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MANWIN LICENSING INTERNATIONAL S.À.R.L.,

Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent.

ICDR Case No. 50 117 T 00812 11

YOUPORN'S SUPPLEMENTAL IRP BRIEF ON REMEDIES AND OTHER PROCEEDINGS

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I. INTRODUCTION

As YouPorn demonstrated in its preceding brief, ICANN is a hugely powerful monopoly which earns enormous revenues. The extent of its private control over the ubiquitous and critical worldwide Internet engine of commerce and ideas is unprecedented and potentially dangerous. Sensitive to this, ICANN has touted its mechanisms for public accountability and input. This Panel plays an extremely important and not just private but societal role in ensuring such input and accountability. Unfortunately, like many powerful monopolies, ICANN now seeks to avoid scrutiny of its decision-making by imposing a variety of impediments to this IRP review. None prevent this proceeding. In brief:

1. ICANN says this IRP is meaningless because IRP decisions are always advisory and in any event could never interfere with ICM Registry LLC's contractual rights. But IRP decisions nevertheless have value in educating ICANN and permitting public input, even where they can or do result in no concrete change in past decisions. If that were not true, ICANN would never have created or touted the wholly non-binding IRP process. In any event, a favorable decision here would not necessarily be only educational or academic. As YouPorn explains below, such a decision could stimulate ICANN to cure or ameliorate many of the fundamental flaws in the .XXX TLD, without violating any ICM rights.

2. ICANN says this proceeding improperly interferes with or seeks reconsideration of the past IRP decision. It does not, for several reasons. First, the Panel's decision will be advisory, and so cannot change the previous ruling. Second, this IRP addresses critical .XXX TLD issues never decided (and which no party had any incentive to raise) in the last proceeding. Specifically, for example, in the last IRP the only issue decided was whether ICANN should be permitted to reconsider a previous decision to approve the .XXX TLD. The previous IRP Panel did not decide whether the .XXX TLD or registry contract created an anticompetitive defensive registration racket. Indeed, ICM wished and intended to benefit from just such a racket, and so had no reason to challenge it. Nothing insulates ICANN's decisions from review merely because another party previously raised self-interested and limited IRP challenges to distinct issues about broadly similar topics.

3. ICANN says this IRP impermissibly duplicates YouPorn's federal lawsuit. But YouPorn's lawsuit will turn on proof of intricate and demanding elements of antitrust law. This proceeding by contrast addresses only whether ICANN has breached its own Bylaws, an issue not presented in the lawsuit. ICANN may breach its Bylaws even without violating antitrust law. ICANN should not be able to avoid review of its Bylaw breaches, which among other things impact the speech and association interests of members of the Internet community, merely because ICANN's conduct may also violate antitrust law.

4. ICANN continues to argue that YouPorn lacks standing. But ICANN's complete abandonment of its prior arguments on this issue is telling. ICANN argued vehemently and at length in its opening brief that IRP standing was the same as constitutional Article III standing. YouPorn demonstrated in response that it plainly and easily meets that standard. In its last brief, ICANN does not even attempt to rebut YouPorn's Article III standing, instead abandoning that standard and arguing that other unstated and inchoate policies should bar YouPorn. The argument fails. YouPorn meets the test for standing as interpreted by ICANN itself in its opening brief. ICANN's other policy arguments are inconsistent with the plain language of the Bylaws, would contravene the purpose of IRPs, and are unavailing.

At the end of the day, this IRP is largely an opportunity to provide public input and educational review of the decision to implement the .XXX TLD and registry contract. IRP review serves for the privately directed Internet much the same purpose as litigation against the government under the First Amendment. In the famous words of Justice Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants …."[1] ICANN may choose not or be unable to implement this Panel's decisions. But ICANN and public Internet accountability cannot help but benefit from a thorough airing of its decision-making about the .XXX TLD – the most controversial top level domain name ever approved and broadly decried worldwide as an extortion scheme. Despite ICANN's revisionist views, nothing precludes this critical IRP airing.

[1] *Buckley v. Valeo*, 424 U.S. 1, 68 n. 80 (1976) (quoting L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933)).

II. YOUPORN SEEKS APPROPRIATE RELIEF

The Panel has asked what relief YouPorn contends the Panel could grant "with respect to ICANN's contract with ICM."

YouPorn seeks the only IRP relief it understands to be permissible: An advisory declaration that ICANN violated its Bylaws. You Porn seeks such a declaration concerning both ICANN's decisions to: (a) approve the .XXX TLD in the first instance without adequate competitive processes or adequate consideration for governmental, expert, or other opinions; and (b) approve an ICM registry contract that lacked competitive protections and in fact authorized the defensive registration racket. Thus, while YouPorn does seek relief "with respect to" the ICM/ICANN contract, its requested relief is not strictly limited to that contract. *See also* Section IV (discussing the alleged Bylaw violations in greater detail).

ICANN makes several arguments why YouPorn's requested relief should preclude these proceedings. None has merit.

First, ICANN argues that this Panel's decisions would not be binding. But IRP decisions are never binding. Thus, if the advisory nature of the decisions bars an IRP, an IRP could never be held. ICANN cannot adopt and tout IRPs as an important component of its "transparency" and "accountability," but then hypocritically contend that such proceedings are precluded because ICANN has elected advisory opinions as the only permissible remedy.

Second, ICANN argues that IRP remedies are useless here because the Panel can do nothing to impair the rights of a necessarily affected third party, ICM.[2] But IRPs are not limited to circumstances where ICANN can implement the advisory declarations without impediment. As ICANN itself admits, IRPs are intended to provide – and are the only mechanism for providing – ***independent*** non-binding reviews of the propriety of ICANN decision-making. Such reviews are thus an extremely important means of educating and informing ICANN – an enormously powerful and potentially insular private monopoly – of sophisticated neutral arbitrator opinions about its

[2] The argument is ironic. As discussed in Section III below, ICANN contends (incorrectly) that YouPorn is bound by the last IRP, even though never a party. In making ***this*** argument, however, ICANN contends that ICM cannot be bound by this IRP ***because*** it is a non-party.

processes. They also have the beneficial effect of publicizing and providing an opportunity for public review of and pressure concerning ICANN's proper operations.[3]

These educational and public benefits persist even where the IRP declarations are not or cannot be implemented. Plainly, ICANN can learn from and accept input concerning its mistakes even when it cannot (or chooses not to) fix them. ICANN itself must agree. It could easily have limited IRPs to circumstances where the resulting arbitrator recommendations ***could or had to be*** implemented. It adopted no such limitations. Instead, again, it repeatedly has touted the importance and benefit of IRP review to its Internet "stakeholder" responsiveness, regardless of whether ICANN can or will as a result change the particular decision at issue.

While IRPs thus have value even if the decisions at issue will not be changed, an appropriate IRP recommendation here would not be academic. If the Panel confirms (as YouPorn advocates) that ICANN failed to adequately promote competition by (for instance) authorizing the .XXX defensive registration racket, ICANN can take steps to rectify that failure. Among other things, ICANN could investigate and elect to implement rights to rescind ICM's .XXX registry contract. As one example, the ICM/ICANN contract bars ICM from acting as a registrar.[4] It appears that ICM has breached that material obligation by directly selling domain names during its "Founders Program" and "Premium .XXX Domain Name Program." ICANN could choose to seek rescission of the contract based upon that or other ICM breaches.[5] *See* .XXX Registry

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[3] ICANN provides that the IRP proceedings are fully public and published online, except they permit limited sealing to protect trade secrets. *See* Exhibit B to ICANN's Response To YouPorn's Brief Re Standing To Maintain An IRP ("ICANN Resp. re Standing"), Bylaws Of The Internet Corporation For Assigned Names And Numbers, *available at* http://www.icann.org/en/about/governance/bylaws (hereinafter, "Bylaws"), Art. IV, §§ 3(13), 3(14).

[4] ICANN/ICM .XXX Registry Agreement, Section 7.1(b) (hereinafter ".XXX Registry Agreement"), *available at* http://www.icann.org/en/about/agreements/registries/xxx.

[5] YouPorn's Request identifies a number of other ICM breaches, including breaches of its warranties and representations and violation of its promise to register domain names only for those who already provided or credibly proposed to provide sexually-oriented adult entertainment and related products and services. YouPorn's Request for IRP ¶¶ 26, 46, 47, 49. ICM has also failed to protect the consumer rights of consenting adult consumers in violation of Part 1, Paragraph 2, of Appendix S to the .XXX Registry Agreement by making it difficult for existing content providers to obtain defensive registrations and thereby facilitating consumer confusion. Moreover, ICM has failed to protect free expression rights as defined in the United Nations Declaration of Human Rights in violation of Part 1, Paragraph 2, of Appendix S to the .XXX Registry Agreement. The policies of the ICM created and dominated .XXX sponsoring organization – known by the

Agreement, Section 6.1. After such rescission, ICANN could negotiate a more competitive .XXX registry contract – for example, one that permits free or market-priced defensive .XXX registrations. As another example, under Section 3.1(b) of the .XXX Registry Agreement, ICANN has the right to adopt Consensus Policies that ICM must comply with. The Panel could instruct ICANN to move to adopt policies that would, among other things, obligate ICM to better protect (as required by its Bylaws) the speech and association interests of adult companies who object to the policies and advocacy efforts of ICM and IFFOR.[6]

Third, ICANN argues that because IRP decisions are non-binding, and YouPorn can seek binding relief in its antitrust case, this proceeding should be barred. However, as explained in Section IV below, the IRP addresses Bylaw violations not at issue in the antitrust case, with the result that the two proceedings could result in quite distinct remedies. However, even if the two proceedings could result in the same or similar remedies (binding in the lawsuit, non-binding here), those remedies would result from different base violations. Whether or not YouPorn can prove that ICANN violated antitrust law, YouPorn should be entitled to a determination in the IRP that ICANN violated its own Bylaws. Such a determination would have all the educational and public benefits described above. For that reason, YouPorn would still want an IRP declaration of

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acronym IFFOR – are inconsistent with the views of many in the adult entertainment community, and yet ICM forces members of the community to endorse IFFOR in order to obtain .XXX registrations. All these other breaches could provide grounds for ICANN to rescind or negotiate a more competitive .XXX contract.

