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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NAME.SPACE, INC.,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

Case No. CV 12-8676 (PA)

MEMORANDUM IN SUPPORT OF PLAINTIFF NAME.SPACE'S OPPOSITION TO DEFENDANT ICANN'S MOTION TO DISMISS THE COMPLAINT

Hearing Date: Jan. 23, 2012
Hearing Time: 1:30 p.m.
Judge: Honorable Percy Anderson
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PRELIMINARY STATEMENT

As set forth in name.space, Inc.'s ("name.space") Complaint, Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") has engaged in a conspiracy to prevent companies such as name.space from competing in the market for top-level domains ("TLDs")—the foundation of the Internet architecture—in the ICANN-controlled Internet, in violation of federal antitrust laws and to the benefit of ICANN itself and its co-conspirators. ICANN has also sought to maintain its monopoly power in the market for domain names by dictating the supply of TLDs, and has created and maintained a thriving defensive registration market, forcing content creators to "defensively" register their brands with multiple TLDs and permitting ICANN and some TLD registries to extract monopoly rents. Further, ICANN has trampled name.space's rights in the TLDs that name.space has originated, operated and promoted in commerce continuously since 1996 in violation of unfair competition and trademark laws. ICANN has also tortiously interfered with name.space's existing and prospective contracts with customers.

ICANN's principal argument is that name.space released ICANN from any possible liability for the rest of eternity by electronically transmitting an application in 2000—a decade or so before the events underlying name.space's claims even existed—to have certain name.space TLDs recognized on the ICANN Internet as part of a carefully circumscribed test program. Notwithstanding that this purported "release" cannot properly be considered on ICANN's motion to dismiss (*see* name.space's Objection to ICANN's Request for Judicial Notice ("RJN Opp.")), the purported release does not—and cannot—have the impact that ICANN wishes it did. The plain language of the release relates only to claims that existed in 2000, not future claims.

Other than ICANN's flawed argument that name.space released it from any conceivable or inconceivable wrongdoing for the remainder of time, ICANN

submits well-worn—and oft-rejected—arguments that the detailed and fact-filled Complaint fails to allege sufficient facts to state a plausible antitrust claim. In doing so, ICANN ignores and misrepresents name.space's detailed allegations of ICANN's unlawful acts, and seeks to have this Court impose a pleading standard more stringent than the law requires.

For name.space's trademark infringement and unfair competition claims, ICANN again misconstrues the Complaint and argues that name.space is asserting claims based on future, speculative acts, and contends that those claims are not ripe for adjudication. ICANN apparently fails to recognize that name.space's claims are based on the harm resulting from ICANN's *existing* acts, and thus ICANN's argument that the Court lacks subject matter jurisdiction is baseless.

None of ICANN's arguments has merit. Accordingly, name.space respectfully submits that the motion to dismiss should be denied in its entirety.

STATEMENT OF RELEVANT FACTS

ICANN has exclusive control over access to the DNS, a critical chokepoint in the Internet's architecture. (Compl. ¶ 37.) Although ICANN's control of the DNS flows from a series of agreements with the United States government, those agreements specifically state that ICANN is—and should anticipate being—subject to liability for any antitrust violations. (*Id.* ¶¶ 38-39.)

Only websites with top level domains that have been "delegated" by ICANN to the DNS master database known as the "root.zone.file" (the "Root") are accessible to the vast majority of Internet users. (*Id.* ¶ 34.) Yet through its control of the DNS, ICANN has arbitrarily limited the number of "registries," extracting sizeable fees from the few companies that ICANN has permitted to compete in the market and guaranteeing that it and those few companies will continue to earn monopoly profits to the detriment of competitors and consumers alike. (*Id.* ¶¶ 26, 57.) As set forth in the Complaint, ICANN has imposed significant procedural and financial hurdles in the 2012 application process for delegation of new gTLDs to

the Root (the "2012 Application Round"), notwithstanding the lack of financial, technical or other *bona fide* constraints to adding new TLDs to the Root. (*Id*. ¶ 25.) Through this anti-competitive behavior, ICANN has suppressed or eliminated competition to the benefit of a small number of insiders—including ICANN itself and those who pass through a "revolving door" between the ICANN Board and industry behemoths with large war chests. (*Id*. ¶¶ 67, 70-76, 96.) ICANN has also maintained its monopoly position in the domain name market by dictating the supply of TLDs and requiring defensive registrations that force content creators to defensively register their brands with multiple TLD registries that do nothing but extract monopoly rents. (*Id*. ¶¶ 79-80.)

In addition, ICANN has structured the 2012 Application Round with a blatant disregard to intellectual property rights holders, including name.space, which originated and promoted 482 gTLDs and used them in commerce since 1996. In the 2012 Application Round, ICANN has offered for sale nearly all of name.space's gTLDs—for an exorbitant fee—and applicants have sought delegation of 189 gTLDs currently operated by name.space outside of the Root. (*Id*. ¶¶ 87-88.)

LEGAL STANDARD

"The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Govind v. Felker*, No. 2:08 CV-01183, 2011 U.S. Dist. LEXIS 68259, at *4 (C.D. Cal. June 18, 2011). "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.'" *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, CV 11-9514, 2012 U.S. Dist. LEXIS 125126, at *10 (C.D. Cal. Aug. 14, 2012). ("[A]ll allegations of material fact are taken as true and are construed in the light most favorable to [the plaintiff]." *Coal. for ICANN Transparency, Inc. v. Verisign, Inc.*, 611 F.3d 495, 500 (9th Cir. 2010).

A complaint must meet a standard of "plausibility." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Plausibility "is not akin to a 'probability requirement,'" rather, it requires "more than a sheer possibility that a defendant has acted unlawfully." *Id*. (citing *Twombly*, 550 U.S. at 556).

