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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MANWIN LICENSING, INTERNATIONAL S.A.R.L. and DIGITAL PLAYGROUND, INC.

Plaintiffs,

vs.

ICM REGISTRY, LLC, d/b/a .XXX; INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS; and DOES 1-10

Defendants.

Case No. CV 11-9514-PSG (JCGx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ICM REGISTRY, LLC'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO RULE 12(b)(6)

Date: April 2, 2012
Time: 1:30 p.m.
Place: Courtroom 880

Hon. Philip S. Gutierrez

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I. INTRODUCTION

As demonstrated in ICM's accompanying Motion to Strike, the Complaint here is nothing more than a transparent and ironic attempt to use the antitrust laws to eliminate a new internet platform for adult content—.XXX—that Plaintiff Manwin perceives as posing unwelcome competition to its dominant .com adult-entertainment empire.[1] Given that context, it is not surprising that not only are their various antitrust theories internally contradictory, but Plaintiffs do not even make a serious attempt to allege the requisite elements of their claims. Thus, even though the Complaint itself recites the long and frustrating history of ICM's efforts to secure approval for the .XXX Top-Level Domain Name ("TLD"),[2] despite repeated ICANN rejections of its application and the absence of sustained interest from any other bidders, Plaintiffs nevertheless contend that ICM and ICANN were *conspiring* to eliminate competition for the establishment of adult-oriented TLDs and .XXX registry services during this same period. Similarly, although it is well-established that the antitrust laws exist to protect the competitive process and not the profit streams of individual firms, it is clear from the Complaint that Plaintiffs' real concern is with the competition to their .com websites that may be posed by rivals offering adult content via .XXX domain names—a business in which neither ICM nor ICANN participates.

But it is the proposed remedy for these purported violations that really exposes the baselessness of Plaintiffs' claims and their ulterior motives in bringing this action. Presumably because they cannot show any damages from the challenged conduct, Manwin and Digital Playground instead seek sweeping and unsupportable injunctive relief "enjoining the .XXX TLD altogether," voiding the ICM-ICANN contract "and/or" imposing price and other restrictions on the offering of registry services.

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[1] Compl. ¶ 4. Plaintiff Manwin has just announced the acquisition of Plaintiff Digital Playground. *See* http://www.xbiz.com/news/141694.

[2] Within each internet domain name, the alphanumeric field to the far right of the period is the TLD. Compl. ¶ 20. In addition to the newly-established .XXX, other examples of TLDs include .com and .org. *Id.* ¶ 2.

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Compl. ¶ 87. Plaintiffs make such requests even though they cannot identify any authority requiring ICANN to insist on competitive bidding or contractual price constraints in contracts for new TLDs and acknowledge that ICANN's operations (including its recommendations for new TLDs and registry contracts) are subject to review by the U.S. Department of Commerce ("DOC").

Unfortunately for Plaintiffs, under the Supreme Court's most recent formulation of the pleading standard in antitrust cases, they must do more than merely assert the existence of Sherman Act violations to get past a Rule 12(b)(6) motion. Given the absence of factual allegations plausibly suggesting the existence of antitrust injury, standing, any unlawful ICM-ICANN agreement, or even unilateral anticompetitive conduct, the Complaint must be dismissed.[3]

II. FACTUAL BACKGROUND

A. The Parties

Plaintiff Manwin Licensing International, S.a.r.l. ("Manwin") is a business headquartered in Luxembourg that "owns and licenses the trademarks and domain names used for many of the most popular adult-oriented websites," including YouPorn.com ("YouPorn"), the single most popular free adult video website on the Internet. Compl. ¶¶ 1, 4. Instead of creating content themselves, YouPorn and other Manwin companies operate so-called "tube" websites that offer free user-generated and searchable adult content. *Id.* ¶ 1.

Plaintiff Digital Playground, Inc. ("DP"), recently acquired by Manwin,[4] is a California corporation possessing "one of the world's largest high definition libraries of original adult content," which it makes "available through its websites, including digitalplayground.com." *Id.* ¶ 5.

[3] ICM also adopts and incorporates by reference Section III.C. of the Memorandum of Points and Authorities in support of ICANN's Motion to Dismiss, which demonstrates Plaintiffs' failure to plead a relevant market.

[4] *See supra* note 1.

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Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") is a non-profit, California corporation that "was created in 1998, in response to a policy directive of the [DOC], to administer the Domain Name System" ("DNS"). *Id.* ¶ 6. Pursuant to a series of agreements with DOC, ICANN was assigned overall authority to manage the DNS and charged with "determining what new TLDs to approve, choosing registries for existing or newly approved TLDs, and contracting with the registries to operate the TLDs." *Id.* ¶ 25. As part of its bylaws and agreements with DOC, ICANN receives input from national governments (including the U.S. government) through the Government Advisory Committee, is obligated to consider competition issues in approving TLDs and registries and has repeatedly received input from the U.S. Department of Justice's ("DOJ") Antitrust Division on its operations. *Id.* ¶¶ 27-29, 37, 44.

Defendant ICM Registry, LLC ("ICM") is a Delaware corporation headquartered in Florida that acts pursuant to a 2011 contract with ICANN as the registry for the .XXX TLD. *Id.* ¶ 7. ICM does not compete with Manwin or DP in the operation of adult-oriented websites.

B. The DNS and Operation of TLDs

Each computer or host server connected to the Internet has a unique numerical identity—its Internet Protocol address ("IP address"). Compl. ¶ 17. Because the string of numbers contained in IP addresses is hard to remember, the DNS was introduced to allow individual users to identify different websites using an alphanumeric "domain name," such as "YouPorn.com." *Id.* ¶ 18.

The TLD in "YouPorn.com" is ".com"—most TLDs with three or more characters are referred to as "generic" TLDs ("gTLDs") and can either be "sponsored or unsponsored." *Id.* ¶¶ 21, 22. A sponsored TLD ("sTLD") is one "that has a sponsor, usually an organization representing by consensus the narrower industry, interest group or community most affected by or interested in the particular TLD." *Id.* ¶ 21. Under the ICANN rules governing sTLD applications submitted in response to

ICANN's December 15, 2003 Request for Proposals ("RFP") for sTLDs, the sponsored community must be "precisely defined" and authority for policy-making must be delegated to a "sponsoring organization." *Id.* ¶¶ 21, 31.