[6] This Panel's decisions could also be very informative to ICANN when implementing its new proposed round of gTLDs. Broad concerns have been expressed about the potential defensive registration costs that such new gTLDs will impose. Gartner Research, *New gTLDs Require A Business Case* (July 23, 2011), *available at* http://blogs.gartner.com/lydia_leong/2011/07/23/new-gtlds-require-a-business-case/ ("The proliferation of new gTLDs is going to multiply everyone's defensive registration headaches for domain names. Many new gTLD registries will probably make most of their money off defensive registrations, and not active primary-use domains. This is very sad and creates negative value in the world."); Coalition Against Domain Name Abuse, Inc., *Comments on New gTLD Final Reports on Competition and Pricing* (last visited January 6, 2013), *available at* http://www.cadna.org/sites/default/files/pdfLORWvSGdun.pdf ("To assert that this TLD launch will improve competition and benefit consumers without substantial evidence or even knowledge about TLDs and domain names is misleading to the Internet community."). ICANN should be carefully considering how to limit the adverse competitive impacts of such defensive registration costs, and may significantly benefit from this Panel's insights in the .XXX example.

Bylaw violations, even if it obtains a binding remedy in the antitrust suit (and will of course also want that determination if the lawsuit results in no such remedy).[7]

III. THE PRIOR IRP DOES NOT PRECLUDE THIS ONE

ICANN argues that "[w]hether labeled as *res judicata*, collateral estoppel, finality of judgments or just common sense, neither YouPorn nor anyone else has standing to re-litigate issues previously decided by a different IRP panel."[8] This argument is wrong because this IRP does not (and cannot seek to) interfere with the previous IRP. Moreover, ICANN relies on principles of preclusion applicable only to re-litigation of prior: (1) binding determinations; (2) in proceedings involving the same parties; and (3) addressing the same issues. None of these prerequisites are met here.

A. IRP's Are Not Binding and So Have No Preclusive Effect

The parties agree that IRPs are non-binding. As ICANN asserted in the last IRP: "The plain language of the IRP provisions ... provides that the Panel's declaration is advisory to the ICANN Board and not binding."[9] In the last IRP, the Panel expressly adopted and approved ICANN's argument. It "concluded that the Panel's Declaration is not binding, but rather advisory in effect."[10] Of course, ICANN continues to maintain that position in this IRP.[11] Because this proceeding is not binding, it could not in any manner interfere with the previous IRP proceeding.

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[7] The same is true of the other alternative proceedings that ICANN proposes, such as UDRPs. These might help YouPorn after-the-fact with a specific misuse in .XXX of one of its particular tradenames. But these will not address the broader systemic .XXX-related violations by ICANN of its Bylaw obligations to (for example) promote competition, heed governmental advice, or permit the free flow of information.

[8] ICANN Resp. re Standing p. 3.

[9] *ICM v. ICANN IRP*, ICANN May 8, 2009 Response to ICM Memorial on the Merits ("ICANN/ICM Memorial") p. 29, ¶ 78, *available at* http://www.icann.org/en/news/irp/icm-v-icann/icann-response-for-icm-memorial-on-merits-08may09-en.pdf. *See also id.* at 30-33, ¶¶ 80-85; *ICM v. ICANN IRP*, ICANN Response to ICM Request for IRP p. 9, ¶ 21("ICANN/ICM Response") ("The IRP's declaration is not binding on the parties."), *available at* http://www.icann.org/en/news/irp/icm-v-icann/icann-response-to-icm-request-08sep08-en.pdf.

[10] Exhibit A to ICANN Resp. re Standing, *ICM v. ICANN IRP*, Declaration of IRP Panel (hereinafter "IRP Decl.") p. 61, ¶ 134, *available at* http://www.icann.org/en/news/irp/icm-v-icann/news/irp/-panel-declaration-19feb10-en.pdf.

[11] ICANN's Response To YouPorn's Request For IRP ("Resp. to YouPorn IRP") ¶ 44 ("the Panel's declaration is not binding"); ICANN Resp. re Standing p. 3 ("an IRP Panel's declaration is 'advisory in effect'").

Also, because this IRP and the previous one are non-binding, res judicata and collateral estoppel are inapplicable. An arbitration has no preclusive effect unless the parties have agreed it does. *See, e.g., Sullivan v. Lenscrafters. Inc.*, No. CV 02-942-BR, 2004 U.S. Dist. LEXIS 10973, *9 (D. Or. June 9, 2004) (non-binding arbitration findings had no preclusive effect); Rest. (2d) Judgments § 84, comment (h) ("The terms of an agreement to arbitrate . . . may limit the issue preclusive effect of the determination of issues in arbitration"). Here, ICANN has agreed that the results of an IRP arbitration are not preclusive or binding under any circumstances.

B. The Prior IRP Involved Different Parties and Issues

Even if IRP proceedings were generally binding, the previous IRP could have not preclusive effect against YouPorn here. A binding prior determination has preclusive effect only upon ***parties*** to the earlier proceeding if the new proceeding concerns the ***same issues*** or causes of action ***actually decided*** in the previous proceeding. "Res judicata precludes parties or their privies from relitigating a *cause of action* [finally resolved in a prior proceeding]." *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 828 (1999) (italics in original) (internal quotation marks omitted). Under collateral estoppel, "an issue necessarily decided in [prior] litigation [may be] conclusively determined as [against] the parties [thereto] or their privies . . . in a subsequent lawsuit on a different cause of action." *Id.* (internal quotation marks and citations omitted). *See also, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (due process precludes application of collateral estoppel or res judicata to "a litigant who was not a party or a privy [to the prior proceeding] and therefore has never had an opportunity to be heard"); *Blonder-Tongue Lab. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (collateral estoppel applies only to parties to the previous proceeding and only to efforts to relitigate "the identical issue" previously decided).[12]

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[12] Indeed, even where an issue was previously decided among related parties, it will not have preclusive effect if the parties sought to be bound had inadequate incentive to litigate the issue in the prior proceeding. *See, e.g., Jones v. Bates*, 127 F.3d 839, 848 (9th Cir. 1997) ("[D]ue process requires both that the prior litigation of the issue have been motivated by the same underlying purposes, and that the original party have had an incentive and opportunity to litigate the issue in the manner best suited to furthering those common underlying purposes."); *Sutton v. Golden Gate Bridge*, 68 Cal. App. 4th 1149, 1155 (1998) ("Notwithstanding the adversarial relationship between the parties, we cannot conclude that the prior adjudication was a bar to the present motion because appellant did not have the incentive to litigate the issue in that action."). Neither ICM nor ICANN had any incentive to litigate in the first IRP the issues now raised here (nor did they do so).

Any effort to make the previous IRP binding against YouPorn founders on these precepts. First, YouPorn was not a party to the prior proceeding, is not in privity to any party, and had no opportunity (either directly or by proxy) to litigate the issues in that proceeding. [13]

Second, the issues to be decided are completely distinct. The last IRP decided only that ICANN had previously decided that .XXX met the sponsorship criteria for TLD approval, and that ICANN could not thereafter properly reconsider that decision. IRP Decl. ¶¶ 147-150, 152 ("[T]he Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria. . . . The Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.").