ARGUMENT

I. NAME.SPACE DID NOT AND COULD NOT RELEASE IN 2000 FUTURE CLAIMS FLOWING FROM ICANN'S CONDUCT IN 2012.

ICANN cannot avoid liability at the motion to dismiss stage by arguing that name.space released in 2000 (the "2000 Release") claims flowing from ICANN's conduct in structuring and implementing the 2012 Application Round. As a threshold matter, the Court should not consider the document that ICANN relies on to support its release argument because that document is not judicially noticeable. As name.space shows in its Objection to ICANN's Request for Judicial Notice, the incomplete "Unsponsored TLD Application Transmittal Form" (the "Transmittal Form")—a document that ICANN incorrectly and misleadingly refers to as name.space's "2000 Application"—is not properly considered on a motion to dismiss because name.space does not make any claims based on its 2000 Application. RJN Opp. at 4-6; *see also Lizalde v. Advanced Planning Servs.*, No. 10-CV-834, 2012 U.S. Dist. LEXIS 86967, at *22 (S.D. Cal. June 22, 2012) (declining to enforce release in part because plaintiff's action did not implicate the contract that contained the release). But even if the 2000 Release is judicially noticeable, ICANN's release argument suffers from two fatal deficiencies.[1]

[1] name.space was not required to preemptively defend against ICANN's release argument in the Complaint. It is well-settled that "[p]laintiffs are not required to plead around anticipated affirmative defenses," such as ICANN's release argument. *Oliver v. In-N-Out Burgers*, Case No. 12-CV-0767, 2012 U.S. Dist. LEXIS 156425, at *7 (S.D. Cal. Oct. 19, 2012) (citing *United*

First, the plain language of the 2000 Release does not evidence an intention to release ICANN from future conduct. "As a general rule, contractual limitations on liability for future conduct must be clearly set forth." *Jardin v. Datallegro, Inc.*, No. 08-cv-1462, 2009 U.S. Dist. LEXIS 3339, at *15 (S.D. Cal. Jan. 18, 2009) (citing 17A Am. Jur. 2d Contracts § 282). The 2000 Release states only that "in consideration of ICANN's review of the application" the applicant releases "all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD." (RJN Ex. C ¶ 14.2.)[2] This language does not contain any forward-looking language, let alone any language that could be construed as barring future antitrust, trademark and unfair competition claims flowing from conduct unknown to name.space in 2000. *See Jardin*, 2009 U.S. Dist. LEXIS 3339, at *15. (declining to enforce release because "the language of the contract does not explicitly release liability for future misconduct").

That the 2000 Release did not contain an express waiver of California Civil Code 1542 further demonstrates that it cannot release future claims against ICANN, and especially not future claims based on conduct that was unrelated to and occurred long after the 2000 Application. *See Chaganti v. Ceridian Benefits*, C 03-05785, 2004 U.S. Dist. LEXIS 17075, at *11 (N.D. Cal. Aug. 23, 2004) (release waiving unknown future claims is only valid where the release explicitly waives California Civil Code section 1542, which demonstrates that the waiving party "consciously understood the benefits conferred by section 1542 and consciously waived those benefits"); *see also Lizalde*, 2012 U.S. Dist. LEXIS 86967, at *22 ("A release of claims based on future unknown conduct is unenforceable as a matter of law in California."); *Marvin v. Sun Microsystems, Inc.*, No. C-08-03727, 2010 U.S.

States v. McGee, 993 F.2d 184, 187 (9th Cir. 1993)). Regardless, name.space would be able to plead facts sufficient to negate ICANN's assertion of this affirmative defense.

[2] "RJN Ex." refers to documents attached as exhibits to ICANN's Request for Judicial Notice.

Dist. LEXIS 6326, at *11 (N.D. Cal. Jan. 11, 2010) (denying motion to dismiss because release "[did] not apply to claims arising out of decisions, actions or omissions occurring after the execution of the Release.").[3]

San Diego Hospice v. Cnty of San Diego, 31 Cal. App. 4th 1048 (1995), the case relied on most heavily by ICANN in its motion, shows the error in ICANN's argument. The release in that case expressly noted that it related to claims "which have not yet been discovered" and "all disputes that exist or hereafter could arise." *Id.* at 1053. Moreover, "[t]o eliminate any doubt as to the scope of the release, the parties recited and expressly waived the protections afforded by Civil Code Section 1542." *Id.* The 2000 Release contains none of this clear language.

ICANN's attempt to rely on the larger context of the Transmittal Form as evidence of the "prospective nature" of the 2000 Release is equally unavailing. The language ICANN quotes, like all representations in the Transmittal Form, relates only to claims flowing from the 2000 Application and nothing more. ICANN states that "[t]he prospective nature of name.space's release was reinforced by its representation that 'it has no legally enforceable right . . . to the delegation in any particular manner of any top-level domain that may be established in the authoritative DNS root.'" (Mot. at 8 (quoting RJN Ex. C, ¶ B12).) What ICANN excises from this quote, however, is telling. Where ICANN uses an ellipsis, the Transmittal Form provides that the applicant "has no legally enforceable right to acceptance or any other treatment of this application or to the delegation in any particular manner of any top-level domain that may be established in the authoritative DNS root." (RJN Ex. C, ¶ B12.) The 2000 Release is limited to claims relating to the 2000 Application and does not cover the claims in this action.

[3] If ICANN is really taking the position that the 2000 Release even releases claims that are unrelated to the 2000 Application and pre-release conduct, then the 2000 Release is void as a matter of public policy. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955); *Lizalde*, 2012 U.S. Dist. LEXIS 86967, at *22 (citing *FASA Corp. v. Playmates Toys, Inc.*, 892 F. Supp. 1061, 1066-68 (N.D. Ill. 1995) (applying California law)).