The DNS correlates IP addresses with user-friendly domain names by reference to an authoritative TLD database. In order to ensure universal address resolution, only one "particular assigned organization" can be designated to "operat[e] each TLD." *Id.* ¶ 23. The entity responsible for operating a particular TLD database is called the "registry operator" or "registry" and its responsibilities include "overseeing the sale and allocation of domain names in the TLD." *Id.* Registries (like ICM) do not generally deal directly with prospective domain name owners or "registrants" (like Plaintiffs) themselves—instead they authorize separate companies called registrars accredited by ICANN to sell TLD domain names to the ultimate businesses or consumers. *Id.* The registrars set and collect the fees paid by registrants to register domain names within particular TLDs and the registrars then pay fees to the registries. *Id.* Both registries and registrars pay fees to ICANN on a quarterly basis. *Id.* No registrars are named as defendants in the Complaint.

C. Approval of the .XXX TLD

Pursuant to a public ICANN invitation to submit applications for new gTLDs, ICM first sought approval of an .XXX TLD intended for adult-oriented content almost twelve years ago. Compl. ¶ 30. Although a limited number of new TLD applications was approved, the applications of ICM and two unrelated applicants also seeking approval for an .XXX TLD were not selected—and neither was the application from another firm for .sex. *Id.;* Lawley Decl. ¶ 4.[5] Only ICM re-applied to operate an

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[5] All citations to the "Lawley Decl." are to the declaration of ICM's CEO Stuart Lawley, concurrently filed in support of ICM's motion to strike. The Lawley declaration—as well as the other factual material accompanying ICM's Motion to Strike —is properly before the Court as exhibits to that Motion. To the extent those facts provide context that is useful for understanding Plaintiffs' allegations, they are referenced herein. However, those facts are not necessary to the disposition of ICM's Motion to Dismiss.

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adult-themed TLD in 2004, in response to ICANN's issuance of a public RFP for sponsored TLDs. Compl. ¶ 31. According to the Complaint, ICM then embarked on a "lobbying" campaign designed to persuade ICANN that it had met ICANN's criteria for identifying a defined sponsorship community that supported and would benefit from .XXX. *Id.* ¶¶ 35, 36.[6] At no point after the initial, unsuccessful round in 2000 does the Complaint indicate that there were any other applicants seeking approval for .XXX or for any other TLDs devoted to adult-oriented content.

Apparently persuaded by the merits of ICM's arguments, in June 2005, ICANN authorized its President and General Counsel to begin negotiations for a registry agreement governing ICM's operation of the .XXX TLD. *Id.* ¶ 36. Subsequently, however, ICANN came under pressure from entities opposing the creation of an .XXX TLD (including DOC) and rejected the proposed registry agreement. *Id.* ¶ 39. ICM then filed a request for reconsideration, but, far from accommodating its alleged co-conspirator, "ICANN again rejected the .XXX TLD" in March 2007. *Id.* ¶ 39.

Convinced that its position was legally sound, in June 2008, ICM pursued its rights under the ICANN Bylaws to file an Independent Review Proceeding ("IRP")—a non-binding quasi-arbitral process established by ICANN—contending that ICANN's rejections of ICM's proposal and the .XXX TLD in 2006 and 2007 were improper reversals of its decision to begin negotiations with ICM in June 2005. *Id.* ¶ 40. In February 2010, the majority of the IRP vindicated ICM's position, issuing a Declaration that ICANN had in June 2005 determined that ICM met the sponsorship criteria and could not reopen the issue consistent with its Bylaws. *Id.* While ICANN was still considering whether to adopt the IRP's decision, ICM allegedly threatened litigation to enforce its rights if ICANN again rejected its application. *Id.* ¶ 41. In

[6] ICM chose the International Foundation for Online Responsibility ("IFFOR") as its "sponsoring" organization for the .XXX sTLD. Such a sponsor is an ICANN requirement for all sTLDs. *See* Motion to Strike Br. at 3.

March 2011, ICANN finally signed a contract making ICM its registry for .XXX. *Id.* ¶ 42.

D. The Alleged Relevant Market

The Complaint contends there are two separate relevant markets at issue in this case. The first is for so-called "defensive registrations"—the registration of names registered in other TLDs in .XXX. Compl. ¶ 55. Purchases of these sorts of registration services "are not intended to make use of a registered name for an operating .XXX website with new content, but only to prevent or block such use by others." *Id.* Such defensive registrations are allegedly necessary in order to "preclude others from registering and using the owners' names in .XXX" and prevent the loss of business, customer confusion and reputational harm that might result. *Id.* ¶¶ 3(a), 57. ICM is alleged to have a "monopoly" in this market because there purportedly are no reasonable substitutes for blocking the use of single domain names in the .XXX TLD. *Id.* ¶ 56.

Plaintiffs also contend there is a second relevant market for "affirmative registrations" of names within TLDs connoting adult content. *Id.* ¶ 59. Affirmative registrations are intended to make use of a domain name for the purpose of identifying websites showing new content. *Id.* Despite the fact that .XXX was fully launched only on December 6, 2011 (after the filing of this Complaint) and, by their own admission, YouPorn.com "is the world's most popular source for free adult-oriented streaming videos," Plaintiffs contend there is a "serious danger" that ICM "will establish and monopolize" this purportedly distinct market. *Id.* ¶¶ 4, 59.

E. The Alleged Antitrust Claims

Notwithstanding the 11-year gap between ICM's application for .XXX approval, the multiple rejections of the .XXX TLD in the interim, and the fact that ICM had to pursue both a reconsideration request and an independent review in accordance with the ICANN Bylaws, Plaintiffs contend that there is an ICM-ICANN conspiracy that encompasses the following, allegedly anticompetitive, conduct:

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(1) the approval of the .XXX TLD; (2) the approval of ICM as the .XXX registry, and of the contract with ICM; (3) an ICM/ICANN contract that does not contain restrictions on ICM pricing of registry services; and (4) ICANN acquiescence in ICM's charging allegedly "supracompetitive" prices for defensive registrations, limiting the availability of permanent blocking and requiring registrants to adhere to IFFOR policies. *Id.* ¶ 84.

In addition to their § 1 claim, Plaintiffs assert that in violation of the § 2 provisions directed at *single-firm* conduct both ICM *and* ICANN "have acted willfully to have ICM acquire and perpetuate a complete monopoly" in the purported "market for permanent blocking and other defensive registrations in the .XXX TLD." Compl. ¶¶ 90, 92. The same conduct they challenge under § 1 is alleged as the predicate for this § 2 claim, although ICM's "litigation tactics" in pressuring ICANN to approve its application are asserted to be additional "predatory acts." *Id.* ¶ 94.

