); *Diebold*, 2005 WL 1629813, at *3 n.4 (same); *Am. Baptist Churches in the U.S.A. v. Meese* 712 F. Supp. 756, 765-66 (N.D. Cal. 1989) (failing third prong in equitable relief case).

[13] *See Nat'l Solid Wastes Mgmt. Ass'n v. Daviess Cnty.*, Ky., 434 F.3d 898, 901 (6th Cir. 2006) ("In addition to the Article III requirements, Plaintiff [an association] must prove prudential standing");

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CFIT purports to act on behalf of a broad and generalized group of "Internet stakeholders" (*e.g.*, FAC, ¶¶ 7, 118), vaguely asserting that defendants' actions have "disrupted the competitive balance of the Internet." (*Id.*, ¶ 105.) However, it is apparent from the FAC that even if CFIT could satisfy Article III standing requirements, CFIT is still not a proper party to represent all "Internet stakeholders" in an antitrust case dependent upon concrete allegations of injury, in relevant markets, and alleged harm to "competition," not simply harm to a couple of competitors. CFIT's allegations amount to "generalized grievances" rather than injuries to a "distinct group" of persons as required for prudential standing. But under prudential principles, "a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.'" *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). "Internet stakeholders" or "registrars, registrants, and back order service providers" are not distinct groups with unified interests, but a generalized descriptions of the millions of users of the domain name system.

CFIT never explains how these various "stakeholders" have been injured by the alleged conduct; how back order service providers can represent the interests of registrants (essentially their customers) or registrars (their competitors) in the alleged relevant markets; how CFIT can represent these varied interests; or, alternatively, whether CFIT seeks to tip the "balance" in favor of a few market participants. Indeed, although CFIT's standing allegation gives the illusion of broad-based support (FAC, ¶ 7), the only listed members of CFIT are one back order service provider (Pool.com) and one participant in an unidentified Internet market (R. Lee Chambers). If CFIT, in fact, only represents two members, those members should bring suit directly.

Since CFIT has not met its burden to "clearly allege facts demonstrating that [it] is a proper party to invoke judicial resolution of the dispute," *United States v. Hays*, 515 U.S. 737, 743 (1995) (citations and quotations omitted), the FAC should be dismissed under principles of prudential standing.

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Molski v. Mandarin Touch Restaurant, 359 F. Supp. 2d 924, 935 (C.D. Cal. 2005) ("other prudential standing doctrines" apply in case involving associational standing under the *Hunt* test).

B. CFIT Has Not Plead Valid Sherman Act Claims

The FAC repeats the five Sherman Act claims alleged in its original Complaint. For each of its Sherman Act claims, the law requires that CFIT allege VeriSign (1) engaged in exclusionary conduct (2) that threatens a harmful effect on competition (3) in properly defined relevant markets. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (monopolization); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (attempted monopolization); *Tanaka v. USC*, 252 F.3d 1059, 1069 (9th Cir. 2001) (Section 1 rule of reason claim).[14] CFIT also must allege facts showing antitrust injury – an injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986). "If the injury flows from aspects of the Defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury." *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

1. The "Expiring Names Registration Services Market" Is Not A Relevant Market.

In its Order, the Court warned CFIT that it faced an "additional bar" in pleading its claims based on the purported "Expiring Names Registration Services Market," even if it were able to plead standing. (Order at 16.) As this Court noted, the two courts to consider purported relevant markets based on subsets of domain names have rejected those "markets" and the antitrust claims based on them. In *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159 (N.D. Ala. 2001), the plaintiff claimed that Network Solutions (VeriSign's predecessor that operated the .com and other registries) maintained an unlawful monopoly of expired domain names. *Id.* at 1160. The court ruled that "the relevant market is domain names generally" and rejected the plaintiff's proposed market definition

[14] While the Ninth Circuit has stated that proof of market power in a relevant market is not an essential element of a conspiracy to monopolize claim under Section 2, it has made clear that a "specific intent to monopolize" is required. *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003). As the Supreme Court held in *Spectrum Sports* and *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965), however, whether a market is susceptible of being monopolized requires a definition of the relevant market.

that included only "expired domain names" because it was an artificial subset of all domain names. *Id.* at 1170. The *Smith* court concluded:

> there is no inherent difference in character, for purposes of interchangeability and cross-elasticity of demand, between domain names that are "expired" and held by NSI and those that are not. It is true in a literal sense that each domain name is unique. And one given individual domain name may be far more valuable on the open market than others. But products need not be entirely fungible to be considered part of the same relevant market.