Second, in any event, whether the parties intended the ambiguous and overbroad 2000 Release to apply to name.space's claims in this action cannot be decided on a motion to dismiss; at the least, ICANN's interpretation of the 2000 Release is subject to dispute. *See Low v. Altus Fin. S.A.*, 136 F. Supp. 2d 1113, 1118 (C.D. Cal. 2001) (holding that "in light of the disputed scope and validity of the release, the Court finds that dismissal based on motions challenging the mere pleadings would be premature and inappropriate"); *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1069 (C.D. Cal. 2008) ("a motion to dismiss should not be granted where the contract 'leaves doubt as to the parties' intent'") (internal citation omitted). Should the Court consider the effect of the release here—and it should not—the Court must also consider extrinsic evidence to determine what the parties' intended the language of the release to mean. *See First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1066-67 (9th Cir. 2011) (noting that "'[w]here the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning.") (quotations omitted). And the extrinsic evidence in this case will show, beyond any possible doubt, that ICANN itself does not agree with the interpretation of the 2000 Release that it is trying to hide behind in this case. (*See* Note 7, *infra*.)

II. NAME.SPACE HAS PLED A SECTION 1 CLAIM.

ICANN misstates the relevant pleading standard in arguing for dismissal of name.space's claims under Section 1 of the Sherman Act, effectively arguing for a heightened pleading standard akin to Rule 9(b). Even under ICANN's erroneous pleading standard, however, name.space has pled detailed, plausible allegations of an antitrust conspiracy sufficient to state a claim. (Compl. ¶¶ 61, 66-72.) The conspiracy described in the Complaint describes how specific current and former members of ICANN's board of directors conspired with each other and other named industry players whose interests those Board members represent to impose

significant procedural and financial hurdles in the 2012 Application Round with the intent of restricting competition in a billion-dollar market in order to preserve and entrench their own economic positions. (*See* Compl. ¶¶ 61, 65, 96-97.) These allegations are more than sufficient to state a Section 1 claim.

A. Antitrust Claims Are Not Subject to a Heightened Pleading Standard.

name.space's claims must satisfy the requirements of Rule 8(a) to survive a motion to dismiss—nothing in *Twombly* has changed that. "Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *GSI Tech., Inc. v. Cypress Semiconductor Corp.*, Case No. 5:11-cv-03613, 2012 U.S. Dist. LEXIS 93888, at *7 (N.D. Cal. July 6, 2012) (citing *Twombly*, 550 U.S. at 555). "[A]lthough *Twombly* and *Iqbal* require 'factual amplification [where] needed to render a claim plausible,' . . . *Twomby* and *Iqbal* [do not] require the pleading of specific evidence or extra facts beyond what is needed to make a claim plausible." *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120-21 (2d Cir. 2010) (internal citations omitted); *see also In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1148 (N.D. Cal. 2009) (rejecting argument that plaintiffs must plead "'who attended these meetings, what was discussed at them, or how they purportedly related to the conspiracy other than providing an opportunity for the parties to talk to one another'" in order to survive motion to dismiss) (citing *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007)).

In any event, ICANN contends that name.space's complaint "must 'answer the basic questions: who, did what, to whom (or with whom), where, and when?" (Mot. at 10 (citing *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008).) That is precisely what the Complaint does.

B. name.space's Conspiracy Allegations Satisfy Its Pleading Obligation.

Notwithstanding ICANN's misstatement of the relevant pleading standard, name.space has pled sufficient facts to support each element of its claim. First, name.space alleges that ICANN entered into a conspiracy with current and former board members—who have vested economic interests in the TLD registry market—as well as TLD registries such as Verisign and Afilias. (Compl. ¶¶ 61, 95-96 (identifying the "co-conspirators").) Second, name.space alleges that ICANN and the co-conspirators intentionally structured the 2012 Application Round with the intention of limiting competition in the TLD registry market. (*Id*. ¶¶ 97-98.) Third, name.space alleges that, as a result of the conspiracy, competition in the TLD registry market has been suppressed or eliminated, consumers have fewer TLDs from which they can choose, prices for registering a TLD are artificially high and there is a thriving—and unnecessary—market for expensive "defensive" registrations. (*Id*. ¶¶ 99-100.)

name.space's Section 1 claims "answer the basic questions" of the conspiracy posed in *Kendall* (even though the *Kendall* motion was decided *after* discovery). 518 F.3d at 1046-47. name.space identifies four specific current or former ICANN board members with vested economic interests in the outcome of the 2012 Application Round: Steve Crocker, Bruce Tonkin, Ram Mohan, and Peter Dengate Thrush. (Compl. ¶ 61.) name.space also specifically alleges that other industry members, not just board members, participated in the conspiracy. (Compl. ¶¶ 76, 95.) Further, name.space identifies nine specific meetings—including where and when the meetings took place—where ICANN and the co-conspirators furthered their conspiracy. (*Id*. ¶ 66.) The "what" of the conspiracy is similarly crystal clear from the Complaint's allegations. The Complaint alleges that ICANN and its co-conspirators entered into a conspiracy to "limit competition to the TLD registry market in order to retain their dominant market positions." (Compl. ¶ 98.)