Next, Plaintiffs assert the same § 2 claims, again against *both* ICM and ICANN, with respect to the so-called "incipient market for the affirmative registration of domain names in the .XXX TLD." *Id.* ¶ 100. The injunctive relief sought for all these § 2 claims is almost identical to what is requested for their § 1 claim (*i.e.*, enjoining .XXX altogether, voiding the ICM/ICANN registry contract and institution of price controls), with an additional plea for imposition of price and service constraints on so-called "affirmative registration[]" services. *Id.* ¶ 108(c).

Finally, Plaintiffs assert state antitrust and unfair competition claims premised on the same allegedly anticompetitive conduct. *Id.* ¶ 110-26.

III. LEGAL STANDARD

In order to make out their Sherman Act §1 claim, Plaintiffs must allege facts showing (1) concerted action among two or more independent entities, (2) an unlawful restraint of trade, and (3) antitrust injury.[7] *Kendall v. Visa U.S.A. Inc.*, 518 F.3d 1042,

[7] Plaintiffs' Cartwright Act claims require the same elements as their Sherman Act § 1 claim, and are deficient for the same reasons. *See infra* note 30. Plaintiffs'

1047, 1051 (9th Cir. 2008). For their § 2 monopolization claims, Plaintiffs must establish (1) possession of monopoly power by ICM in a relevant market, (2) exclusionary conduct, and (3) causal antitrust injury. *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004). Finally, the elements of attempted monopolization are: (1) specific intent to destroy competition; (2) predatory or anticompetitive conduct; (3) a dangerous probability of achieving "monopoly power;" and (4) causal antitrust injury. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988).

Relying on recent Supreme Court guidance,[8] the Ninth Circuit has outlined the following process for testing the sufficiency of a complaint's factual allegations:

> [W]e begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. We disregard threadbare recitals of the elements of a cause of action, supported by mere conclusory statements. After eliminating such unsupported legal conclusions, we identify well-pleaded factual allegations, which we assume to be true, and then determine whether they plausibly give rise to an entitlement to relief.

Alvarez v. Chevron Corp., 656 F.3d 925, 930-31 (9th Cir. 2011) (quoting *Telesaurus VPV, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010)).

In evaluating "plausibility," courts must consider whether the non-conclusory facts alleged by the plaintiff make misconduct more likely than an "obvious alternative explanation." *Twombly*, 550 U.S. at 567. As described below, none of Plaintiffs' claims survives this test.

Unfair Competition Law (UCL) claim is also inadequate. *See infra* note 30. *See also* Motion to Strike Br. at 21-25.

[8] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 167 L. Ed. 2d 929, 127 S. Ct. 1955 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 173 L. Ed. 2d 868, 129 S. Ct. 1937 (2009).

IV. ARGUMENT

A. Plaintiffs Have Not Established Antitrust Injury

Any private plaintiff seeking to state a claim for violation of § 1 or § 2 of the Sherman Act must plausibly allege that it has suffered "antitrust injury." *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-44, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). "This requirement ensures that otherwise routine disputes between business[es] … do not escalate to the status of an antitrust action." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998). Because antitrust injury typically "'depends less on the plaintiff's proof than on the logic of its complaint and its theory of injury[,]'" it is "'well-suited to pre-discovery disposition.'" *McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc.*, Civil No. 08-00080 JMS/BMK 2008 WL, 2437739, at *4 (D. Haw. June 17, 2008) (quoting Areeda & Hovenkamp, *Antitrust Law*, ¶ 337d (2007)).

The Ninth Circuit has enunciated a four-part definition of 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." *American Ad Mgmt., Inc. v. General Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999). As a practical matter, "plaintiff must show how defendant's anticompetitive conduct harms both competition and plaintiff." *Digital Sun v. Toro Co.*, No. 10-CV-4567-LHK, 2011 WL 1044502, at *4 (N.D. Cal. Mar. 22, 2011).

Manwin and DP cannot hope to meet this standard. Here is what they allege to be the principal, imminently threatened "injury" resulting from their purported inability to register in .XXX: (1) the "diversion of business away from Plaintiffs, 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) "to the extent consumers associate the .XXX TLD with adult content, … los[t] business and income [Plaintiffs] could otherwise earn from affirmative registrations in .XXX." Compl. ¶ 80.

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The first problem with these allegations is that, at best, they describe hypothetical harm to Plaintiffs themselves and not, as the Supreme Court requires, to the competitive process or consumer welfare. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 901 (9th Cir. 2008) (recognizing the "Supreme Court's long and consistent adherence to the principle that the antitrust laws protect the process of competition, and not the pursuits of any particular competitor"); *see also Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1036 (9th Cir. 2001) (shift of business from plaintiff to other competitors "does not directly affect consumers and therefore does not result in antitrust injury"); *Kinderstart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2006 WL 3246596, at *8 (N.D. Cal. July 13, 2006) (allegations of "lost revenue, loss of returning and new web traffic, and loss of goodwill" are "insufficient to show that [plaintiff] has suffered an antitrust injury").

Indeed, Plaintiffs concede that their supposed injuries arise from *increased*, rather than reduced, competition—*i.e.*, "diversion of business away from Plaintiffs'" websites to similar .XXX domains, and "los[t] business and income [Plaintiffs] could otherwise earn [due to] affirmative registrations in .XXX" (Compl. ¶ 80). Such "harm" is categorically not antitrust injury. *See, e.g.*, *Juster Assocs. v. City of Rutland, Vt.*, 901 F.2d 266, 270 (2d Cir. 1990) (affirming dismissal for lack of antitrust injury because real estate developer-plaintiff's "claim [was] designed to enhance barriers to entry of new competitors, a result that would stand antitrust law on its head").