YouPorn does not propose in this IRP to seek any new determination about whether or not ICANN made a binding determination that ICM satisfied the sponsorship criteria. Instead, YouPorn proposes to seek adjudications of a variety of issues ***never decided*** in the previous IRP. Indeed, some of these issues could never have been decided because they first arose ***after*** the previous IRP. In particular for example, YouPorn seeks decisions on the following issues never decided in the previous IRP:

- Did ICANN fail to adequately weigh the competitive disadvantages before approving the .XXX TLD? More particularly, given the vibrant market for adult content web sites in other TLDs, was there any significant market need for a new TLD devoted to adult content? Even if there was such a need, did the particular need for defensive registrations in such a TLD outweigh any perceived market benefits? Did ICANN fail to satisfy its Bylaw obligations to

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[13] ICANN argues that *Brinton v. Bankers Pension Servs., Inc.*, 76 Cal. App. 4th 550 (1999), holds that a prior arbitration decision can be asserted against a non-party. ICANN Resp. re Standing p. 4 and n.11. It holds no such thing. In *Brinton*, plaintiff filed a securities fraud claim with the NASD against Thon, Titan, and Bankers. Thon and Titan participated in the NASD arbitration; Bankers declined to do so. 76 Cal. App. 4th at 554. The NASD panel denied all plaintiff's claims and the courts confirmed that denial. *Id.* ***The same plaintiff*** then sued Bankers on ***the same claims*** raised in the NASD arbitration. *Id.* The courts as a result found plaintiff's claims against Bankers barred by the earlier arbitration. *Id.* at 557. *Brinton* thus asserted preclusive effect against a ***party*** to the prior arbitration on the very ***same issues*** decided in that arbitration. Nothing in *Brinton* or any other authority supports asserting the results of a prior arbitration against a non-party like YouPorn and on issues not previously decided.

promote competition by inadequately or incompletely considering these issues? *See* YouPorn's Request for IRP ¶¶ 10(b), 12(c) and (d), 14, 40-43, 45, 56(a)-(d), 57, 59, 61(a)-(c).

- In approving the .XXX TLD, did ICANN fail to comply with its Bylaw obligations to obtain expert advice and to heed governmental objections? Many experts have opined that .XXX poses extreme competitive disadvantages, and that ICANN failed to obtain adequate expert advice on such competitive concerns. Many governments and others objected to the .XXX TLD in general. *See id.* ¶¶ 10(d) and (e), 12(d), 13, 14, 17, 28, 41-43, 56(b)-(d), 57(b), 61(a)-(c).
- Even if the .XXX TLD made competitive sense, should ICANN have promoted competition in the award of the registry contract by permitting ICM to compete with other potential registries? The *VeriSign* case holds that it should have. *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 502-504 (9th Cir. 2010) (hereinafter, "*VeriSign*"). Should that competition have particularly included competing proposals for providing low cost or free defensive registrations, or otherwise limiting the adverse competitive impact of the need for defensive registrations? Did any of this conduct violate ICANN's Bylaw obligations to promote competition? *See* YouPorn's Request for IRP ¶¶ 44, 56(b), 57(e), 58(e), 60(d), 61(i).
- Does the .XXX Registry Agreement have improperly anticompetitive provisions? Specifically, for example, should ICANN have required in the contract that ICM must provide free or market-priced .XXX defensive registrations within .XXX? Should ICANN have refused to agree to a presumptive renewal provision of the kind the *VeriSign* case holds unreasonably suppresses competition? *VeriSign,* 611 F.3d at 502-503. Through the ICM contractual provisions, did ICANN violate its Bylaw obligations to promote competition? *See* YouPorn's Request for IRP ¶¶ 3(d), 44, 57(d) and (e), 59, 60(d), 61(d).
- Does the .XXX Registry Agreement fail to require ICM to adequately protect the speech and association interests of members of the adult entertainment community who object to associating themselves with all of the policies and advocacy efforts of ICM and IFFOR but nevertheless want to participate in .XXX in various manners? Should ICANN have insisted on such protections given that the "core values" listed in Article I, Section 2 of ICANN's Bylaws

include respect for "the creativity, innovation, and flow of information made possible by the Internet?"

The last IRP did not actually ***decide*** any of these issues. And it could never have decided those identified in the last two bullet points because, at the time of the last IRP, the contract between ICANN and ICM had not even been made. The last IRP could not even address – let alone decide – the propriety of the terms in a contract not yet then even in existence.

C. Policy Considerations and ICANN Rules Permit This IRP

Not only do the Bylaws and applicable laws authorize this IRP allowing a new party to address these new issues, such an IRP is extremely important for policy reasons. In the last IRP, ICM's objective was solely to obtain a contract that would ***allow*** it to engage in profitable anticompetitive monopoly conduct. As a self-interested party, ICM could not properly raise, and had no incentive to raise, issues about appropriate restrictions on its activities. Such restrictions would reduce ICM's own profits but benefit consumers and other ICANN constituents, and could mitigate the broadly anticompetitive effects of the .XXX TLD. Competitive and other issues regarding TLDs are critical to the entire international economy, and can only be properly attacked by parties (like YouPorn) adversely affected by (rather than profiting from and advocating for) them.

This Panel should also permit the IRP because ICANN has adopted no rule barring them under these circumstances. ICANN could have – but did not – adopt specific rules addressing when previous IRPs would preclude or affect later IRPs. The Panel should not adopt a rule which ICANN itself did not.

D. Summary

At base, ICANN argues that a decision on the new issues raised by YouPorn may support a conclusion that ICANN should not have approved the .XXX TLD, while the last IRP decided that ICANN improperly reversed course when it refused to enter a registry contract with ICM. But in reaching its conclusion, the last IRP simply did not analyze or decide many of the important .XXX issues. Moreover, while this IRP may not be able to force ICANN to undo all its .XXX decisions, it can educate ICANN and provide public input on the critical and previously undecided issues. It

may thus stimulate ICANN to change its future behavior concerning both the .XXX and other TLDs. Given its advisory nature, an IRP can never do more.

IV. THE ANTITRUST CASE DOES NOT BAR THE IRP

ICANN argues that YouPorn's antitrust suit bars this IRP. It does not. The proceedings are independent, address violations of different standards before different authorized bodies, and may result in different remedies.

ICANN's Bylaws provide that: "ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws...." Bylaws, Art. IV, § 1. IRPs provide a mechanism for that accountability by permitting "declarations ... whether the Board has acted consistently with the provisions of [its] Articles of Incorporation and Bylaws." *Id.* § 3(3). Here, YouPorn asserts that the .XXX TLD and registry contract violated ICANN's Bylaws by, among other things, authorizing the anticompetitive .XXX defensive registration protection racket, failing to adequately account for broad governmental and community opposition to .XXX, failing to obtain appropriate expert advice on the anticompetitive consequences of the .XXX TLD and registry agreement. ICANN's actions thus violated, among others, its Bylaw obligations to "[i]ntroduc[e] and promot[e] competition," to "promote well-informed decisions based on expert advice," and to "duly tak[e] into account "governments' or public authorities' recommendations." *Id.* Art. I, § 2; Art. III, § 6; Art. IV, § 1.

In contrast, in the federal antitrust lawsuit, YouPorn sues ICANN and ICM for violations of Sections 1 and 2 of the Sherman Antitrust Act. 15 U.S.C. §§ 1, 2. Section 1 proscribes "contracts or conspiracies ... in restraint of trade." *Id.* § 1. Section 2 proscribes monopolization and conspiracies or attempts to monopolize. *Id.* § 2. In the antitrust suit, YouPorn contends that ICANN and ICM have violated these laws by, among other things: (a) agreeing to award the .XXX registry contract without competition from other registry operators, with the result that ICM has been permitted to charge monopoly above-market and extortionate prices for .XXX defensive registrations; (b) agreeing to an ICM registry contract that authorizes ICM to create and exploit the .XXX defensive registration monopoly by charging such prices; and (c) agreeing to an ICM registry contract that facilitates the impermissible monopoly and anticompetitive conduct by, for

example, providing for presumptive renewal of that contract in a manner that suppresses competition.[14]

While both the IRP and antitrust lawsuit focus on ICANN's conduct in establishing the .XXX TLD and approving the .XXX TLD registry contract, the two proceedings judge that conduct under different standards. For example, nothing in the antitrust suit will determine whether ICM has violated its Bylaws. More specifically, that suit will not determine whether ICANN violated its Bylaw obligation to adequately consider the objections to the .XXX TLD by governmental bodies and others. It will not determine whether ICANN failed to obtain and follow appropriate expert advice, as required by the ICANN Bylaws, on the anticompetitive effects of establishing the .XXX TLD and in authorizing the ICM registry contract. Those determinations can only be made in this IRP. This Panel could well find violations of those Bylaws even if YouPorn ultimately fails to prove its antitrust claims in the lawsuit.

Similarly, while both actions will address competitive aspects of the .XXX TLD and the .XXX registry contract, they will do so under different standards. In the lawsuit, YouPorn must meet all the specific prerequisites to federal antitrust claims, including for example exacting requirements for antitrust standing and market definition. This Panel may conclude that ICANN violated its Bylaw obligations to "promote competition" even if YouPorn fails to establish each of the prerequisites for antitrust liability. Nothing suggests that the Bylaw obligation to "promote competition" is completely consonant with antitrust liability. If it were, ICANN could have dispensed with the Bylaw altogether, or have simply provided that ICANN will abide by antitrust law. Moreover, the Bylaw obligation to promote competition may apply to conduct or effects in jurisdictions beyond the reach of United States antitrust law. To the extent YouPorn or others suffer in foreign jurisdictions, ICANN's Bylaw obligations may be the only effective constraint on its anticompetitive behavior.

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[14] ICANN and ICM filed extensive challenges to YouPorn's allegations. The district court denied those challenges as to YouPorn's claims about the defensive registration market. The district court's opinion aptly summarizes YouPorn's federal antitrust claims. *See* Exhibit 1, hereto, *Manwin Licensing Intern'l. S.A.R.L. v. ICM Registry, LLC*, No. CV 11–9514 PSG, 2012 U.S. Dist. LEXIS 125126, *25-29 (C.D. Cal. Aug. 14, 2012).