There is nothing implausible about name.space's allegations that ICANN and the co-conspirators structured the 2012 Application Round with barriers designed to entrench the power of the dominant players. (*Id*. ¶¶ 69-71, 97.) ICANN argues that name.space cannot, as a matter of law, make claims based on a "conspiracy between ICANN and its own Board of Directors." (Mot. at 12.) But name.space does not allege that ICANN conspired with itself. Rather, the Complaint identifies specific co-conspirators by name, and states that some of those individuals "had already left ICANN and some . . . were in the ICANN organization when the 2012 Application Round was decided and announced, but thereafter left ICANN." (Compl. ¶¶ 61, 65.) name.space specifically alleges that ICANN's directors were acting in their own self-interest, not in furtherance of their obligations to ICANN. (Compl. ¶ 61.) Those individuals acted both as agents of ICANN—a private, standard setting body (*see ICANN Transparency*, 611 F.3d at 507)—and on behalf of companies whose interests they represented, such as Afilias and Verisign, which have vested economic interests in the outcome of the 2012 Application Round.[4] (Compl. ¶¶ 44, 61, 95.) name.space also expressly alleges that non-board members are part of the conspiracy. (*Id.* ¶ 95.)

Thus, the Supreme Court's reasoning in *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), requires the denial of ICANN's motion. A "standard setting organization like [ICANN] can be rife with opportunities for anticompetitive activity," it may be liable under Section 1 for the acts of its agents "whether they intended to benefit [ICANN] or solely to benefit themselves or their employers." *Id.* at 571; *see TruePosition, Inc. v. LM Ericsson Tel. Co.*, Civ. Act. No. 11-4574, 2012 U.S. Dist. LEXIS 143611, at *19 (E.D. Pa. Oct. 4, 2012)

[4] Indeed, since the filing of the Complaint, ICANN's Chief Strategy Officer, Kurt Pritz, who was in charge of the 2012 Application Round, abruptly resigned due to a "recently identified conflict of interest," according to ICANN's CEO Fadi Chehadé. These many conflicts of interest are at the heart of name.space's conspiracy allegations. *See* http://www.icann.org/en/news/announcements/announcement-15nov12-en.htm (as of Jan. 4, 2013).

(denying motion to dismiss where plaintiff alleged "that there was coordinated action between employees of the [co-conspirators] among themselves and acting as agents of [the standard-setting body]" and that agents "manipulate[d] [the body's] standardization process for their alleged unlawful conspiratorial objective"); *see also Manwin*, 2012 U.S. Dist. LEXIS 125126, at *18; *Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1317 (8th Cir. 1986) ("When the interests of principal and agents diverge, and the agents at the time of the conspiracy are acting beyond the scope of their authority or for their own benefit rather than that of the principal, they may be legally capable of engaging in an antitrust conspiracy with their corporate principal.").[5]

ICANN claims that the allegation that ICANN entered into agreements in furtherance of a conspiracy during its own Board meetings "defies logic" because ICANN's Bylaws allegedly would have required that ICANN disclose such unlawful agreements. (Mot. at 12-13.) Apparently, ICANN has discovered a way to make the antitrust laws obsolete—all a corporation needs to do to avoid liability is to adopt bylaws that prohibit unlawful activity or that require the disclosure of unlawful agreements. Obviously, ICANN's decision not to disclose publicly its unlawful agreements entered into at Board meetings hardly "defies logic" and in fact further supports name.space's conspiracy allegations. Indeed, courts have recognized plausible conspiracy claims in similar cases. *See In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1148 (N.D. Cal. 2009) (finding that Section 1 claims were plausible in part because "participation [at regularly-held industry events and meetings] demonstrates how and when Defendants had opportunities to exchange information or make agreements"); *see also In re High-Tech Emple.*

[5] Unlike *Verisign, Inc. v. ICANN*, in which plaintiff alleged that competitors controlled ICANN's *advisory committees*, name.space specifically identifies current and former members of ICANN's *board of directors*—ICANN's "ultimate decision maker"—who have vested economic interests in the outcome of the 2012 Application Round. Case No. CV 04-1292, 2004 U.S. Dist. LEXIS 17330, at *15 (C.D. Cal. Aug. 26, 2004).

Antitrust Litig., 856 F. Supp. 2d 1103, 1120 (N.D. Cal. 2012) (finding conspiracy allegations based in part on overlapping board membership "plausible in light of basic economic principles") (citations omitted).[6]

Finally, ICANN argues that name.space's allegations are implausible because ICANN has exclusive authority to determine who operates in the TLD registry market and ICANN offered an $86,000 fee reduction to all 2012 applicants that had applied in 2000.[7] (Mot. at 13.) Neither of these allegations makes name.space's claims implausible. To the contrary, ICANN's exclusive authority over the TLD registry market reinforces the likelihood that individuals with deep ties to companies invested in the outcome of the 2012 Application Round have personal economic motives to conspire with ICANN to ensure their personal success in the 2012 Application Round at the expense of name.space and other potential market entrants. *See, e.g., U.S. Info. Sys. v. IBEW Local Union No. 3*, 00-civ-4763, 2002 U.S. Dist. LEXIS 1038, at *17 (S.D.N.Y. Jan. 23, 2002) (finding that "[t]he alleged motive is sufficiently 'economically plausible' to survive the instant motion to dismiss"); *cf. Coal. for ICANN Transparency*, 611 F.3d at 503 (reversing dismissal, in part because "plaintiff has also alleged that ICANN was economically motivated to conspire . . . because VeriSign agreed to share its monopoly profits . . ."). And the $86,000 fee reduction is meaningless with regard to the plausibility of name.space's conspiracy allegations. A one-time $86,000 fee reduction does little to offset the multi-million dollar cost of name.space applying for the same set of gTLDs in 2012 as it did in 2000, and accepting such reduction came with the

[6] ICANN's citation to *Goldstein v. Bank of Am., N.A.*, No. 1:09-cv-329, 2010 U.S. Dist. LEXIS 28887 (W.D.N.C. Jan. 10, 2010) is inapposite. The Magistrate Judge in *Goldstein* recommended the dismissal of the plaintiff's attempt to assert a civil conspiracy claim based on an underlying fraud claim that the Magistrate Judge found wanting under Rule 9(b). *Id.* at *18-19.