The second problem is that Plaintiffs' own allegations make clear that, even if they were to occur, these purported "injuries" would not be due to any unlawful conduct on the part of ICM or ICANN. Despite their general assertions of having been unable to register in .XXX because of anticompetitive conduct by ICM, a close review of the Complaint reveals that what Plaintiffs are really complaining about is the fact that they lost the opportunity to purchase the least expensive defensive

registry options offered by ICM because *they missed the deadline*. The Complaint concedes that, consistent with its unprecedented commitment to safeguard the rights of intellectual property owners, during a two-month "Sunrise" period ICM "sold through approved registrars … the permanent right to block use of names in the .XXX TLD" for "a one-time fee of about $150." *Id.* ¶ 64. Plaintiffs admit that this option was available to all registered trademark owners, *id.* ¶ 67(b), which they suggest they are,[9] yet do not allege they ever sought to purchase permanent blocking rights.[10]

They also admit that defensive blocking rights for their domain names, whether or not those names are trademarked—are *still available*—just on an annual, rather than permanent, basis. *Id.* ¶ 69. Plaintiffs' quarrel with this option is that the purchase of annual blocking rights is more expensive (at $60 per year) and that those purchasing annual services are "forced by ICM to agree to comply with policies of IFFOR," ICM's sponsoring organization. *Id.* The second of these allegations is pure fiction[11] and the first plainly does not qualify as antitrust injury. Plaintiffs, of course, do not claim to have actually paid the annual fee, and even if they had, their unsupported assertion that the fee is "supracompetitive" is insufficient to support an inference of market-wide anticompetitive harm. *See Discon Inc. v. NYNEX, Corp.*,

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[9] *See, e.g.*, Compl. ¶ 4 ("Manwin owns and licenses one of the largest portfolios of premium adult-oriented website domain names and trademarks").

[10] Plaintiffs list other purported restrictions on purchases through the Sunrise program (Compl. ¶¶ 65-67)—most of which they have invented (*e.g.*, unavailability of rights to prevent typosquatting or requirements to adhere to IFFOR policies). *See* .XXX Launch Plan and Related Policies, *available at* http://www.icm.xxx/launch/plan/. The Court can take judicial notice of the policies. *See United States v. Corinthian College*, 655 F.3d 984, 999 (9th Cir. 2011) (court can "consider unattached evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document.") (citation omitted). But, in any event, Plaintiffs never attribute their failure to seek permanent blocking rights to any of these limitations.

[11] A registrant can choose to request a purely defensive registration—where the registered domain name would not "resolve" (*i.e.*, display only a "non-existent domain" error)—without complying with "onerous" requirements like agreeing to eschew displaying or advertising "child abuse images." *See* .XXX Launch Plan and Related Policies, *available at* http://www.icm.xxx/launch/plan/. These policies are directly referenced in the Complaint.

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86 F. Supp. 2d 154, 163 (W.D.N.Y. 2000) (conclusory assertion of supracompetitive pricing insufficient to establish an antitrust injury).[12]

Perhaps recognizing their inability to pursue this action based on imagined future losses to their businesses alone, Manwin and DP also try to suggest that some harm to consumers may result from their failure to obtain less expensive registry services from ICM. *See* Compl. ¶ 78 (contending that higher prices for .XXX registrations may lead businesses to "charge consumers higher prices for using websites" or "offer less desirable websites"). Putting aside Plaintiffs' admissions that their websites are free, and it is consumers, not they, who generate the content, Compl. ¶ 1, these bare assertions of broader injury cannot salvage their antitrust claims. *See Sprint Nextel Corp. v. AT&T Inc.*, ___F. Supp. 2d___, Civ. Nos. 11-1600 & 11-1690 (ESH), 2011 WL 5188081, at *4 (D.D.C. Nov. 2, 2011) (a plaintiff has sufficiently pled antitrust injury only if it meets the standards set out in *Twombly* and *Iqbal*); *In re Webkinz Antitrust Litig.*, 695 F. Supp. 2d 987, 997 (N.D. Cal. 2010) (granting motion to dismiss where plaintiffs "summarily assert[ed] that consumers have been harmed, but [did] not allege facts" supporting the assertions).[13]

[12] The same is true for Plaintiffs' allegations with respect to affirmative registrations. There is no indication in the Complaint that Manwin or DP ever sought to affirmatively register any domain name in .XXX—instead they merely make summary assertions that the $60 annual fee is somehow "above-market". Compl. ¶ 75.

[13] Having failed to make out the antitrust-injury element of their claims, Plaintiffs also lack standing to proceed with this case. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110-11 nn.5-6, 113, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986) (antitrust injury is necessary, but not sufficient, to establish antitrust standing). And even if antitrust injury could somehow be shown, the indirect and entirely conjectural nature of plaintiffs' alleged harm would still preclude a finding of antitrust standing. *See, e.g.*, *Lucas Auto. Eng'g, Inc. v. Bridgestone Firestone, Inc.*, 140 F.3d 1228, 1232 (9th Cir. 1998) (even if antitrust injury has been established, courts must also consider the "directness of the injury" and the "speculative measure of the harm" in deciding whether plaintiffs have standing).

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B. Plaintiffs Fail to Allege an Unlawful Agreement Between ICM and ICANN

Plaintiffs' Sherman Act § 1 and Cartwright Act claims also fail because the conduct that the Complaint principally alleges—an eleven-year (ultimately successful) effort by ICM to obtain approval for the .XXX TLD and a contract to operate the registry—simply does not describe, as it must, a plausible conspiracy between ICM and ICANN "intended to harm or restrain trade or commerce [and] which actually injures competition." *Kendall*, 518 F.3d at 1047. Because the Complaint contains only "facts" describing unilateral conduct and allegations directly contradicted by the ICM/ICANN registry contract, coupled with "a few stray statements speak[ing] directly of agreement … [that] are merely legal conclusions," Plaintiffs have not met their pleading burden. *Id.* (quoting *Twombly*, 550 U.S. at 564); *see also Alvarez*, 656 F.3d at 930-31.

1. <u>No Agreement On the .XXX TLD Approval Process</u>

The Complaint contains no facts supporting its mere assertion that ICM and ICANN *conspired* to "approve[e] the .XXX TLD without competition from any other adult-content TLD" or to "approve[e] ICM as the registry of the .XXX TLD" without competition from other registries. Compl. ¶ 84(a) and (b). Plaintiffs in fact allege that "*ICANN* did not solicit, approve or consider any adult-content TLDs other than .XXX[,] *ICANN* entertained no competitive bids … [and] *ICANN* had no process for" approving the .XXX domain without approving ICM as the registry. Compl. ¶ 50 (emphases added). Even if these allegations accurately set forth the process by which ICANN ultimately approved the ICM .XXX proposal (which they do not),[14] all they describe is *unilateral* conduct by ICANN, which does not state a § 1 claim. *See Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2011 WL 4948567, at *7 (N.D. Cal. Oct. 18, 2011) (dismissing § 1 claim because allegation that defendant acted

[14] These allegations are contradicted by the clear public record. *See* Motion to Strike Br. at 2-6.