The different Sherman Act and Bylaw standards may also result in distinct remedies. Even if YouPorn succeeds in both the lawsuit and this IRP, the Panel could provide instruction to ICANN on issues going beyond those that the District Court will consider and address with injunctive relief. For example, this Panel could tell ICANN that it should have given more consideration to public and governmental objections to the .XXX TLD, which continued after the prior Panel reached its decision. That issue does not arise under the antitrust laws.

Also, recommendations about ICANN's Bylaw obligations and violations are particularly important regardless what happens in the antitrust suit. ICANN's Bylaw obligations will apply to many other transactions or consequences, even those beyond the reach of United States antitrust law. ICANN and the public will thus benefit from this Panel's opinions on those issues, which may (again) appropriately inform ICANN's future actions on the .XXX TLD and other new proposed TLDs.

Finally, consistent with the different standards and functions of the IRP and lawsuit, no law precludes both from proceeding. Nor does any IRP or other ICANN rule. ICANN could have, but did not, adopt rules barring IRPs under certain circumstances where they might overlap with other actions. There is no reason for this Panel to adopt for ICANN a rule which it did not itself find appropriate, particularly where this IRP can address important Bylaw issues which will not be determined in the lawsuit.

V. YOUPORN HAS STANDING

YouPorn fully addressed ICANN's standing arguments in its previous briefing, but quickly re-emphasizes a few issues in response to ICANN's latest brief.

A. YouPorn Satisfies ICANN's Self-Defined Article III Standing Requirement

In its original response brief, ICANN argued vehemently that the IRP standing provision had to "be informed by the analogous" constitutional Article III standing requirement, and that YouPorn could not meet that standard. Resp. to YouPorn IRP p. 34 ¶ 108. In its last brief, YouPorn established that it plainly meets and easily exceeds that Article III standard. ICANN does not and cannot contend otherwise. Its most recent brief makes no counterargument of any kind. After advocating for the Article III standard at length, ICANN thus now abandons it, by

arguing exclusively that impediments other than Article III preclude YouPorn's standing. ICANN cannot play so hot and cold. Moreover, its chosen Article III standard is if anything more restrictive than the plain language of the IRP standing provision. As YouPorn has demonstrated, the plain language must be the first and ultimate determinant of the standing requirement.

ICANN also argues that the Panel must defer to its interpretation of the standing language. Even if that were true, such deference would lead to the Article III standard for which ICANN vehemently advocated, which is if anything more restrictive than the plain language, and which fully supports YouPorn's standing.[15]

In addition, no such deference is owed. The previous IRP specifically rejected ICANN's deference argument, concluding that "the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially." IRP Decl. ¶ 136. This holding was based in part on ICANN's expressed intent that IRPs provide independent review of its actions. *See id.* Whatever deference might otherwise be owed to an entity's interpretation of its Bylaws is forfeited where, as here, the entity expresses an intent for independent non-deferential review. As the last IRP panel noted: "As California courts have explicitly stated, 'the rule of judicial deference to board decision-making can be limited ... by the association's governing documents.'" *Id.* ¶ 56 (quoting *Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn.*, 166 Cal. App. 4th 103, 122 (2008)). Moreover, ICANN's new interpretations are at odds with the plain standing language and so would be due no deference anyway. *See Hard v. Cal. State Employees Assn.*, 112 Cal. App. 4th 1343, 1347 (2003) (unreasonable interpretations are not given deference).

ICANN also argues that *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 631 (1911), supports a rule that "where a proposed [Bylaw] interpretation would 'hamper the board' in its ability to operate, courts will read a bylaw's terms in a 'more restricted sense,' so as to effectuate the corporation's purpose." ICANN Resp. re Standing p. 12. But in *Slater*, the Court merely

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[15] ICANN had also argued that YouPorn lacked standing because it failed to participate in ICANN's processes. YouPorn demonstrated both that participation was not necessary and in any event that it did participate. ICANN similarly now abandons that argument, addressing it not at all in its last response.

construed the Bylaw term at issue "in accordance with the usual understanding of the term," and in the manner that "gives to the Bylaw a more reasonable operation and effect." *Slater*, 161 Cal. at 631. In any event, as explained in Section D below, there is no evidence that the proper plain language interpretation of the standing provision would hamper ICANN's Board.

B. Nothing in the IRP Drafting History Precludes Standing

ICANN cites some of its historical IRP discussions as support for restricting IRP standing. But all those discussions were superseded by the plain language ICANN subsequently adopted, and which ICANN has interpreted as equivalent to Article III standing. Nothing suggests that the superseded discussions were intended to construe the current standing provision contrary to its plain language or to ICANN's own most recent interpretation.[16]

C. YouPorn Seeks Review of ICANN's Commercial "Decisions or Actions"

ICANN argues that YouPorn does not seek review of a "decision or action" of the ICANN Board. However, ICANN admits that it made a "decision" when approving the .XXX TLD, but argues that YouPorn has abandoned its attack on that decision because it was the subject of the last IRP. In fact, as explained above, YouPorn has not abandoned its attack on that admitted ICANN "decision."

ICANN also argues that its approval of the .XXX registry contract was not a "decision or action" because YouPorn complains about provisions omitted rather than contained in the contract. This argument fails for two reasons. First, YouPorn complains both about what the contract contains and what it does not contain. For example, the contract improperly contains an authorization for ICM to set its own anticompetitive monopoly prices. It does not contain any

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[16] As an example of ICANN's loose use of historical IRP discussions, ICANN claims that IRPs "may not 'involve a review of the merits of the particular decision.'" ICANN Resp. re Standing pp. 16-17. To the contrary, of course, the very expressed purpose of an IRP is to determine whether the decision violated ICANN's Bylaws. For the quoted proposition, ICANN cites a 2002 self-titled "thought piece" from a mere ICANN Committee. *Id.* The Committee's paper did not purport to interpret any existing IRP language, but rather addressed the wisdom of ***expanding*** independent IRP review. Exhibit H to ICANN Resp. re Standing. The paper "offer[ed] thoughts for further discussion. These are not conclusions, so these thoughts may or may not actually form the basis of specific recommendations to the Board or the community as a whole." *Id.* A tentative piece by a mere Committee addressing not the current IRP requirements but their possible expansion has no precedential value. ICANN's other historical cites are equally unpersuasive, and can never overcome the plain standing language or ICANN's own most recent interpretation of it.

restrictions on such prices of the kind ICANN has adopted in other contracts. Second, even if YouPorn complained only about what the contract does not contain, ICANN nevertheless made a decision and took action to approve a contract without the appropriate provisions.

Finally, and in any event, YouPorn attacks not just ICANN's decisions and actions in approving the .XXX TLD and in making the registry contract, but other decisions or actions, such as ICANN's decision not to permit competition among potential .XXX registries and to approve IIFOR despite its restrictive policies.

ICANN also argues that its "purposes are technical, not commercial or political." ICANN Resp. re Standing p. 12. Even if true, how that would preclude this IRP is inexplicable. But it is not true. ICANN expressly commits in its Bylaws to the commercial goal of "promoting competition." Bylaws, Art. I, § 2(6). Moreover, ICANN has touted the commercial benefits of its operation, bragging for example about how it has successfully introduced competition into the registrar (although not the registry) market.[17] And in this specific case, ICANN has engaged in commercial conduct by earning huge fees from approving .XXX and the .XXX registry contract. The District Court in the antitrust suit particularly found that:

> [T]he transactions between ICANN and ICM described in the First Amended Complaint are commercial transactions. ICANN established the .XXX TLD. ICANN granted ICM the sole authority to operate the .XXX TLD. In return, ICM agreed to pay ICANN money. This is 'quintessential' commercial activity ...

Exhibit 1, hereto, *Manwin Licensing Intern'l. S.À.R.L.*, 2012 U.S. Dist. LEXIS 125126,*14-15.

D. <u>ICANN's Parade of Horribles Is Unconvincing</u>

ICANN argues that applying the standing criteria as written would result in an overwhelming and debilitating flood of IRPs. The claim is plainly wrong for at least four reasons.

First, there have only been two IRPs ever. There is no evidence whatsoever of an impending tidal wave. As this proceeding demonstrates, IRPs are expensive and time-consuming.

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[17] ICANN's Motion to Dismiss YouPorn's First Amended Complaint, *Manwin Licensing Intern'l. S.À.R.L. v. ICM Registry, LLC*, No. CV 11-9514 PSG (JCGx), p. 4:12-13 (05/08/12) *available at* http://www.icann.org/en/news/litigation/manwin-v-icm/icann-motion-to-dismiss-first-amended-complaint- 08may12-en.pdf

Few have been – or in the future may be – willing and able to sustain the significant costs of holding ICANN accountable.

Second, ICANN is not at risk, as it misleadingly argues, of becoming subject to IRPs for effects largely unrelated to its own conduct. After all, no matter who has standing, IRPs must be based on ICANN conduct in violation of its own Bylaws or Articles.