Id. at 1169. The court further explained, "[b]ecause the number of domain names . . . is essentially unlimited, there will always be reasonable substitute names available" and, therefore, "the relevant product market is domain names generally." *Id.* at 1170. Similarly, in *Weber v. Nat'l Football League*, 112 F. Supp. 2d 667, 674 (N.D. Ohio 2000), the Court agreed that "the number of domain names is essentially limitless," finding that the market must be "defined in terms of domain names in general." VeriSign is aware of no court that has accepted an alleged relevant market of expired domain names. As in *Smith* and *Weber*, CFIT's purported market for services "used by end users in the purchase and sale of expiring domain name registrations" fails because it is artificially limited to a subset of domain names and does not include reasonably interchangeable domain names.

Against this background, this Court warned CFIT that an amended complaint would need to "contain *detailed allegations to show that registered and unregistered domain names are not reasonably interchangeable*" while at the same time noting that CFIT's chance of making such allegations "may be unlikely" but is "theoretically possible." (Order at 17 (emphasis added).) Despite this specific admonition from the Court, the FAC makes *no* allegations distinguishing expired domain names from registered or never-registered domain names. The three new paragraphs in the FAC regarding expired domain names allege only that there are existing companies that compete to procure expired domain names for customers. (*See* FAC ¶¶ 48-50.) There are no allegations defining a relevant market in terms of the substitutability of domain names of different registration statuses. Nor does the FAC allege any other measure that would allow the Court to infer that expired domain names are "not reasonably interchangeable" with registered or never-registered domain names. (*See, e.g.*, Order at 17.) Without allegations of a relevant market in expired domain

names, the allegation that there are companies competing to acquire expired domain names is irrelevant to market definition.

Where, as here, a relevant market is not properly alleged, the Ninth Circuit has made clear that the claims should be dismissed. *See, e.g., Tanaka*, 252 F.3d at 1063 (affirming dismissal of action when plaintiff alleged an implausible relevant market that only contained the UCLA women's soccer program); *Newcal Indus., Inc. v. Ikon Office Solutions, Inc.*, 2004 WL 3017002, at *3 (N.D. Cal. Dec. 23, 2004) ("Circuit courts that have addressed the issue, including the Ninth Circuit, have held that the plaintiff's failure to identify a [proper] relevant market is a proper ground for dismissal in a Rule 12(b)(6) motion.").[15] Claims III-VI, to the extent they rely on the Expiring Names market, therefore must be dismissed.

2. CFIT'S Failure To Allege Exclusionary Conduct Requires Dismissal of CFIT's Claims.

CFIT's causes of action for violations of the Sherman Act are insufficient as a matter of law for failing to allege specific predatory or exclusionary conduct. Failure to plead such conduct is grounds for dismissal. *See, e.g., Grinnell*, 384 U.S. at 570-71; *Spectrum Sports*, 506 U.S. at 456 (attempted monopolization); *Freeman*, 322 F.3d at 1154 (conspiracy to monopolize); *SmileCare Dental Group v. Delta Dental Plan of Calif., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996) (affirming dismissal for failure to allege "intentional predatory or anticompetitive conduct and resultant injury").