[7] This fact also demonstrates why ICANN's release argument fails. In return for the $86,000 payment, ICANN obtained a release from the former 2000 applicants. Why would ICANN try to buy a release for $86,000 if it already had a release as part of the 2000 Application process? name.space did not accept this ransom deal, and is not a party to any release that is relevant to this action.

condition that the applicant execute a waiver of claims related to the 2000 application. (Compl. ¶¶ 68, 70-71.)

The unlawful conspiracy was a way to maintain and expand ICANN's market power to the co-conspirators. ICANN's imposition of these barriers to entry can be explained as an attempt to render name.space's business model obsolete and to maintain the monopoly positions of the co-conspirators in the gTLD, international domain name and defensive registration markets. (*See* Compl. ¶¶ 69, 102, 112-113.) These allegations are more than sufficient to survive a motion to dismiss. *See, e.g.*, *Black Box Corp. v. Avaya, Inc.*, Civ. No. 07-6161, 2008 U.S. Dist. LEXIS 72821, at *38-39 (D.N.J. Aug. 29, 2008) (denying motion to dismiss where plaintiff alleged that defendant changed policies for anticompetitive reasons to exclude plaintiff and others from the market); *Xerox Corp. v. Media Scis. Int'l, Inc.*, 511 F. Supp. 2d 372, 388-89 (S.D.N.Y. 2007) (denying motion to dismiss where plaintiff alleged that defendant's unjustified product redesign could only be explained as an attempt to exclude plaintiff and other new market entrants); *cf. Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 986 (N.D. Cal. 2010) (denying motion to dismiss where plaintiff alleged that unjustified policy changes excluded plaintiff from the market).

III. ICANN IS LIABLE UNDER SECTION 2 OF THE SHERMAN ACT.

Judge Gutierrez recently held that because "ICANN's activities play an important role in the commerce of the internet and ICANN's actions could exert a restraint on that commerce […] ICANN may be held liable under the Sherman Act." *Manwin*, 2012 U.S. Dist. LEXIS 125126, at *15-18 (denying ICANN's motion to dismiss claims under Section 1 and Section 2 of the Sherman Act). Yet ICANN maintains in this case that it cannot be held liable under Section 2 of the Sherman Act because (1) "ICANN is legally incapable of monopolizing the 'TLD registry market,' a market in which it does not compete," (2) ICANN's monopoly was "thrust upon" it and (3) ICANN was free to charge applicants in the 2012

Application Round whatever "price" ICANN wanted to impose. (Mot. at 14-17.) ICANN's arguments are without merit.

As an initial matter, ICANN apparently seeks dismissal only as to Section 2 claims relating to the market to act as a gTLD registry with access to the DNS. As to the other two distinct markets alleged in the Complaint (the market for domain names and the market for blocking or defensive registration services), ICANN does not dispute the sufficiency of name.space's Complaint. (*See* Compl. ¶¶ 79-80); *Manwin*, 2012 U.S. Dist. LEXIS 125126, at *21 (denying motion to dismiss antitrust claims in defensive registration market). Thus, the only question raised by ICANN's motion is whether name.space's Section 2 claims relating to the market for acting as a gTLD registry with access to the DNS can proceed. The answer to that question is "yes."

ICANN first argues that it does not compete in the relevant market. This argument ignores the well-pleaded factual allegations of the Complaint, ICANN's own admissions in its motion to dismiss, and fundamental reality. As the Complaint alleges, ICANN controls all potential gTLDs. ICANN itself concedes in its motion to dismiss that it was granted that control by Congress, and ICANN also concedes that this control amounts to a monopoly that permits it to charge whatever price it wants, unfettered by competition. In sum, there can be no competition in the market for gTLDs with access to the DNS unless and until ICANN determines to do something with the control it has. In ICANN's own terminology, its decision to transfer its market position to some other entity (which, because of ICANN's participation in the Section 1 conspiracy and conspiracy to monopolize alleged elsewhere in the Complaint, has inevitably turned out to be participants in the conspiracy) is termed a "delegation." In other words, ICANN is "delegating" its monopoly position to another entity. By any interpretation, then, ICANN is in the market for gTLDs with access to the DNS. It maintains that monopoly when it engages in the conduct described in great detail in the Complaint, which has the

ultimate effect of protecting gTLDs from market competition. Even if true, the assertion that ICANN chooses not to actively market the gTLDs it controls in a way that would benefit competition and consumers does not mean it is not in that market, and does not protect ICANN from Section 2 liability where the delegation process reflects the unlawful conspiracies and exclusionary conduct described in the Complaint. For example, in *Tate v. Pac. Gas & Elec. Co.*, 230 F. Supp. 2d 1072, 1078-79 (N.D. Cal. 2002), the Court noted that it did not matter that the defendant was not actually actively selling its product—as the Court noted, "[t]hat is actually plaintiffs' point." Instead, the defendant was maintaining its monopoly position by excluding plaintiff from the market. *See id.* (finding that defendant is "frustrating the ability of downstream competitors in [its] captive region physically to access the gas.").

Whether ICANN's bylaws prohibit it from competing with TLD registries is irrelevant, especially at this stage of the case. At most, ICANN identifies only the existence of such a policy; ICANN's actual market behavior is a question for a later stage of this litigation. *See Gammel v. Hewlett-Packard Co.*, SACV 11-1404, 2012 U.S. Dist. LEXIS 155681, at *8 (C.D. Cal. Aug. 29, 2012) (taking judicial notice of documents, but not "for the truth of the matters they assert"); RJN Opp. at 3.