Third, the standing requirement as written requires injury caused by ICANN's Bylaw violations. Not everyone will have injury. Because of its unusual prominence in adult entertainment, YouPorn in particular has demonstrated special and significant injury resulting from ICANN's anticompetitive conduct.

Fourth, and perhaps most importantly, ICANN writes the IRP rules and so controls its own destiny. If ICANN finds the cost and volume of IRPs unacceptable, ICANN can eliminate IRPs altogether or rewrite and tighten IRP standing. It must, however, then forthrightly face any resulting governmental and consumer uproar. What ICANN cannot do is placate the Internet community by touting liberal standing rules and IRPs as its only independent vehicle for accountability, but then hypocritically argue for harsh standing restrictions appearing nowhere in its written rules.

VI. CONCLUSION

This IRP should proceed to the merits.

Date: January 7, 2013

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KEVIN E. GAUT

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EXHIBIT 1

Manwin Licensing International S.A.R.L., et al. v. ICM Registry, LLC, et al.

CV 11-9514 PSG (JCGx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2012 U.S. Dist. LEXIS 125126; 2012-2 Trade Cas. (CCH) P78,009

August 14, 2012, Decided
August 14, 2012, Filed

COUNSEL: [*1] Attorneys Present for Plaintiff(s): Not Present.

Attorneys Present for Defendant(s): Not Present.

JUDGES: The Honorable Philip S. Gutierrez, United States District Judge.

OPINION BY: Philip S. Gutierrez

OPINION

CIVIL MINUTES - GENERAL

Proceedings: (In Chambers) Order GRANTING in Part and DENYING in Part the Motions to Dismiss

Before the Court are Defendants' motions to dismiss. Dkts. # 29, 30. The Court finds the matters appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After considering the supporting and opposing papers, the Court GRANTS in part and DENIES in part the motions to dismiss.

I. Background

It is necessary to begin with a brief overview of the functioning of the internet in order to understand the specific allegations in this case. The internet is an international network of interconnected servers and computers. *FAC* ¶ 13. [1] Each computer or host server connected to the internet has a unique identity that is established by an Internet Protocol address ("IP address"). *FAC* ¶ 16. An IP address consists of four numbers between 0 and 255 that are separated by periods. *Id.* The IP address ensures that users are directed to the computer or host server for the particular website [*2] that they intend to visit. *Id.* Because strings of numbers are difficult to remember, the Domain Name System ("DNS") was introduced to allow users to identify a computer using alphanumeric domain names, such as "YouPorn.com." *FAC* ¶ 17. Within each domain name, the letters to the right of the last period indicate the Top Level Domain ("TLD"). *Id.* For example, in the domain name "YouPorn.com," the TLD is ".com." *Id.*

1 For purposes of these motions to dismiss, the Court accepts Plaintiff's allegations as true. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993).

Most TLDs with three or more characters are referred to as generic TLDs. *FAC* ¶ 19. Generic TLDs can be sponsored or unsponsored. *FAC* ¶ 20. A sponsored, generic TLD is a specialized TLD that has a sponsor, usually an entity representing a narrower group or industry. *Id.* The sponsor makes policy decisions for the sponsored TLD. *Id.* For example, the sponsored TLD

".museum" is operated for the benefit of museums, museum associations, and museum professionals. *Id.* There are currently twenty-two generic TLDs, fourteen of which are sponsored TLDs. *FAC* ¶ 21.

Each TLD is operated by an assigned [*3] organization, referred to as a registry operator or registry. *FAC* ¶ 22. Operating responsibilities include overseeing the sale and allocation of domain names in the TLD and maintaining a database directory. *Id.* Registries, in turn, authorize separate companies called registrars to directly sell the TLD domain names to businesses or consumers owning and using those names in the TLD. *Id.* Registries then collect fees from registrars, usually on an annual basis. *Id.*

In 1998, the Internet Corporation for Assigned Names and Numbers ("ICANN") was created to operate the DNS. *FAC* ¶ 6. ICANN is a non-profit public benefit corporation. *Id.* 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. *FAC* ¶ 25. According to its Articles of Incorporation, ICANN was established "for the benefit of the Internet industry as a whole." *FAC* ¶ 27. In its founding documents, ICANN has further agreed that it would appropriately consider the need for market competition and the protection of rights in names and other intellectual property when approving TLDs and registries. *FAC* ¶ 29. ICANN earns [*4] fees from approving new TLDs, new registry operators, and new registrars. *FAC* ¶ 32. ICANN also charges registries and registrars fixed annual fees as well as per-transaction fees (e.g., registries and registrars pay ICANN a certain amount of money for every domain name registered). *Id.*

In about 2000, Defendant ICM Registry, LLC ("ICM") first applied to ICANN for approval of a new .XXX TLD, intended primarily for adult content. *FAC* ¶ 34. ICANN rejected the application, finding there was no unmet need for the .XXX TLD and that some segments of the adult online content industry opposed establishing a .XXX TLD. *Id.* ICM applied for approval of the .XXX TLD again in 2004. *FAC* ¶ 35. This time ICM applied as a sponsored TLD. *Id.* ICM proposed an organization named the International Foundation for Online Responsibility ("International Foundation") as the sponsoring organization for the .XXX TLD. *FAC* ¶ 36. ICM claimed that the International Foundation represented a significant portion of the adult entertainment community. *Id.* However, the International Foundation was in fact created by ICM for the sole purpose of attempting to gain approval for the .XXX TLD and the International Foundation did [*5] not actually represent any significant portion of the adult entertainment community. *Id.* ICANN once again rejected the application for a .XXX TLD. *FAC* ¶ 37.

After the 2004 rejection, ICM embarked on a campaign to persuade ICANN to approve the .XXX TLD. *FAC* ¶ 39. One facet of this campaign concerned entities that ICM allowed to preregister for .XXX domain names. *Id.* These entities only registered in order to protect their names from being misappropriated if the .XXX TLD came into existence. *Id.* ICM promised these entities that it would not claim that these registrations showed support for the proposed .XXX TLD. *Id.* However, ICM then misrepresented to ICANN that these preregistrations showed support for the .XXX TLD. *Id.* In addition, ICM offered various inducements to other organizations to support the .XXX TLD, generated fake comments online supposedly showing support for the .XXX TLD, submitted misleadingly edited videos and photos from an adult entertainment conference to falsely suggest there was limited opposition to the .XXX TLD, and touted support from adult entertainment celebrities without disclosing that these celebrities were employed by ICM or otherwise receiving benefits [*6] from ICM. *Id.*

As a result of ICM's misleading campaign, in 2005 ICANN preliminarily authorized its president and general counsel to begin negotiating with ICM to establish the .XXX TLD. *FAC* ¶ 40. After this announcement, certain governmental organizations, including the United States Department of Commerce and Department of State, voiced their opposition to the creation of a .XXX TLD. *FAC* ¶ 41. In response, ICM made an intentionally overbroad and baseless Freedom of Information Act request for documents regarding the .XXX TLD from these federal agencies. *FAC* ¶ 42. ICM eventually filed a lawsuit over the Freedom of Information Act request. *Id.* Despite the pressure from ICM, ICANN decided in 2006 to stop preliminary negotiations and again reject the proposed .XXX TLD. *FAC* ¶ 43.

In 2008, ICM filed an Independent Review Proceeding, challenging ICANN's rejection of the .XXX TLD. *FAC* ¶ 44. The Independent Review Proceeding is a non-binding, quasi-arbitral process established by ICANN to resolve disputes concerning ICANN's

activities. *Id.* In the Independent Review Proceeding, ICM asserted that ICANN had approved the .XXX TLD in 2005 and could not then reconsider that decision. *Id.* In the proceedings, [*7] ICM again made false statements about the level of support for the .XXX TLD. *FAC* ¶ 45. A three member panel presided over the proceeding. *FAC* ¶ 46. The panel did not judge whether ICM had advanced misleading or fraudulent evidence of support for the .XXX TLD, nor did the panel consider antitrust or other competition issues related to the .XXX TLD. *Id.*

In 2010, the majority of the panel, over a dissent, issued a non-binding decision that ICANN had determined ICM met the sponsorship criteria for the .XXX TLD in 2005, and could not thereafter properly reopen the issue. *Id.* ICANN then publicly mulled whether to accept the majority decision of the panel or to reject it. *FAC* ¶ 47. ICM threatened to sue ICANN and its board of members if ICANN did not adopt the panel's decision. *Id.* ICANN then agreed to approve the .XXX TLD and sign a registry contract for ICM to operate the .XXX TLD. *FAC* ¶ 48.