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unilaterally "to restrain trade is not the equivalent of an allegation that [defendant] … conspired with other[s]"); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (boilerplate recitation of a "conspiracy" coupled only with allegations of unilateral action is insufficient to withstand motion to dismiss § 1 claim).

Moreover, there are no allegations suggesting that ICANN closed the process to other adult TLDs or .XXX proposals—the object of the supposed agreement. Compl. ¶ 50. Given that ICANN repeatedly *rejected* or resisted ICM's .XXX TLD applications over ten years, Compl. ¶¶ 30-40, ICANN's purported failure to "solicit" or "entertain" *alternative* .XXX proposals during that time cannot plausibly suggest a preceding agreement to anoint ICM as the .XXX registry. Rather, the "obvious alternative explanation" is that ICANN was acting independently when it considered (and several times rejected), ICM's applications.[15] *Twombly*, 550 U.S at 567 (allegations as consistent with independent action as with agreement do not suggest a conspiracy).

2. <u>No Agreement To "Allow" Purportedly Anticompetitive Acts or Pricing</u>

Plaintiffs' allegations that ICANN and ICM "enter[ed] into terms" for the .XXX registry contract "without providing that ICM would be subject to price caps or other limitations" (Compl. ¶ 84(c) (referring to Compl. ¶ 51)), or that ICANN allegedly "permit[ted] ICM to engage in anticompetitive practices" (Compl. ¶ 84(d)), also do not support a Sherman Act § 1 claim.

[15] Moreover, even if ICM and ICANN had agreed in 2004 to consider only ICM as the .XXX registry, that act occurred well outside of the four year statute of limitations for the Sherman or Cartwright Acts, and cannot be a basis for Plaintiffs' 2011 Complaint. *See Stanislaus Food Products Co. v. USS-POSCO Indus.*, No. CV F 09-0560, 2010 WL 3521979, at * 17 (E.D. Cal. Sept. 3, 2010) (statute began to run once competition was eliminated). Of course, the fact that ICANN rejected ICM's proposal *three more times* after the agreement was supposedly entered into (*see* Compl. ¶¶ 33, 39), squarely contradicts, and therefore renders implausible, the notion that there was any such agreement in the first place. *See In re Late Fee and Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 963 (N.D. Cal. 2007) (dismissing conspiracy claim).

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Agreements between two independent entities to *set* prices—including maximum prices—or to fix other terms of trade may be subject to challenge under § 1 of the Sherman Act. *See, e.g.*, *State Oil v. Khan*, 522 U.S. 3, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997) (vertical price-fixing subject to review under § 1); *Coalition for ICANN Transparency, Inc. v. Verisign, Inc. ("CFIT")*, 611 F.3d 495, 503-04 (9th Cir. 2010) ("pricing provision" in agreement between ICANN and Verisign subject to review under § 1). Here, all that the supporting allegations describe is the *absence* of an agreement between ICM and ICANN regarding price or other registry service terms. *See, e.g.*, Compl. ¶ 51(a), (b) (alleging that "[t]he ICM/ICANN contract contains *no* price caps or other restrictions of any kind on what *ICM* can charge" and "leaves *ICM* with broad discretion … [on] the nature, quality and scope of .XXX registry services") (emphases added). Elsewhere, the Complaint describes purely unilateral conduct. *See*, *e.g.*, *id.* ¶¶ 64-74, 77 (purporting to describe ICM's practices and policies for .XXX, but never mentioning ICANN).[16]

3. No Agreement On Restricting Other Adult-Content TLDs

Finally, Plaintiffs vaguely allege that ICANN and ICM violated the Cartwright Act and § 2 of the Sherman Act with respect to their purported affirmative registration relevant market by "entering into a contract provision which *may* preclude ICANN from approving" alternative adult content sTLDs. Compl. ¶ 104(d) (emphasis added). In support of this theory the Complaint asserts only that ICM "claims" that it can somehow prevent ICANN from approving other adult content TLDs through some unidentified "contractual promise" by ICANN. Compl. ¶¶ 3(g), 51(d); *but see also* Compl. ¶ 59 ("contractual provisions *and other forces* make it unlikely that other

[16] Nor is there any basis to infer a conspiracy between ICANN and ICM to commit "anticompetitive acts" on a bare allegation that ICANN "permitted" them to occur (Compl. ¶ 84(d)). *Kendall*, 518 F.3d at 1048; *see also Salehpoor v. Shahinpoor*, 358 F.3d 782, 789 (10th Cir. 2004) ("[t]hat individual [defendants] failed to take action against other [defendants] does not evidence agreement and concerted action … [I]naction … does not necessarily indicate an agreement to act in concert."). In any event, ICANN is nowhere mentioned—actively or passively—in the supporting allegations for this theory. Compl. ¶¶ 64-74, 77.

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[adult content] TLDs … will be established") (emphasis added); ¶ 104(d) (attributing impediments to other such TLDs in part due to "other factors").

Thus, Plaintiffs have not directly *asserted*—even in a conclusory fashion—an agreement between ICANN and ICM to bar other adult-content specific TLDs. *See Apple*, 2011 WL 4948567, at *7 (allegations must show a "*conscious* commitment to a common scheme" by both parties) (emphasis added). Plaintiffs' eschewal of a § 1 claim based on the purported affirmative registration market is hardly surprising—the .XXX registry contract between ICM and ICANN is a matter of public record, and plainly contains no such "provision" or "promise."[17]

C. None of the Challenged Practices Constitutes Anticompetitive or Predatory Conduct

Another, independent ground for dismissing this Complaint is the absence of any factual allegations plausibly suggesting anticompetitive or predatory conduct. All of Plaintiffs' antitrust claims are predicated on the following purportedly "anti-competitive practices:" (1) ICANN's approval of the .XXX TLD, and of ICM as its registry, without insisting on competitive bidding, and (2) ICM's charging allegedly supracompetitive prices for registry services and imposing certain restrictions on the availability of its services. Compl. ¶¶ 84, 93, 104.[18] In addition, the § 2 claims are also based on ICM's alleged "lobbying efforts" and "litigation tactics," which purportedly "pressured and coerced ICANN into permitting ICM to acquire and perpetuate the monopoly." *Id.* ¶¶ 35, 36, 94, 105.[19]

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[17] *See* .XXX Registry Agreement, *available at* http://www.icann.org/en/tlds/agreements/xxx/. The Court can take judicial notice of the ICANN/ICM contract because it is directly referenced in the Complaint and is central to Plaintiffs' claims. *See supra* note 10.