Exclusionary conduct is conduct that "unfairly tends to destroy competition itself," not conduct which is competitive, "even severely so." *Spectrum Sports*, 506 U.S. at 458. Conduct is

[15] *See also Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 531 (6th Cir 2001) (dismissal of complaint affirmed where plaintiff alleged relevant market of "interior design programs accredited by the Foundation for Interior Design Education Research not "all interior design programs"); *Hack v. President & Fellows of Yale College*, 237 F.3d 81, 85 (2d Cir. 2000) (rejecting "student housing in New Haven," "housing market for Yale students" and "non-subsidized rental housing in New Haven" as alleged relevant markets); *Elliott v. United Ctr.*, 126 F.3d 1003 (7th Cir. 1997) ("food sales within the United Center" does not describe a relevant market that is subject to Section 2 strictures); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437-38 (3d Cir. 1997) (alleged market for "ingredients, supplies, materials and distribution services used by and in the operation of Domino's pizza stores" did not include all reasonably interchangeable products); *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025-26 (10th Cir. 1992) (alleged market for the TNT television channel in Metropolitan Denver is defective as a matter of law).

"exclusionary" or "predatory" if "it makes sense only because it eliminates competition." *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1193 (9th Cir. 1984); *see Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (exclusionary conduct is conduct that "has no rational business purpose other than its adverse effect on competitors.").

The touchstone for determining whether conduct is anticompetitive is its effect on "the health of the competitive process," not on whether it "promote[s] the welfare of particular competitors." *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 267 (7th Cir. 1984). Hence, "[t]he courts have repeatedly observed that the antitrust laws protect competition, not competitors." *SmileCare*, 88 F.3d at 784 n.3 (citations omitted). It is "injury to the market or to competition in general not merely injury to individuals or individual firms that is significant." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812 (9th Cir. 1988); *see Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994) ("If conduct injures particular competitors, without injury to competition, Section 2 is not violated.").

The antitrust claims in the FAC are based on allegations (a) that VeriSign and ICANN have agreed to increase the price caps on domain name registrations, (b) of changes in the renewal provision of the registry agreements, and (c) of "monopoly leveraging" in connection with the alleged future introduction by VeriSign of CLS or other, unidentified, services. Even if true (which they are not), none of these allegations pleads the requisite predatory or exclusionary conduct to form the basis of an antitrust claim.

a. Relaxation of Price Caps

Based on the provisions of the Registry Agreements for the increases in price caps, CFIT alleges that "VeriSign is now using its monopoly power to raise prices" and "to secure for VeriSign free reign to impose supracompetitive prices." (FAC ¶ 81, 83.)[16] CFIT does not allege that the current cap -- which sets a maximum price of $6 for .com domain name registrations -- is an antitrust

[16] The terms of the Registry Agreements do not include an agreement to increase prices or otherwise set any price. Instead, on their face, the agreements leave pricing decisions for the future, while allowing for a relaxation of price caps over time. (FAC, Ex. 3 (2005 .net Agreement, § 7.3); RFJN, Ex. A. (2006 .com Agreement, § 7.3(d)).)

violation. Rather, CFIT alleges that allowing the cap to increase 7% in four of six years under the .com agreement is, standing alone, anticompetitive. (FAC ¶ 89; *see also* FAC ¶ 2 (asking Court to "restore competitive conditions").)[17]

Contrary to CFIT's claims, it is a fundamental principle of antitrust law that unilateral price increases, even by an alleged monopolist, are not subject to antitrust scrutiny. *See, e.g., Alaska Airlines*, 948 F.2d at 548-49 (quoting *Berkey Photo*, 603 F.2d at 294) ("setting a high price may be a use of monopoly power, but it is not itself anticompetitive"; "setting high prices in the original 'monopoly' market, represent the cost that we incur when we permit efficient and natural monopolies"); *Simpson v. US West Commc'ns, Inc.*, 957 F. Supp. 201, 204 (D. Or. 1997) ("raising prices, or even charging supracompetitive prices, is not anticompetitive and is not unlawful in and of itself"); Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 720a (2004) ("Monopoly pricing and monopoly profits should not ordinarily be deemed either an 'exclusionary' act or an 'abuse' of monopoly power under § 2."). The reason for this principle is "that the antitrust laws generally allow a buyer [or a seller] to determine the price or characteristic of the product it would like to purchase" or sell, and do not prohibit a party "from bargaining for the best deal possible." *Brillhart v. Mut. Med. Ins., Inc.*, 768 F.2d 196, 200-201 (7th Cir. 1985); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 925 (1st Cir. 1984). This is true whether the price negotiated is "high," "low," or "just right," and reflects the policy that the "Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business." *49er Chevrolet, Inc. v. Gen. Motors Corp.*, 803 F.2d 1463, 1468 (9th Cir. 1986).