The registry contract allegedly contains several anti-competitive and monopolistic provisions. These include a lack of price caps or restrictions of any kind on the prices ICM can charge for .XXX registry services. *FAC* ¶ 56. This is in contrast to other registry contracts executed by ICANN for other TLDs [*8] which contain express price caps. *Id.* Before the .XXX registry contract was executed, ICM informed ICANN of the higher-than-market prices ICM would be charging. *Id.* Rather than dispute the institution of the non-competitive prices, ICANN agreed to profit from these prices. *Id.* Under the registry contract, ICANN receives an enhanced fee from .XXX domain name registrations. *Id.* This fee is greater than fees charged for most other TLDs. *Id.*

The registry contract lasts for a minimum of ten years and provides that it "shall" be renewed subject to an obligation to negotiate certain terms in good faith. *Id.* This virtually unlimited term of the contract will prevent any competitive bidding for renewal of the contract and will thus insulate ICM from market restraints or any threat of competition in .XXX registry services. *Id.* The contract also contains provisions which ICM itself proclaims will preclude ICANN from approving any other TLDs designated for adult content, such as ".sex" or ".porn." *Id.*

In November 2011, Plaintiffs Manwin Licensing International S.A.R.L. ("Manwin") and Digital Playground, Inc. ("Digital Playground") (collectively "Plaintiffs") filed this action against Defendants [*9] ICANN and ICM (collectively "Defendants"). Manwin owns and licenses one of the largest portfolios of adult-oriented website domain names and trademarks in the world. *FAC* ¶ 4. Digital Playground is a leader in adult-oriented film making and interactive formats. *FAC* ¶ 5.

Plaintiffs assert five causes of action, alleging various violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 ("Section 1" and "Section 2" of the "Sherman Act"). *FAC* ¶¶ 93-139. Plaintiffs assert three causes of action against both Defendants: a Section 1 claim for conspiracy in restraint of trade; a Section 2 claim for conspiracy to monopolize; and a Section 2 claim for conspiracy to attempt to monopolize. *FAC* ¶¶ 93-121. Plaintiffs also assert two causes of action solely against ICM: a Section 2 claim for monopolization; and a Section 2 claim for attempted monopolization. *FAC* ¶¶ 122-139.

Defendants move to dismiss the First Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). Dkts. # 29, 30.

II. Legal Standard

a. Rule 12(b)(6)

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a cause of action if the plaintiff fails to state a claim upon which relief can be granted. [*10] *See* Fed. R. Civ. P. 12(b)(6). In evaluating the sufficiency of a complaint under Rule 12(b)(6), courts should be mindful that the Federal Rules of Civil Procedure generally require only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required to survive a Rule 12(b)(6) motion to dismiss, a complaint that "offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929, (2007)). Rather, the complaint must allege sufficient facts to support a plausible claim for relief. *See id.*

In evaluating a Rule 12(b)(6) motion, the court must engage in a two-step analysis. *See id.* at 1950. First, the court must accept as true all non-conclusory, factual allegations made in the complaint. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). Based upon these allegations, the court must draw all reasonable inferences in favor of the plaintiff. *See Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir. 2009).

Second, [*11] after accepting as true all non-conclusory allegations and drawing all reasonable inferences in favor of the plaintiff, the court must determine whether the complaint alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679. Despite the liberal pleading standards of Rule 8, conclusory allegations will not save a complaint from dismissal. *See id.*

b. Elements of Sherman Act Claims

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. To establish a Section 1 claim, a plaintiff must show (1) concerted action among two or more independent entities, (2) an unlawful restraint of trade, and (3) antitrust injury. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

Section 2 of the Sherman Act imposes liability on "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. For a Section 2 monopolization claim, [*12] a plaintiff must establish (1) possession of monopoly power by defendant in a relevant market, (2) predatory conduct, and (3) causal antitrust injury. *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004). A conspiracy to monopolize claim requires (1) the existence of a combination or conspiracy to monopolize, (2) an overt act in furtherance of the conspiracy, (3) the specific intent to monopolize, and (4) causal antitrust injury. *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). And an attempted monopolization claim requires (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct, (3) a dangerous probability of success, and (4) causal antitrust injury. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988).

III. Discussion

Defendants move on various grounds to dismiss the First Amended Complaint. ICM requests dismissal of all five causes of action for failure to allege (1) an antitrust injury, (2) a conspiracy between ICM and ICANN to restrain trade or monopolize a relevant market, and (3) anticompetitive or exclusionary conduct by ICM. For its part, ICANN argues for dismissal because [*13] (4) ICANN does not engage in trade or commerce, (5) ICANN acted unilaterally and did not conspire with ICM, (6) Plaintiffs fail to identify relevant markets, and (7) the Third Cause of Action for conspiracy to attempt to monopolize does not exist under the Sherman Act.

The Court will address these seven arguments for dismissal in turn. Ultimately, the Court finds, with two exceptions, that the First Amended Complaint adequately pleads antitrust claims. The first exception is the Third Cause of Action for "conspiracy to attempt to monopolize," which is not a recognized cause of action. Second, the Court finds insufficient the allegations of a relevant market for affirmative registrations of names within TLDs connoting or intended exclusively or predominately for adult content. The insufficiency of this market requires the dismissal of the Third and Fifth Causes of Action.

a. ICANN's Involvement in Trade or Commerce

By its terms, the Sherman Act applies to monopolies or restraints of "trade or commerce." 15 U.S.C. §§ 1, 2. The identity of a defendant as a nonprofit or charitable organization does not immunize that organization from antitrust liability. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.22, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) [*14] ("There is no doubt that the sweeping language of § 1 [of the Sherman Act] applies to nonprofit entities."). To the contrary, nonprofit organizations that act in trade or commerce may be subject to the Sherman Act. *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1103 n.5 (9th Cir. 1999) ("A nonprofit organization that engages in commercial activity . . . is subject to federal antitrust laws."). Rather than focusing on the legal character of an organization, an antitrust inquiry focuses on whether the transactions at issue are commercial in nature. *Virginia Vermiculite, Ltd. v. W.R.*

Grace & Co. - Conn., 156 F.3d 535, 541 (4th Cir. 1998) ("We emphasize that the dispositive inquiry is whether the *transaction* is commercial, not whether the *entity* engaging in the transaction is commercial."). "Courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of surrounding circumstances." *United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 666 (3rd Cir. 1993). In any circumstance, "[t]he exchange of money for services . . . is a quintessential commercial transaction." *Id.*

The Court finds the transactions [*15] between ICANN and ICM described in the First Amended Complaint are commercial transactions. ICANN established the .XXX TLD. *FAC* ¶ 49. ICANN granted ICM the sole authority to operate the .XXX TLD. *FAC* ¶ 48. In return, ICM agreed to pay ICANN money. *FAC* ¶ 53. This is "quintessential" commercial activity and it falls within the broad scope of the Sherman Act. Even aside from collecting fees from ICM under the contract, ICANN's activities would subject it to the antitrust laws. In *Goldfarb v. Va. State Bar*, the Supreme Court concluded that an attorney bar association was not exempt from the Sherman Act even where the bar association made no pecuniary gain from its alleged conduct. 421 U.S. 773, 788, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). The bar association could be liable because it played "an important part" in commerce and its anticompetitive activities could exert a restraint in commerce. *Id.* As in *Goldfarb*, ICANN's activities play an important role in the commerce of the internet and ICANN's actions could exert a restraint on that commerce. [2]

> 2 A case that will be frequently discussed in this order, *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495 (9th Cir. 2010), is also instructive on this point. [*16] *VeriSign* did not require the Ninth Circuit to decide whether ICANN's activities were commercial, because ICANN was not a defendant in the action when it came before the Ninth Circuit. However, in analyzing whether the plaintiff had stated a conspiracy to restrain trade, the Ninth Circuit described ICANN's half of the conspiracy thus: "Beyond ICANN's decision not to use competitive bidding to reach the .com agreement, [plaintiff] has also alleged that ICANN was economically motivated to conspire with VeriSign because VeriSign agreed to share its monopoly profits with ICANN and to cease its predatory behavior, which had put ICANN in financial jeopardy." *Id.* at 503. Insofar as ICANN was the other half of the alleged conspiracy in *VeriSign* -- a conspiracy that closely parallels the conspiracy alleged in the present matter -- there is little doubt ICANN could have been liable for the allegations in *VeriSign*. *See also Virginia Vermiculite*, 156 F.3d at 541 (describing how even labor unions exempt from the Sherman Act may be liable for anticompetitive conspiring with non-exempt parties).

In arguing it is not subject to antitrust laws in this matter, ICANN leans heavily on the Ninth Circuit's [*17] decision in *Dedication & Everlasting Love to Animals v. Humane Soc'y of the United States, Inc.*, 50 F.3d 710 (9th Cir. 1995) ("*DELTA*"). In *DELTA*, the Ninth Circuit held "[f]idelity to the language of the statute and its interpretation by the Supreme Court forbids extension of the Sherman Act to charitable fundraising never envisaged as trade by the common law." *Id.* at 713. Thus, the activity of the Humane Society in soliciting donations was not trade or commerce under the Sherman Act. *Id.* at 714. ICANN's reliance on *DELTA* fails because the activities of ICANN set forth in the First Amended Complaint are not solicitations of donations. Instead, ICM is contractually obligated to pay ICANN fees for each registration of a .XXX domain name. *FAC* ¶ 53. Neither *DELTA*, nor any other case cited by ICANN, stands for the proposition that the payment of contractually agreed upon fees is not commercial activity within the Sherman Act.