Similarly deficient is ICANN's claim of antitrust immunity because its monopoly power was "thrust upon" it rather than the creation of exclusionary conduct: agreements between ICANN and the U.S. Government specifically provide that ICANN is not immune to antitrust liability.[8] (Compl. ¶ 38.) *See*

[8] Moreover, most of the cases on which ICANN relies were not decided on a motion to dismiss. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 421 (2d Cir. 1945) (appeal after trial where "more than 40,000 pages of testimony had been taken"); *Alaska Airlines Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991) (appeal of summary judgment). The other cases cited by ICANN are inapposite and distinguishable from this action. *See Credit Chequers Info Servs. v. CBA, Inc.*, 98 Civ. 3868, 1999 U.S. Dist. LEXIS 6084, at *36-38 (S.D.N.Y. Apr. 28 1999) (granting motion to dismiss in part because plaintiff failed to plead unlawful maintenance of monopoly power and consumer demand created defendant's monopoly power); *Standardfacts Credit Servs. v. Experian Info. Solutions, Inc.*, 294 F. App'x. 271, 272 (9th Cir. 2008) (finding that defendants had "no control" over source of monopoly power).

Manwin, 2012 U.S. Dist. LEXIS 125126, at *15-18. In any event, Section 2 protects consumers against both the "acquisition" of monopolies and the "maintenance" of those monopolies. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). The Complaint describes in detail how ICANN has been unlawfully maintaining its monopoly position.

Moreover, ICANN's claim that it "can charge whatever price it wants without violating the antitrust laws" is unavailing in light of the facts pled in the Complaint that demonstrate that it is ICANN's exclusionary conduct that maintains ICANN's power to do so, rather than market forces. (Compl. ¶¶ 70-73.) As the Complaint pleads, ICANN has sought to protect its ability to "charge whatever price it wants" through exclusionary conduct. For example, ICANN set the 2012 Application fee at or above the actual cost of bringing a TLD registry to the market. (Compl. ¶ 74.) Absent ICANN's exclusionary conduct, competition would restrict the price that ICANN would be able to charge—a limitation imposed by market reality rather than a monopolist's fiat. ICANN's argument that it is currently charging a monopoly price in fact concedes that it is actually in the market, charging that price.

Ultimately, ICANN misses the point of name.space's allegations: that ICANN has unreasonably denied name.space and other potential TLD registries access to the DNS in an effort to *maintain* its own monopoly power in the relevant markets and the monopoly power of its current and former board members in those markets. (Compl. ¶¶ 77-80, 107-114.) Among other things, as the entity that controls the Root, ICANN competes in, and gains significant revenues from, the domain name market. (*Id*. ¶ 79.) As the operator of an alternate network, name.space competes with ICANN in the domain name market. Absent ICANN's exclusionary conduct, there would be thriving markets for both TLDs and second-level domains. (*Id*. ¶ 79.) But ICANN has sought to maintain its power to artificially restrict competition in the TLD registry market in order to reap the

monopoly profits that flow from the few number of TLD registries, and has maintained its monopoly power in the domain name market by erecting barriers to enter the TLD registry market.

Further, name.space has satisfied the elements of a conspiracy to monopolize claim. As set forth in Section II, *supra*, name.space alleges that ICANN conspired with its current and former board members to limit competition in the TLD registry market by controlling and limiting the "output" of gTLDs in order to perpetuate the artificial defensive registration market and further entrench the dominant co-conspirators' monopoly positions within those markets. (*Id*. ¶¶ 112-14.) ICANN and the co-conspirators specifically intended to restrict competition in order to preserve the monopoly positions of the dominant TLD registries—many of which have ties to ICANN's Board—and ensure the flow of monopoly profits from the registries to ICANN. (*Id*. ¶¶ 80, 113-14.) The result of the conspiracy was the imposition of procedural and financial barriers in the 2012 Application Round that eliminated competition. (*Id*. ¶ 112.) *See, e.g.*, *Datel Holdings*, 712 F. Supp. 2d at 986 (partially denying motion to dismiss where plaintiff alleged that defendant created barriers to entry without any technological or business justification).

IV. ICANN'S CONDUCT HAS RESULTED IN AN ANTITRUST INJURY.

ICANN argues that name.space has failed to allege an "antitrust injury" because (1) name.space pled an "injury limited to itself" and (2) "name.space's real gripe is that it may face increased competition in the TLD registry market." (Mot. at 18-19.) Both arguments fail.

First, in arguing that name.space pled an "injury limited to itself," ICANN ignores name.space's allegations that ICANN's anticompetitive conduct harms both consumers and competition. name.space alleges numerous harms to consumers, including that: (a) ICANN "dictates the supply of TLDs" and limits consumer choice, despite consumer demand (Compl. ¶¶ 79, 99); (b) because of ICANN's exclusionary conduct, "the price of registering a TLD is artificially high" (*Id*.

¶ 100); and (c) ICANN's anticompetitive conduct forces content producers to "spend enormous amounts of money to 'defensively' register domain names." (*Id*.) Further, central to name.space's antitrust claims are allegations that ICANN suppressed or eliminated competition in the TLD registry market and that "ICANN uses its control over access to the Root in order to eliminate competition from the relevant markets." (*Id*. ¶¶ 67-76, 97, 112.)