The FAC alleges nothing more than that VeriSign plans to use its alleged monopoly power to increase prices. Such allegations, even as against an alleged monopolist, are insufficient as a matter of law to plead predatory conduct under the antitrust laws.

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[17] The pricing terms in the proposed 2006 .com agreement are not, in substance, different from those in the 2001 agreement. VeriSign and ICANN could have increased the stated price cap at *any time* under the 2001 agreement, and as many times as they chose. (FAC, Ex. 1 (2001 .com Agreement, § II.22, App. G).) Although other terms of the approved .net Registry Agreement are the same as the proposed .com Registry Agreement, the price cap in the .net Registry Agreement will be removed on January 1, 2007. (FAC, Ex. 3 (2005 .net Agreement, § 7.3).)

The additional allegations in the FAC that the alleged oversight body, ICANN, has agreed to the price increase does not change the application of these basic principles of antitrust law. It is well established that an agreement concerning price between two parties that are not competitors -- such as is the case with VeriSign and ICANN -- is not a violation of the antitrust laws. *See, e.g., Texaco, Inc. v. Dagher*, 126 S. Ct. 1276, 1280 (2006) (observing that "price fixing" by parties that do not compete in a relevant market "may be price fixing in a literal sense, [but] it is not price fixing in the antitrust sense"); *49er Chevrolet*, 803 F.2d at 1468 (affirming dismissal of antitrust claims and holding that agreement between automobile manufacturer and dealers setting price manufacturer will pay for warranty repairs is not anticompetitive); *Brillhart*, 768 F.2d at 200-01 (affirming dismissal of antitrust claims and holding that agreement specifying price doctors will charge insurer for provision of medical services is an agreement between non-competitors and is thus lawful; the agreement amounts to "a legitimate contract between a buyer of medical services and sellers of such services"); *Med. Arts Pharm. of Stamford, Inc. v. Blue Cross & Blue Shield*, 675 F.2d 502, 506 (2d Cir. 1982) (agreements establishing maximum price insurer will pay is not violative of antitrust laws).

In *Kartell*, for example, the court rejected challenges under Sherman Act Sections 1 and 2 to Blue Shield's agreements with doctors that set prices for medical services as a condition to Blue Shield's making payments to doctors for services they performed for insureds. Analogizing Blue Shield to a purchaser of services, the court held that the agreements were not subject to antitrust scrutiny even if Blue Shield possessed market power. 749 F.2d at 924-25. The court further cited two factors that supported its rejection of the Sherman Act claims. First, the court observed that the agreement addressed maximum prices for services (rather than setting minimum prices). Second, the payment system generally was subject to regulatory oversight, even though not subject to immunity. In the present case, as in *Kartell*, ICANN acts like a purchaser setting maximum prices that VeriSign will charge registrars for domain name registrations. Furthermore, like the agreement in *Kartell*, the registry agreements not only require the specific approval of the DOC, but are themselves with an alleged oversight body, ICANN.

Therefore, whether the registry agreements are viewed as gradually relaxing price caps (as the agreements clearly state), or are viewed as agreements to increase prices in the future (as CFIT

falsely alleges, contradicting the express terms of the agreements), the analysis is the same: without more, price increases, even by an alleged monopolist, are not subject to antitrust scrutiny. CFIT's claims based on threatened price increases under the Registry Agreements are thus insufficient as a matter of law.

b. Renewal Provisions

CFIT alleges that a change in the renewal terms in the Registry Agreements "all but eliminates" the potential for future competitive bidding to be the sole registry operator and thus violates the antitrust laws. (FAC ¶ 103.) Contrary to this allegation, the change in the renewal provisions in the new Registry Agreements is not material and, in any event, is not a predatory act. First, both the old and new registry agreements provide for automatic renewal in perpetuity. Second, the concept of a re-bid should VeriSign propose a price increase above the maximum price provisions still exists. However, even accepting CFIT's allegation, removal of the provision for a re-bid if VeriSign proposed renewal at a higher price than the price cap set in 2001, as a matter of law, cannot be a predatory act for the same reasons that price changes under the new Registry Agreements would be entirely lawful, as explained *supra*.