ICANN also spends much time recounting its charitable purpose and arguing that it only collects fees to carry out this charitable purpose. *ICANN Mot.* 13:18-18:8. However, these arguments are irrelevant to an analysis of whether ICANN's activities are commercial. *See* [*18] *Virginia Vermiculite*, 156 F.3d at 541 (holding it was "not necessary" that the nonprofit defendant "have shared [its co-conspirator's] alleged anticompetitive motive in entering into a proscribed restraint," but rather, it was sufficient that the nonprofit defendant, "regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects"); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 573-74, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982) (holding that

whether a nonprofit's agents acted to benefit the nonprofit was irrelevant to antitrust liability because the "anticompetitive practices of [the nonprofit's] agents are repugnant to the antitrust laws even if the agents act without any intent to aid [the nonprofit]").

Accordingly, ICANN may be held liable under the Sherman Act for the actions alleged in the First Amended Complaint.

b. Relevant Markets

An antitrust plaintiff must "identify the markets affected by [a defendant's] alleged antitrust violations." *Big Bear Lodging Ass'n v. Snow Summit Inc.*, 182 F.3d 1096, 1104 (9th Cir. 1999). The plaintiff must allege "both that a 'relevant market' exists and that the defendant has power within that market." [*19] *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044 (9th Cir. 2008). A relevant market "can be broadly characterized in terms of the cross-elasticity of demand for or reasonable interchangeability of a given set of products or services." *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 507 (9th Cir. 2010) (quotation marks omitted). A relevant market must "encompass the product at issue as well as all economic substitutes for the product." *Newcal*, 513 F.3d at 1045 (9th Cir. 2008). The validity of a relevant market is subject to factual inquiry and proof, but a court may dismiss allegations of a relevant market if the definition is "facially unsustainable." *Id.*

Plaintiffs allege two different relevant markets.

1. Defensive Registration Market

The first market is for blocking services and defensive registrations in the .XXX TLD. *FAC* ¶ 60. Plaintiffs allege owners of trademarks, owners of domain names in other TLDs, and owners of other name rights purchase domain names in the .XXX TLD for "defensive or blocking purposes." *Id.* In other words, these owners seek to prevent others from using their names in the .XXX TLD. *Id.* These owners may wish to protect their [*20] names from loss of goodwill, prevent consumer confusion, or prevent association with adult entertainment. *FAC* ¶¶ 60, 62. There is no reasonable substitute for these defensive registration services, because the only way to block a name in the .XXX TLD is to register a name in the .XXX TLD. *FAC* ¶ 61.

ICANN argues this is not an appropriately defined market. *ICANN Mot.* 22:1-23:12. ICANN contends the market fails because there is no market for all .XXX defensive registrations. Rather, each .XXX domain name would be its own individual market. Each name owner would only be seeking to purchase the rights to block that individual name from being used as a .XXX website name. In support of this argument, ICANN primarily relies on two, out-of-circuit, district court cases. *See Weber v. Nat'l Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000); *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159 (N.D. Ala. 2001).

The Court finds this argument is foreclosed by *VeriSign*. In *VeriSign*, the plaintiff alleged a market of "expiring domain names." *VeriSign*, 611 F.3d at 501. "Expiring domain names are names that have fallen back, or are about to fall back into the registry database as a result of non-renewal [*21] by their current owners." *Id.* The defendant argued this market was insufficient because each expiring domain name would be its own market, and there was no such thing as a market for all expiring domain names. *Id.* at 507. In evaluating this argument, the Ninth Circuit considered the same out-of-circuit, district court cases raised by ICANN. *Id.* at 508. The Ninth Circuit rejected these cases. *Id.* The Ninth Circuit held the plaintiff had properly alleged a market of all expiring domain names, not just those a particular consumer would like to acquire. *Id.* Similarly, here Plaintiffs allege a market of all defensive registrations in the .XXX TLD, not just individual registrations. *FAC* ¶ 60.

Accordingly, Plaintiffs have adequately pled a relevant market for defensive registrations.

2. Affirmative Registration Market

The second market described by Plaintiffs is for affirmative registrations of names within TLDs connoting or intended exclusively or predominately for adult content. *FAC* ¶ 66. "There is a serious danger that ICM will establish and monopolize such a distinct market because of the unique association of the 'XXX' name with adult content and the resulting self-reinforcing pattern that [*22] will arise from that association with adult content." *Id.* Plaintiffs posit that through "network effects" the .XXX TLD could attract more and more providers of adult content and consumers of adult content, until a point is reached when .XXX is the exclusive purveyor of adult content on the internet. [3] *Id.*

Plaintiffs also allege that the registry agreement between ICM and ICANN has provisions making it unlikely that any other TLD connoting adult content will be approved. *FAC* ¶ 68. In addition, ICANN has allegedly adopted new rules and procedures that will effectively block new entrants into this market by allowing governmental objectors to veto any new adult-oriented TLDs. *FAC* ¶ 70. Lastly, Plaintiffs assert that Congress has previously considered, and may consider again, legislation that would force all adult content on the internet into the .XXX TLD. *FAC* ¶ 68.

> 3 In more detail, Plaintiffs argue: "Viewers looking for adult content will gravitate toward the .XXX because the letters uniquely connote such content. The more such users gravitate to .XXX, the more suppliers of such content will want to attract those potential customers by displaying on that TLD. The additional suppliers will [*23] in turn attract even more viewers, which will then attract even more suppliers, and so on in a self-reinforcing pattern eventually resulting in a monopoly of adult sites on .XXX." *Plts. ICANN Opp.* 20:12-18.

The Court finds Plaintiffs have failed to adequately plead the affirmative registration market. Plaintiffs have not alleged why other currently operating TLDs are not reasonable substitutes to the .XXX TLD for hosting adult entertainment websites. To the contrary, Plaintiffs allege that Manwin's own website YouPorn.com is the most popular free adult video website on the internet. *FAC* ¶ 1. It thus appears from the face of the First Amended Complaint that an adult content website registered in the .com TLD is an adequate economic substitute for an adult content website registered in the .XXX TLD. Thus, because the relevant market also includes .com domain names, Plaintiffs have not only failed to include all substitute products in their relevant market, but they have failed to allege that Defendants have or will have market power in this greater market. *See Newcal*, 513 F.3d at 1044-45 (the relevant market must include all substitute products and defendant must have market power in [*24] the relevant market).

In opposition, Plaintiffs argue that although there may be current substitutes to the .XXX TLD, there may not be such substitutes in the future because of legislation or network effects. *Plts. ICANN Opp.* 19:10-24:5. However, Plaintiffs point to no authority for the proposition that they may adequately allege a market that does not include substitute products that presently exist, merely because Plaintiffs allege those substitute products may disappear in the future. Indeed, this proposition would entirely negate the requirement that an antitrust plaintiff describe a relevant market that includes all substitute products. *See Newcal*, 513 F.3d at 1045 ("[T]he relevant market must include the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.") (quotation marks omitted).

The only authority Plaintiffs do rely on are cases where threatened antitrust injuries warranted prospective injunctive relief. *Id.* at 22:1-24:5. The proposition that an antitrust plaintiff may pursue injunctive relief for incipient harm to a relevant market, is not the same as the proposition that an antitrust plaintiff [*25] need not include substitute products in the definition of a relevant market. Therefore, the Court finds Plaintiffs' description of a relevant market for affirmative registrations is insufficiently pled.

The affirmative registration market is asserted in support of the Third Cause of Action for conspiracy to monopolize under Section 2 of the Sherman Act and the Fifth Cause of Action for attempt to monopolize under Section 2 of the Sherman Act. *FAC* ¶¶ 112, 132. Both an attempt to monopolize and a conspiracy to monopolize claim require allegations of a relevant market. *See Newcal*, 513 F.3d at 1052, n.3 (holding, in a case involving attempt to monopolize and conspiracy to monopolize claims, that "[t]he 'relevant market' and 'market power' requirements apply identically under the two different sections of the [Sherman] Act"); *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 311 (5th Cir. 1997) ("To establish Section 2 violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant market."). Accordingly, the Third and Fifth Causes of Action are dismissed, with leave to amend.

c. Antitrust Injury

The Ninth Circuit has identified four [*26] requirements for an antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999).

Plaintiffs allege that Defendants harmed competition in the market for .XXX TLD registry services by suppressing or eliminating competing bids for the original .XXX TLD registry contract and any renewals of that contract. *FAC* ¶¶ 54-55. The resulting no-bid contract contains unfavorable prices and sales terms that Plaintiffs allege would not exist in a competitive market. *FAC* ¶¶ 73-88. Under the Ninth Circuit's *VeriSign* decision, these are adequate allegations for antitrust injury. In *VeriSign*, the plaintiff alleged very similar harm to competition through a conspiracy to eliminate competitive bidding for a domain registry contract and a conspiracy to limit competition for renewal of the contract. *VeriSign*, 611 F.3d at 502. The elimination of "competition itself" is "precisely the type of allegation required to state an injury to competition." *Id.* In addition, the Ninth Circuit [*27] held that allegations of "higher prices for registration of domain names, and potentially lower-quality services" were sufficient to plead harm under the Sherman Act. *Id.* at 503. In accord with *VeriSign*, the Court finds Plaintiffs have adequately stated antitrust injuries.