A recent Central District decision found against ICANN on this very issue. In *Manwin*, the court found allegations that ICANN's conduct "suppressed or eliminated competition" to be "precisely the type of allegation required to state an injury to competition." *Id.*, 2012 U.S. Dist. LEXIS 125126, at * 26 ("Under the Ninth Circuit's *Verisign* decision, these are adequate allegations for an antitrust injury.").[9] name.space makes the same allegations: by imposing procedural and financial hurdles in the 2012 Application Round, ICANN suppressed or eliminated competition in the relevant markets. (Compl. ¶¶ 76, 97, 112.)

Second, contrary to ICANN's argument, name.space is not claiming it is injured because "it may face increased competition in the TLD registry market." The TLD registry market is defined in the Complaint as "the market to act as a gTLD registry *with access to the DNS*." (*Id.* ¶ 77 (emphasis added).) name.space is claiming injury due to ICANN's exclusionary conduct, which has suppressed competition. What name.space wants is open competition. The Complaint expressly alleges that ICANN structured the 2012 Application Round to prevent name.space and other potential new market entrants from having access to the DNS. name.space cannot "face increased competition" in the TLD registry market because name.space's gTLDs *are not accessible* through the DNS and thus

[9] The plaintiff in *Manwin* asserted that ICANN "harmed competition in the market for .XXX TLD registry services by suppressing or eliminating competing bids for the original .XXX registry contract." 2012 U.S. Dist. LEXIS 125126, at *26.

name.space presently does not—and cannot—compete in that market. (*Id.* ¶¶ 32-34.)

ICANN's reliance on *Verisign* is similarly misplaced. (Mot. at 20.) In that case, Verisign—the registry operating the .com and .net gTLDs under contract with ICANN—alleged that ICANN engaged in conduct that "deprived consumers of a beneficial new service" operated by Verisign and prevented Verisign from competing "more effectively" in the market. 2004 U.S. Dist. LEXIS 29965, at *11, 19. ICANN argued on a motion to dismiss that Verisign did not "sufficiently allege impacts on services, prices or the number of entrants in the marketplace." *Id*. at *19. ICANN does not, and cannot, make the same argument here because, unlike in *Verisign*, name.space has alleged that ICANN's conduct diminishes customer choice, results in higher prices, excludes new market entrants and entrenches insiders and industry behemoths. (Compl. ¶¶ 67-76, 79, 97, 99-100, 112.)

ICANN cannot avoid liability by ignoring name.space's allegations, misreading name.space's Complaint and rehashing arguments that have either been rejected or simply have no bearing here. name.space has pled an antitrust injury.

V. THE CLAIMS FOR UNFAIR COMPETITION AND TRADEMARK INFRINGEMENT ARE RIPE AND ADEQUATELY ALLEGED.

ICANN's attempt to dismiss the unfair competition and trademark claims pursuant to Rule 12(b)(1) fails because the allegations are sufficient to show a "live case or controversy." name.space alleges actual, not speculative, harm caused by ICANN's behavior and, thus, name.space's claims are ripe under Article III.

ICANN selectively quotes from sections of the Complaint for the phrases "would be infringed" and "if and when" in an attempt to distort name.space's claims as not ripe for adjudication. But ICANN is not quoting from the claims that it seeks to have dismissed pursuant to Rule 12(b)(1), namely, name.space's Fourth, Fifth and Seventh Claims for Relief. Those claims plainly allege existing and concrete harm, including that: "ICANN's unauthorized conduct *has deprived* and

will continue to deprive name.space of the ability to control its gTLDs and consumers' perception with regard to those gTLDs" (Compl. ¶ 127 (emphasis added)); "ICANN *has profited* and will continue to profit from the strength of name.space's gTLD trademarks, and name.space *has been and will continue to be damaged* by ICANN's acts" (*id.* ¶ 142 (emphasis added)); and "ICANN *has effectively misappropriated name.space's gTLDs* at little or no cost, and without name.space's authorization or consent." (*Id.* ¶ 154 (emphasis added).)

name.space's unfair competition and trademark infringement claims against ICANN are based on "ICANN's willingness to allow competing TLD registries to use the identical gTLDs in commerce on the ICANN-controlled DNS, in exchange for substantial fees that these registries pay to ICANN for such use." (*Id.* ¶¶ 123, 136.) ICANN does not dispute that offering name.space's gTLDs for sale—which *has already occurred* and *continues to occur*—is an act capable of causing a likelihood of confusion sufficient to prevail on a claim for unfair competition and trademark infringement. *See, e.g., Nova Wines, Inc. v. Adler Fels Winery LLC*, 467 F. Supp. 2d 965, 972, 982 (C.D. Cal. 2006) (enjoining sale of products pursuant to trade dress infringement and unfair competition claims where accused products had not yet been sold); *Millennium Labs., Inc. v. Ameritox. Ltd.*, No. 12-CV-1063, 2012 U.S. Dist. LEXIS 147528, at *2 (S.D. Cal. Oct. 12, 2012) (denying motion to dismiss where "Plaintiff alleges that [Defendant] has offered for sale 'confusingly similar reports that copy [Plaintiff's] trade dress'"); *see also Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1314 (9th Cir. 1997) ("Shilon admitted to offering to sell counterfeit Levi's jeans and components. Such an offer will suffice to create liability under the Lanham Act."). ICANN argues that name.space's claims are based on the future delegation of name.space's gTLDs to the Root. While such acts would also be actionable, that is not the basis of name.space's claims here, which a plain reading of the Complaint confirms. (Compl. ¶¶ 123, 136, 153.)

Even if name.space's claims were dependent on ICANN's delegation of name.space's gTLDs, courts have held infringement claims to be ripe where there exists a clear case or controversy notwithstanding some dependence on future events.[10] Here, while name.space's claims are based on ICANN's acceptance of applications and fees for third-parties to control name.space's gTLDs—and thus the unlawful acts have already transpired—the parties' positions, including ICANN's policies, are plainly evident. There is a clear controversy to adjudicate.