More specifically, the 2001 .com agreement provides: "Following consideration of the Renewal Proposal, Registry Operator *shall be* awarded a four-year renewal term unless ICANN demonstrates that: (a) Registry Operator is in material breach of this Registry Agreement . . . ." (FAC, Ex. 1 (2001 .com Agreement, § 25.B (emphasis added)).)[18] To the same effect, the proposed 2006 .com, Registry Agreement provides: "This Agreement *shall be* renewed upon the expiration of the term set forth in Section 4.1 above and each later term, unless the following has occurred: (i) following notice of breach to Registry Operator . . . an arbitrator or court has determined that Registry Operator has been in fundamental and material breach . . . ." (RFJN, Ex. A (2006 .com Agreement, § 6.1) (emphasis added).)

[18] The agreement provides that this provision for automatic renewal "shall be included in any renewed Registry Agreement unless Registry Operator and ICANN mutually agree to alternative language." (FAC, Ex. 1 (2001 .com Agreement, § 25.B).)

Both agreements provide for automatic renewal unless there is a material breach. The proposed 2006 Registry Agreement does replace the requirement that ICANN "demonstrate" the material breach with an arbitration process whereby that demonstration would occur. But this addition of certainty -- the intervention of a neutral arbitrator before the registry can be forfeited -- obviously could not be a predatory act under the antitrust laws.

With respect to pricing upon renewal, the existing .com registry agreement provides that ICANN may conduct a re-bid if "(d) the maximum price for initial and renewal registrations proposed in the Renewal Proposal exceeds the price permitted under Section 22 of this Registry Agreement." (FAC, Ex. 1 (§ II.25.B).) This provision was unnecessary in the 2006 .com Registry Agreement because the new section 7.3 addresses and *forecloses* potential price increases upon renewal, instead, providing for a specified, gradually relaxed price cap in subsequent renewal periods. As discussed in section III.B.2.a, *supra*, neither a price increase by VeriSign, nor an agreement with ICANN, a non-competitor, to allow such a price increase could constitute a predatory act in violation of the antitrust laws. Thus, the specification of a gradually relaxed price cap that would apply to renewal periods cannot violate the antitrust laws.

c. **Monopoly Leveraging Of Other Services – CLS**

The FAC alleges that the Registry Agreements permit "monopoly leveraging" by allowing VeriSign to use *its* market power to introduce new products in markets in which it does not now compete. In support of this claim, the FAC points to an alleged agreement to introduce CLS[19] and

[19] CFIT's allegations of an anti-competitive agreement relating to CLS are contradicted by the 2006 .com Registry Agreement itself, upon which CFIT relies. CFIT alleges that the Registry Agreements enable VeriSign "to launch the very services that ICANN and the Internet community have previously thwarted on competitive grounds," including CLS, and that "ICANN intentionally abdicated its responsibility under the MOU to support competition and to ensure that new proposed registry services are not anticompetitive." (FAC ¶¶ 93-94, 98.) However, Appendix 9 of the 2006 .com Registry Agreement identifies the services that the parties agree can be introduced under the Registry Agreement. CLS is not included. (*See* RFJN, Ex. A, App. 9.) Indeed, the Registry Agreements contain no reference whatsoever to CLS. While CFIT may again claim that CLS is simply a "modified and expanded version of Wait List Service," which is identified in Appendix 9, (*see* FAC ¶ 95), Appendix 9 only approves WLS "in accordance with" the letter dated January 26, 2004 from John Jeffrey of ICANN to Russell Lewis of VeriSign. (And DOC approval is required, including of Appendix 9.) That letter (which is incorporated by reference into the agreement and thus in the FAC) sets forth conditions that VeriSign could not possibly meet with the proposed CLS that is described in the FAC. (FAC, ¶¶ 95-96.) Thus, it is clear that the introduction of CLS would require a future approval of the service by ICANN. The 2006 Registry Agreements set forth a