[18] As noted in the preceding section, there are no plausible allegations suggesting that any of this purported conduct resulted from an unlawful agreement between ICM and ICANN. This discussion explains why none of these practices, undertaken unilaterally, could qualify as exclusionary or anticompetitive if engaged in by a single firm.

[19] In connection solely with their § 2 claim relating to the so-called "affirmative registration" market, Plaintiffs also cite a purported ICM/ICANN "contract provision"

1. Purported Absence of Competitive Bidding

Plaintiffs suggest that ICANN's failure both to "solicit" or "consider any adult-content TLDs other than .XXX" and/or to "entertain[]" any competitive bids for the .XXX registry contract constitutes anticompetitive conduct for purposes of both its Sherman Act claims. Compl. ¶ 50. Such allegations, however, ignore the undisputed fact that in 2000, at the very beginning of its process for considering new TLDs, ICANN issued an RFP open to any interested parties, and *three applicants in addition to ICM* submitted proposals for adult-oriented TLDs.[20] ICANN thus clearly "solicit[ed]" and "consider[ed]" multiple bids for an adult-content TLD, but it chose to reject *all four of them.* Compl. ¶ 50; Lawley Decl. ¶ 4.

Only ICM decided to try again with an application for an sTLD devoted to adult content, but the Complaint does not allege (presumably because it cannot) that there was ever any bar on similar efforts by other applicants. Nor is there any indication from the Complaint or elsewhere that another party (such as Plaintiffs) ever again expressed interest to ICANN in seeking approval for an adult-content TLD or later in becoming the .XXX registry—so if ICANN did not "entertain[]" alternative bids for the .XXX registry contract, it is because no one tried to submit one. Compl. ¶ 50.

The fact that ICANN did not, as Plaintiffs now suggest they should have, insist on additional proposals subsequent to the 2000 RFP, cannot qualify as predatory conduct. The antitrust laws do not require competitive bidding,[21] and Plaintiffs have

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which they say "may preclude ICANN from approving [other] TLDs" intended for adult content. Compl. ¶ 104)(d). As explained *supra* at pp. 15-16*,* there is no such provision in the ICM/ICANN registry contract.

[20] *See* http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm. Two of these proposals also sought approval of an .XXX gTLD and one sought approval of a .sex TLD. *Id*. The Court can take judicial notice of this record it is referenced in Plaintiffs' complaint. *See supra* note 10.

[21] *See, e.g.*, *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-96, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978) ("[t]he Sherman Act does not require competitive bidding"); *CFIT*, 611 F.3d at 503 ("competitive bidding is not required before entering into an exclusive licensing agreement … [s]o long as the agreement is the result of independent business judgment"); *Security Fire Door Co. v. County of Los Angeles*, 484 F.2d 1028, 1031 (9th Cir. 1973) ("[e]ven a direct contract …,

not pointed to any DOC or other regulatory authority that mandated ICANN to affirmatively seek out and obtain applications from additional parties.[22]

2. "Supracompetitive" Prices and Service "Restrictions"

Plaintiffs' next category of so-called "anticompetitive practices" really boils down to a complaint about three things: ICM prices for affirmative and defensive registration services, restrictions on the availability of permanent blocking rights and the requirement that those who choose to register a domain name in .XXX that "resolves" (*i.e.*, directs the internet user to a website with content, instead of a page with an error message) agree to abide by the policies of IFFOR, ICM's sponsoring organization. *See* Compl. ¶¶ 64-69. None of this conduct remotely qualifies as an antitrust violation.

With respect to ICM's prices, even if there were a basis other than Plaintiffs' conclusory assertions to suggest they were elevated relative to some relevant benchmark (which there is not, *see supra* at 11-12), charging "high" prices alone has never been found anticompetitive or predatory. *See, e.g.*, *Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 447, 172 L. Ed. 2d 836, 129 S. Ct. 1109 (2009); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 549 (9th Cir. 1991). In fact, the Supreme Court has recently emphasized that even the charging of *monopoly* prices is "not unlawful; it is an important element of the free-market system."[23]

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without any pretense of putting the job out to bid …would not in itself have constituted a restraint of trade").

[22] On the contrary, the Complaint acknowledges that ICANN exercises its authority to approve new TLDs and choose registries pursuant to a series of agreements with DOC, but does not suggest those agreements contain any competitive bid requirement. Compl. ¶ 25. Moreover, even if such a provision existed, its breach by ICANN would not constitute an antitrust violation. *See Security Fire Door*, 484 F.2d at 1031 (even a municipality's violation of a competitive bid statute would not contravene the Sherman Act).

[23] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 157 L. Ed. 2d 823, 124 S. Ct. 872 (2004) (explaining that "[t]he opportunity to charge monopoly prices … is what attracts 'business acumen' in the first place; it induces the risk taking that produces innovation and economic growth").

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Plaintiffs concede that there can only be one registry for each TLD. Compl. ¶ 23; *see also CFIT*, 611 F.3d at 499. Given this fact, pricing for ICM registry services was never going to be "competitive" in the sense of multiple .XXX registries vying for the business of firms interested in purchasing .XXX domain or blocking services.[24] Accordingly, any pricing power ICM may have as a result of being the only .XXX registry would have existed regardless of what firm ICANN chose as the operator and therefore cannot constitute predatory conduct.[25]

Plaintiffs' complaints about ICM's prices fail for the additional reason that there is no allegation that its fees were set at a level that would result in the "sacrifice of short-term profits for long-term gain from the exclusion of competition." *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1134 (9th Cir. 2004). Both the Supreme Court and Ninth Circuit have made clear that "[a]s a general rule," all firms, even monopolists, "are free to choose the parties with whom they will deal, as well as the *prices, terms, and conditions* of that dealing." *Linkline*, 555 U.S. at 448 (emphasis added); *LiveUniverse, Inc. v. MySpace*, 304 F. App'x 554, 556 (9th Cir. 2008). Exceptions to this rule are extremely narrow—*i.e.*, allegations that the defendant has

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[24] As the Complaint admits, however, there are multiple *registrars* competing to provide registry services to such firms, and it is they, and not ICM, that set the prices registrants like Manwin would pay. Compl. ¶ 23.