Defendants' arguments regarding antitrust injury largely misconstrue the allegations of harm in the First Amended Complaint. Defendants read Plaintiffs' allegations to assert injury from "(1) the 'diversion of business away from Plaintiff, harm to Plaintiffs' name rights, and loss of Plaintiffs' business income' that will allegedly occur with 'the probable registration of similar names by others in .XXX;' and (2) 'profits which [Plaintiffs] might otherwise have earned from affirmative .XXX registrations.'" *ICM Mot.* 10:5-11. As recounted above, the First Amended Complaint alleges other injuries than those recited by Defendants.

Defendants' arguments made in response to Plaintiffs' opposition are no more persuasive. First, Defendants contend that Plaintiffs have conceded that "ICANN's application process for new TLD's (including .XXX) was entirely open." *ICM Reply* 6:19-20. In so arguing, Defendants focus on the establishment [*28] of the .XXX TLD itself and ignore the award of the contract to run the .XXX TLD to ICM. This argument misses the thrust of Plaintiffs' pleadings, which allege that there was no competition for the registry contract to operate the .XXX TLD, and that the renewal provisions in the contract ICANN signed with ICM mean there will be virtually no competition in future bidding to operate the .XXX TLD. *FAC* ¶¶ 54-55.

Second, Defendants argue the holding in *VeriSign* was "explicitly based on alleged statements by potential competitors of VeriSign that, if awarded the contract, they would offer registry services at prices well below VeriSign's." *ICM Reply* 6:20-23. This is a misreading of *VeriSign*. While the *VeriSign* court did note that counsel for the plaintiff stated at oral argument before the district court that potential competitors had stated publicly that they would have offered lower prices, the Ninth Circuit did not "explicitly" rely on this statement from oral argument. *VeriSign*, 611 F.3d at 503. To the contrary, in accord with the legal standard for reviewing a motion to dismiss, the Ninth Circuit assessed the pleadings and found them adequate. In any event, there is no requirement that [*29] an antitrust plaintiff must identify, at the pleadings stage, specific companies that have made public statements that they would offer lower prices than an antitrust defendant.

The Court finds Plaintiffs have adequately pled antitrust injury.

d. Anticompetitive and Predatory Conduct

Plaintiffs assert ICANN and ICM agreed to the following anticompetitive and predatory conduct: suppression of competition for the initial .XXX registry contract and renewal of that contract; preclusion of other adult content TLDs; setting above market prices and output restrictions; and delegating ICANN's sales and pricing authority to ICM for the purpose of allowing ICM to institute even less competitive sales and pricing terms in the future. *FAC* ¶¶ 55-58, 73-82, 84-86.

The Court finds, once again, that these allegations are sufficient under *VeriSign*. While *VeriSign* confirmed that competitive bidding is not required under the Sherman Act, "concerted action between co-conspirators to eliminate competitive bidding for a contract is an actionable harm." *VeriSign*, 611 F.3d at 502. Plaintiffs have alleged just such conduct. Likewise, while unilaterally charging higher prices is not an antitrust violation, "concerted [*30] action to restrain trade by imposing prices higher than market rate and under conditions hostile to competition" is an antitrust violation. *Id.* at 504. Plaintiffs have also alleged this type of conduct.

Plaintiffs further allege that ICM mounted a coercive campaign to force ICANN to approve the .XXX TLD and award the registry contract to ICM. *FAC* ¶¶ 34-51.

Defendants argue that this conduct cannot have been predatory because the conduct was unsuccessful and also protected by the *Noerr-Pennington* doctrine. *ICM Reply* 5:5-6:1. While even this argument would not negate Plaintiffs' allegations as to competitive bidding, pricing terms, and sales terms, the argument also fails under *VeriSign*. There, the Ninth Circuit held that "Verisign's predatory litigation activity was aimed at coercing ICANN to perpetuate Verisign's role as exclusive regulator of the .com domain name market by awarding Verisign the 2006 .com Agreement without any competitive bidding, and by agreeing to the terms that favored Verisign." *VeriSign*, 611 F.3d at 506.

Plaintiffs have alleged a similar misleading and predatory campaign here. This campaign allegedly included misrepresenting interest from the public in establishing [*31] a .XXX TLD, submitting intentionally overbroad and baseless Freedom of Information Act requests to federal governmental bodies interested in the .XXX issue, filing a baseless lawsuit against these governmental bodies, and baselessly threatening to sue ICANN. *FAC* ¶¶ 36, 39, 42, 45, 47. At this time, the Court need not parse whether any of these particular activities are protected under the *Noerr-Pennington* doctrine. At the very least, the misrepresentation of support from adult entertainment companies, the generation of fake comments in support of .XXX, the submission of misleadingly edited videos and photos, the non-disclosure that certain celebrity adult entertainment supporters of .XXX were paid by ICM, and the creation of a supposedly independent sponsoring entity that was in fact controlled by ICM, are sufficient allegations to establish improper, anticompetitive conduct under *VeriSign*. *FAC* ¶ 39.

Therefore, Plaintiffs have sufficiently pled anticompetitive and predatory conduct by Defendants.

e. Concerted Activity

Furthermore, Plaintiffs sufficiently allege that much of the anticompetitive and predatory conduct set forth above was as a result of concerted activity between ICANN and [*32] ICM. *See FAC* ¶¶ 55-58, 73-82, 84-86. Indeed, most of Plaintiffs' allegations rest on a written agreement between the two Defendants. As also set forth above, the *VeriSign* court held that a registry agreement between ICANN and another party that was replete with similar terms as Plaintiffs alleged here, was an adequate basis for antitrust claims under Sections 1 and 2 of the Sherman Act. In accord with *VeriSign*, Plaintiffs have set forth sufficient allegations of concerted activity between ICM and ICANN.

f. Relief

Defendants argue the nature of the remedy Plaintiffs seek "supports" dismissal of the First Amended Complaint. *ICM Mot.* 24:1-25:4. The relief Plaintiffs seek includes: enjoining the .XXX TLD as it is currently operated, voiding the agreements between ICANN and ICM, requiring a new .XXX registry contract that would be open to competitive bidding, imposing reasonable price constraints and service requirements on ICM, and/or other relief as the Court deems just and proper. *FAC* ¶¶ 99, 109, 120, 129, 139; *FAC* at 54:6.

The Court finds Plaintiffs' requested remedies do not require dismissal. As a general matter, in fashioning relief in antitrust cases "district courts are invested with [*33] large discretion to model their judgments to fit the exigencies of the particular case." *United States v. Glaxo Grp., Ltd.*, 410 U.S. 52, 64, 93 S. Ct. 861, 35 L. Ed. 2d 104 (1973). In addition, Federal Rule of Civil Procedure 54(c) requires a court to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." The cases cited by Defendants do not hold that otherwise proper antitrust claims should be dismissed because of the requested remedy. *See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410-415, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (holding, first, that the allegations failed to establish liability under the Sherman Act and then finding the relief plaintiffs sought "may be . . . beyond the practical ability of a judicial tribunal to control"). Because the Court has found Plaintiffs have stated valid antitrust claims, the proper time to fashion relief will be after Plaintiffs have proven their allegations.

g. Conspiracy to Attempt to Monopolize

Defendants move to dismiss the Third Cause of Action for "Conspiracy to Attempt to Monopolize," because there is no cause of action for a conspiracy to attempt to monopolize. *ICANN Mot.* 20:10-21:11. In opposition, [*34] Plaintiffs implicitly concede the argument and request the Court either ignore the labeling of the Third Cause of Action or permit leave to amend the labeling. *Plts. ICANN Opp.* 24:6-25:10. The Court has already held that the Third Cause of Action is dismissed for failure to allege a relevant market. If

Plaintiffs choose to amend the Third Cause of Action, they may correct the faulty labeling.

IV. Requests for Judicial Notice

The parties have requested the Court take judicial notice of various documents. Dkts. # 31, 32-2. As the Court finds that none of these documents would affect the disposition of any aspect of the motions to dismiss, the requests for judicial notice are deemed moot.

V. Conclusion

For the foregoing reasons, the motions to dismiss are GRANTED as to the separate market for affirmative registrations of domain names within TLDs connoting or intended exclusively or predominately for adult content. This market is inadequately pled. Accordingly, the Third and Fifth Causes of Action are DISMISSED. The Third Cause of Action is also dismissed because there is no cause of action for "conspiracy to attempt to monopolize." Plaintiffs are GRANTED leave to amend their pleadings. The [*35] motions to dismiss are DENIED in all other respects. If Plaintiffs wish to file an amended complaint, they must do so by **September 9, 2012.**

IT IS SO ORDERED.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, California 90064-1683.

On January 7, 2013, I served a copy of the foregoing document(s) described as **YOUPORN'S SUPPLEMENTAL IRP BRIEF ON REMEDIES AND OTHER PROCEEDINGS** on the interested parties in this action at their last known address as set forth below by taking the action described below:

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☒ **BY ELECTRONIC MAIL:** I served the above-mentioned document electronically on the parties listed at the email addresses above and, to the best of my knowledge, the transmission was complete and without error in that I did not receive an electronic notification to the contrary.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on January 7, 2013, at Los Angeles, California.

Mari Tamura