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VeriSign's alleged intention to commercialize traffic data. CFIT also makes vague and irrelevant allegations regarding the provision in the Registry Agreements for the review and approval of new registry services (which provision is the same in all new registry agreements entered by ICANN) and changes in the provisions of the Registry Agreements applicable to consensus policies (also the same in all new Registry Agreements entered by ICANN). None of these allegations amounts to anything more than CFIT's dissatisfaction with ICANN's performance of its alleged regulatory role. Neither the changes reflected in the Registry Agreements nor the alleged threat to introduce new services constitutes a violation of the antitrust laws.

At bottom, CFIT's theory of "monopoly leveraging" has repeatedly been rejected, including by cases in this Circuit. The introduction of a new service, even by an alleged monopolist that enjoys a competitive advantage because of its monopoly power, is not an antitrust violation. Instead, an antitrust claim must be supported by specific independent wrongful conduct. As explained by the Ninth Circuit Court of Appeals in *Alaska Airlines*:

> The anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in the second market. . . .
>
> *Monopoly leveraging is just one of a number of ways that a monopolist can permissibly benefit from its position.* . . . Both "monopoly leveraging" in an adjacent market and setting high prices in the original "monopoly" market, represent the cost that we incur when we permit efficient and natural monopolies.

948 F.2d at 548-49 (emphasis added.) *See Berkey Photo,* 603 F.2d at 276 (a firm that is integrated so that it participates in related markets does not violate the antitrust laws by using "the competitive advantage of its broad based activity . . . to develop complimentary products. . . . These are gains that accrue to any integrated firm, regardless of market share, and they cannot by themselves be considered uses of monopoly power."); *Catlin v. Wash. Energy Co.*, 791 F.2d 1343, 1345-46 (9th Cir.

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detailed process for approval of new services under that agreement, which includes an analysis of whether the service "could raise significant competition issues." (FAC ¶ 93 (citing 2006 .com Registry Agreement § 3.1(d)(iv)).)

1986) (applying *Berkey* and holding that a utility did not abuse monopoly power in a natural gas market by using gas customer lists to facilitate entry into the market for gas-related consumer products; to be actionable "the introduction of a product in a second market "must involve 'some associated conduct'" "that is "anticompetitive"); *Calif. Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 744 (9th Cir. 1979) ("IBM, assuming it was a monopolist, had the right to redesign its products to make them more attractive to buyers whether by reason of lower manufacturing cost and price or improved performance").[20]

CFIT's claims regarding CLS and commercialization of traffic data are based entirely on CFIT's theory of "monopoly leveraging," rejected by the authorities above. CFIT makes no allegations of independent predatory conduct in support of these claims. Therefore, CFIT's claims regarding CLS and the commercialization of traffic data must be dismissed for this reason as well as plaintiff's failure to plead a relevant market (addressed in section III.B.1, *supra*).[21]

CFIT's vague allegations regarding alleged changes in the consensus policy provisions of the Registry Agreements and the procedure for the introduction of new services likewise fail to allege

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[20] Courts have been extremely reluctant to limit the introduction of new services -- which is exactly what CFIT alleges as the purported basis for its claims – under antitrust laws. As the Second Circuit explained, "any firm, even a monopolist, may bring its products to market whenever it chooses." *Berkey Photo,* 603 F.2d at 282-83. Where antitrust violations have been found in connection with the introduction of a new product, "it is not the product introduction itself, but some associated conduct, that supplies the violation." *Id.* at 286 n.30 (emphasis added). Here, CFIT's allegations regarding CLS are based solely on the claimed effects that would result from mere introduction of that services. That is wholly insufficient, and there is no requirement that a monopolist alleviate the adverse effects the introduction of a new service may cause for individual competitors. *Calif. Computer Prods.*, 613 F.2d at 744.