[25] *See Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266-67 (7th Cir. 1984) ("[f]rom the standpoint of antitrust law, … it is a matter of indifference [which, firm] exploits a monopoly" through charging high prices); *Columbia River People's Util. Dist. v. Portland Gen. Elec. Co.*, 217 F.3d 1187, 1190 (9th Cir. 2000) (same); *Vizio, Inc. v. Funai Elec. Co.*, No. CV 09-0174 AHM (RCx), 2010 WL 7762624, at *4 (C.D. Cal. Feb. 3, 2010) ("unlawful shift of market power from the hands of one company to another" is not anticompetitive, even if it results in the charging of higher prices).

Of course, here the allegations do not even relate to an existing "monopoly" or the existing Internet at all, but rather the creation of an entirely new platform for adult content (proposed by ICM), which *expands* the number of TLD alternatives for consumers and creators of adult content alike. As such, neither ICM's nor ICANN's conduct in establishing or operating .XXX can be "exclusionary" or "predatory" in the antitrust sense. *See, e.g.*, *Walgreen Co. v. AstraZeneca Pharm. L.P.*, 534 F. Supp. 2d 146, 151 (D.D.C. 2008) ("here there is no allegation that [defendant] eliminated any consumer choices. Rather, [defendant] added choices. It introduced a new [product] to compete with already-established [products]").

"unilateral[ly] terminat[ed] [ ] a voluntary and profitable course of dealing"—and nowhere established in this Complaint. *LiveUniverse*, 304 F. App'x at 556.

These precedents also doom any suggestion that ICM's restrictions on the availability of permanent blocking rights or implementation of IFFOR policies are anticompetitive or predatory. In fact, as outlined in its Motion to Strike, ICM's Sunrise program and other initiatives designed to protect the rights of intellectual property owners and minimize the need to purchase blocking services are unique in the industry and have been widely applauded. Motion to Strike at 9-10. Moreover, the IFFOR policies are determined by ICM's independent sponsoring organization, not ICM, and are part and parcel of being an sTLD—the requirements for which were developed by ICANN based on extensive community consultation and input from its advisory committees, including the Governmental Advisory Committee more than nine years ago.[26] In any event, contrary to the Complaint's allegations, firms seeking only defensive registry services from ICM (which is all Plaintiffs allege they want), do not have to adhere to IFFOR policies.[27]

3. "Lobbying Efforts" and "Litigation Tactics"

In addition to the so-called "anticompetitive practices" described above, Plaintiffs also contend that ICM engaged in a variety of purportedly "predatory" lobbying efforts and "litigation tactics" designed to pressure ICANN to approve .XXX as an sTLD and ICM as its registry. Compl. ¶¶ 36, 37, 38, 40, 41. Specifically, Plaintiffs complain about: (1) ICM efforts "leading to and after the rejection of its 2004 application … to persuade ICANN that ICM and the .XXX TLD met the sponsorship criteria;" (2) FOIA requests and ultimately a lawsuit filed by ICM against the State Department and DOC seeking documents "demonstrating their interest in the

[26]. ICANN Board Resolutions in Carthage, Tunisia, *Finalization of New sTLD RFP*, (Oct. 31, 2003), *available at* http://www.icann.org/en/announcements/advisory-31oct03.htm. Because these the Board Resolution is a public document on which is central to Plaintiffs' claim, the Court can take judicial notice of it. *See supra* note 10.

[27] *See supra* note 11.

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.XXX issue"; (3) ICM's 2008 filing of an IRP challenging ICANN's rejection of the .XXX TLD; and (4) "threats of litigation" against ICANN and its Board members if ICANN did not adopt the IRP majority Declaration ruling in ICM's favor. Compl. ¶¶ 41, 45.

With respect to ICM's purported "lobbying efforts," the Complaint concedes that notwithstanding the application of this purportedly "improper pressure," ICANN *twice rejected* ICM's .XXX TLD proposal. Compl. ¶ 38, 39. It is hard to see how, and ICM is aware of no authority suggesting that, entirely unsuccessful efforts to persuade another party can possibly qualify as predatory. In fact, the case law is clear that even successful attempts to persuade a decisionmaker to grant the petitioner a monopoly do not constitute anticompetitive conduct. *See, e.g.*, *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 524, 526 (5th Cir. 1999) (efforts by defendant to "tout[ ] the virtues" of its position to decisionmaking authority amounted to "'simple salesmanship' that enhanced rather than subverted competition on the merits"—even if its arguments "may have been wrong, misleading, or debatable") (citing *Security Fire Door*, 484 F.2d at 1031); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 544 (7th Cir. 1986) (rejecting plaintiffs' assertion that defendants' lobbying of the NBA amounted to "exclusionary conduct … [s]ince only one competitor could win NBA approval, it was not in itself anticompetitive for CPSC to suggest to the NBA that it should be the lucky one").

As for ICM's filing of the IRP, Plaintiffs admit that the panel majority *ruled in ICM's favor*, and, even if it had not, it is difficult to imagine how bona fide efforts to enforce one's rights through a "quasi-arbitral process" can amount to predation. Compl. ¶ 40. Finally, the FOIA requests and lawsuits against DOC and the State Department are plainly covered under the *Noerr-Pennington* doctrine[28] and thus

[28] The *Noerr-Pennington* doctrine is derived from the Supreme Court's decisions in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961) and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). *See Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1059 (9th Cir. 1998).

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immune from antitrust scrutiny. *Kottle*, 146 F.3d at 1059 (this doctrine "sweeps broadly" and its immunity extends to "both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government"). As for the alleged "litigation threats" and their subsequent resolution, the Ninth Circuit has made clear that pre-litigation communications between private parties, including pre-suit demand letters and threats of litigation, as well as settlement demands, are protected by this immunity. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934-36 (9th Cir. 2006) ("the law of this circuit establishes that communications between private parties are sufficiently within the protection of the Petition Clause to trigger the *Noerr-Pennington* doctrine," so long as they relate to petitioning activity).