[21] Furthermore, as appears from the face of the FAC, CLS is procompetitive. CFIT alleges that CLS contemplates that VeriSign will notify any participating registrars that certain domain names are about to be deleted and become available for registration. VeriSign then would allegedly hold a five-day auction for such domain names, whereupon the successful bidder will be able to register the domain name. (*Id.* ¶ 96.) If there are no bids on a particular domain name, it will be deleted as it is now and can be registered anew in the same manner that such transactions occur today. (*Id.*) Thus, CLS will introduce a new service that creates an even more competitive and efficient process for the sale and purchase of "expired domain names," a process that will be available to hundreds of domain name registrars and that will coexist with existing means of registering domain names that are deleted from the registry database. CFIT specifically concedes that all domain name registrars will be able to participate in CLS (*id.* ¶ 96), a concession that completely undermines its allegation that competition in the alleged "expiring names services" market will be eliminated. (*Id.* ¶ 111.) In short, the introduction of CLS could not constitute predatory conduct nor cause antitrust injury. It cannot be said of CLS that it "only makes sense if it eliminates competition." *Airweld,* 742 F.2d at 1193 (no antitrust injury).

any predatory conduct and, therefore, are insufficient to plead an antitrust claim. At most, these allegations complain about the relaxation of potential regulation or oversight, not conduct of VeriSign, much less the required predatory conduct. Again, CFIT merely seeks to second guess an alleged regulatory decision and have this Court determine what procedure might be appropriate for the adoption of consensus policies or the introduction of new registry services. As the Ninth Circuit has indicated, this court should resist the invitation. *See Airweld*, 742 F.2d at 1193 (conduct is "exclusionary" or "predatory" if "it makes sense only because it eliminates competition."); *Alaska Airlines*, 948 F.2d at 547 (specific independent wrongful conduct is required); *see also Concord Boat Corp.*, 207 F.3d at 1062 (exclusionary conduct is conduct that "has no rational business purpose other than its adverse effect on competition"); *Berkey Photo*, 603 F.3d 263.[22]

3. The FAC Does Not Allege A Lessening Of Competition Or Antitrust Injury

CFIT acknowledges that as a matter of technical necessity, "there can be *only one* registry operator at a time for each TLD registry" and "*there is no competition.*" (FAC ¶ 35 (emphasis added).) These allegations are inconsistent with CFIT's claims that the challenged registry agreements will *lessen* competition in the alleged .com and .net registration markets. Courts have consistently required preexisting competition for a plaintiff's antitrust claim to survive.

[22] Furthermore, consensus policies do not govern competitive conduct under either the old or new registry agreements, and what such policies may address has not changed. The provisions addressing the introduction of new services merely make explicit the procedures and timetable to be followed. They do not change the criteria to be considered from that established in the 2001 registry agreements. (FAC, Ex. 1 (§ II.3.C), Ex. 3 (§3.b), Ex. 4 (§ 4.3); RFJA, Ex. A (§ 3.b).) CFIT's other claims of predatory conduct by VeriSign similarly fail. Although CFIT describes VeriSign's litigation against ICANN as predatory conduct (*id.* ¶ 104), it is black-letter law that initiating litigation and conduct related to that litigation are entitled to *Noerr-Pennington* immunity from the antitrust laws. *See Prof'l. Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) (applying *Noerr-Pennington* immunity to all "acts reasonably and normally attendant upon effective litigation"). Because CFIT fails to include any allegations that the litigation was a "sham," it cannot satisfy CFIT's requirement to plead predatory conduct. *See Prof'l Real Estate Investors*, 508 U.S. at 60-66 (requiring that the suit be "objectively baseless" and intended to injure the party through governmental process, rather than the outcome of that process, for *Noerr* immunity not to apply). As discussed in Section II.E., *infra*, the *Noerr-Pennington* doctrine provides defendants with immunity for all CFIT's claims. Finally, CFIT's allegation that VeriSign's introduction of new services known as IDN and ConsoliDate constitutes predatory conduct (FAC ¶ 105) is deficient for the same reasons as CFIT's claims against VeriSign's proposed introduction of CLS discussed above.

IV. CONCLUSION

For the reasons expressed above, VeriSign respectfully requests that the Court dismiss CFIT's First Amended Complain with prejudice.

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