Exclusionary or anticompetitive conduct is an indispensable element of any Sherman Act claim. *See, e.g.*, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987) (anticompetitive conduct required for § 1 claims); *Nero v. MPEG LA, L.L.C.*, No. 10-cv-3672-MRP-RZ, 2010 WL 4366448, at * 4 (C.D. Cal. Sept. 14, 2010) (liability under § 2 of the Sherman Act requires a showing of predatory conduct). Having failed to make this showing with respect to either ICM or ICANN, Plaintiffs should not be permitted to proceed with this case. *Nero,* 2010 WL 4366448, at *7 (dismissing § 2 claim where predatory conduct allegations failed to meet the *Twombly* standard); *LiveUniverse*, 304 F. App'x at 556 (same); *Rutman,* 829 F.3d at 735 (dismissing § 1 claim for failure to plausibly allege restraint of trade).[29]

D. Plaintiffs' Monopolization Claims Impermissibly Challenge Joint Action by ICM and ICANN

Even if they could surmount the hurdles of adequately alleging antitrust injury, standing, monopoly power and predatory conduct, Plaintiffs' § 2 claims would

[29] Plaintiffs' claim for attempted monopolization of the purported affirmative registration market must also be dismissed because the Complaint does not even try to establish the requisite element of specific intent. *McGlinchy,* 845 F.2d at 811.

still have to be dismissed, because instead of challenging unilateral conduct by a single firm (which is what the monopolization and attempted monopolization provisions of the statute were meant to reach), they assert these counts against *both* ICM and ICANN in the same markets. It is well settled that "a § 2 claim can only accuse one firm of being [or attempting to become] a monopolist." *Midwest Gas Servs., Inc. v. Indiana Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003); *see also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995) ("[t]o pose a threat of monopolization, *one firm alone* must have the power to control market output and exclude competition") (emphasis added). As ICANN's separate motion points out, this deficiency is particularly glaring in light of the fact that ICANN does not (and legally cannot) participate in any registry services "market." *See* ICANN Br. at 22-24.

E. The Governmental Role in Overseeing the DNS and Nature of the Remedy Plaintiffs Seek Also Support Dismissal

The Supreme Court has emphasized that even where express or implied immunity may not be available to shield conduct subject to regulatory review from antitrust scrutiny (which ICM does not concede is the case here), the existence of some governmental oversight, particularly where competition concerns are taken into account, is an important consideration in assessing the benefits of antitrust intervention in a particular case. *Trinko*, 540 U.S. at 406, 411-12 (2004); *MetroNet,* 383 F.3d at 1134. Also relevant to the analysis is the nature of the relief requested—where what is sought would require a court to "'identify[ ] the proper price, quantity, and other terms of dealing' …, '[t]he problem should be deemed irremedia[ble] by antitrust law.'" *Linkline,* 555 U.S. at 452-53 (quoting *Trinko,* 540 U.S. at 408, 415).

Here, the Complaint acknowledges that ICANN was created "in response to a [DOC] policy directive," to administer the DNS, and is "charged by [DOC] with" "determining what new TLDs to approve, choosing [TLD] registries …, and contracting with the registries to operate the TLDs." Compl. ¶¶ 6, 25. Plaintiffs further admit that (1) pursuant to its bylaws and agreements with DOC, ICANN

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receives input from the U.S. and other national governments, and has committed to DOC that it will consider competition issues in approving TLDs and registries; (2) its activities are subject to review and comment by DOJ's Antitrust Division; and (3) ICANN's rejections of ICM's proposal in 2006 and 2007 were prompted at least in part by opposition from DOC and other governmental entities. Compl. ¶¶ 27-29, 37-39, 44. Moreover, the injunctive relief Plaintiffs seek would require this Court to (a) enjoin .XXX altogether; (b) mandate that the .XXX registry contract be voided and "rebid to introduce competition;" and (c) "[i]mpos[e] reasonable price constraints and service requirements on" blocking services, as well as defensive and affirmative registrations in the .XXX TLD. *Id.* ¶¶ 87, 97, 108.

Based on Plaintiffs' own allegations, then, there plainly is a significant measure of governmental supervision of ICANN's activities relating to the selection of new TLDs and registries—and that regulatory role clearly includes attentiveness to competition concerns. *See, e.g.*, Compl. ¶ 28 (in "bylaws and agreements with the DOC, ICANN also confirms that its activities in approving TLDs and registries will appropriately consider the need for market competition"); *id.* ¶ 44 (citing DOJ determination that "economic studies about the competitive effects of or economic needs for new TLDs, … were required by ICANN's bylaws, its contractual commitments [with DOC], and legitimate competition concerns"). And Plaintiffs' plea for relief would manifestly require court involvement in specifying and supervising "terms of dealing" between ICM and its customers, if not a reworking of the existing process by which ICANN, subject to DOC's review, currently selects new TLDs and registries. As both the Supreme Court and Ninth Circuit have recognized, these factors suggest that the costs of antitrust enforcement in this case are likely to outweigh any benefits, and provide another basis for dismissal. *Linkline*, 555 U.S. at 452 (" [i]nstitutional concerns also counsel against recognition of … claims" that would require courts 'to act as central planners'") (quoting *Trinko*, 540 U.S. at 408); *MetroNet*, 383 F.3d at 1137 (finding that costs of allowing antitrust case to proceed

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outweighed the benefits where there was a regulatory structure attentive to competition concerns). *Cf. CFIT*, 611 F.3d at 509 (acknowledging the relevance of, but declining to reach, the "effect that government supervision may have in displacing the utility of [judicial] antitrust supervision" where DOC role in approving or overseeing the administration of ICANN registry agreement had not been developed by the parties).[30]

V. CONCLUSION

For the foregoing reasons, ICM respectfully moves this Court to dismiss the Complaint in its entirety.

Respectfully Submitted,

Dated: January 20, 2012

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[30] As described in ICM's Motion to Strike, Plaintiffs' Cartwright Act claims necessarily fail as a matter of law for the same reasons that the Sherman Act claims are deficient. Motion to Strike Br. at 21-23 (citing, *McGlinchy*, 845 F.2d at 811 n.4; *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175 (Ct. App. 2001) (recognizing the persuasiveness of federal authority in interpreting the Cartwright Act); *Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1092 (9th Cir. 2000) ("[o]ur disposition of [plaintiff]'s Sherman Act claims disposes of its claims under the California Cartwright Act")). Likewise, ICM's Motion to Strike explains why Plaintiffs' UCL claim is deficient as a matter of law and should be dismissed under Rule 12(b)(6). Motion to Strike Br. at 23-25 (citing *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1147 (N.D. Cal. 2011) (allegations that would not state an antitrust claim cannot state "fairness" or "illegal" UCL claims); *see Committee on Children's Television v. General Foods Corp.*, 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783 (1983), *abrogated on other grounds by* Prop. 64 (Gen. Elec. (Nov. 2, 2004)) ("fraudulent" prong requires fraud on the public); *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788, 111 Cal. Rptr. 3d 666 (Cal. 2010) (must allege loss of money or property for UCL standing)).