ICANN's reliance on *Swedlow Inc. v. Rohm & Haas Co.*, 455 F.2d 884 (9th Cir. 1972), a patent case interpreting the Declaratory Judgment Act decades before the Supreme Court's seminal decision in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), is misplaced. *Swedlow* was an action for declaratory relief against a defendant who was in the process of building a manufacturing plant that, upon completion, might produce infringing products. The court held that, under the Declaratory Judgment Act, plaintiff was not entitled to declaratory relief where defendant's acts "threaten" infringement. *Id*. at 885-86. An analogous situation perhaps would be if ICANN had started developing an application process but had not determined which gTLDs were available for purchase and no one had yet applied. ICANN, however, has made name.space's marks available for sale and has accepted payment in return for the opportunity to operate and promote those marks, causing confusion as to the origin or affiliation of the marks. Further, name.space is not seeking relief under the Declaratory Judgment Act to guard

[10] *See, e.g.*, *McGraw-Hill Cos., Inc. v. Ingenium Techs. Corp.*, 375 F. Supp. 2d 252, 255, 257 (S.D.N.Y. 2005) (infringement claims ripe even though license agreement had not yet expired and defendant was "about to infringe" because "it is abundantly clear that the two parties are on a collision course that has already framed the essential disputes in plain terms and that will enable the Court to determine their respective rights"); *Loufrani v. Wal-Mart Stores, Inc.*, No. 09 C 3062, 2009 U.S. Dist. LEXIS 105575, at *12 (N.D. Ill. Nov. 12, 2009) (claim for declaratory judgment for potential infringement ripe in part because "the fact that the parties have developed clear positions on the issue of infringement further demonstrates a substantial controversy and adverse legal interests of the parties"); *see also Teva Pharm. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1308-11 (D.C. Cir. 2010) (pre-enforcement challenge to agency policy ripe because the defendant's views were clear and the court could "almost certainly determine" the rights the plaintiff sought).

against future infringement. name.space is seeking injunctive relief and monetary damages as a remedy for ICANN's already infringing acts.[11]

ICANN also incorrectly argues that the "use in commerce" requirement of common law trademark law has not been met. name.space has alleged use in commerce both by it and ICANN, including name.space's continuous use of its gTLDs in commerce since 1996. (Compl. ¶¶ 8, 81, 133.) The case ICANN cites in support of its argument further illustrates the sufficiency of name.space's claims. In *Rosenfeld v. Twentieth Century Fox Film*, No. CV 07-7040, 2008 U.S. Dist. LEXIS 92099 (C.D. Cal. Sept. 25, 2008), the *plaintiff* alleged that it was merely developing the idea of using the mark at issue. *Id.* at *11. name.space has, in contrast, alleged that name.space actually promotes and sells to its customers the right to use the gTLDs at issue and ICANN has sold to others the opportunity to sell the same gTLDs. There is thus no basis to dismiss any claims for lack of subject matter jurisdiction.

VI. NAME.SPACE ADEQUATELY ALLEGES TORTIOUS INTERFERENCE.

In accordance with the required elements of tortious interference with contractual relations, name.space has alleged (1) it maintains contractual relationships with customers, including the ability to operate domain names under name.space's gTLDs; (2) ICANN's knowledge of name.space's contractual relationships; (3) ICANN's intentional interference with these contracts by allowing name.space's competitors to register the same domain names under the same gTLDs, thereby creating a circumstance where the same gTLD will resolve differently on the ICANN-controlled DNS and name.space's network; (4) an actual

[11] ICANN also places a misplaced emphasis on *Bova v. City of Medford*, 564 F.3d 1093 (9th Cir. 2009). *Bova* involved a declaratory relief action and was brought by current city employees complaining of post-retirement health benefits. *Id.* at 1094. The court held that the claims were not ripe in part because the plaintiffs had not yet retired and because a decision in a related case may ultimately force a change in policy before plaintiffs retired. *Id.* at 1097. That differs from the present case in which infringement and likelihood of confusion already occurred.

disruption of name.space's contractual relationships because name.space's customers can no longer be certain that the domain names using name.space's gTLDs will be unique to name.space's customers; and (5) damages to name.space's business. (Compl. ¶¶ 160-164.) This is plainly sufficient to state a claim under California law. *See Quelimane Co., Inc. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 55 (1998).[12]

A recent case in the Eastern District of California is instructive. In *Conte v. Jakks Pacific, Inc.*, No. 1:12-CV-00006, 2012 U.S. Dist. LEXIS 174716 (E.D. Cal., Dec. 10, 2012), plaintiffs alleged patent infringement against the defendant doll company. Prior to the complaint being filed, plaintiffs sent a letter to several of defendant's customers stating that the doll being marketed by defendant was nearly identical to a doll that was patented, trademarked and copyrighted by the plaintiffs. *Id*. at *3. After the complaint was filed, the defendant brought counterclaims for, *inter alia*, interference with contract and interference with prospective economic advantage as a result of plaintiffs' letter. *Id*. Plaintiffs moved to dismiss the counterclaims and the court denied the motion. *Id*. at *14-19.

The letter in *Conte* was disruptive by causing concern to customers regarding the products that they were purchasing. Likewise, ICANN's allowance of name.space's competitors to apply for delegation to the DNS of the same gTLDs that are the subject of name.space's existing customer contracts is disruptive by causing concern to name.space's customers that domain names using those gTLDs will resolve on both the ICANN-controlled DNS *and* name.space's network. (Compl. ¶ 162.) name.space has thus sufficiently pled a claim for tortious interference with contractual relations.

[12] ICANN cites *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp*. for the claim elements but incorrectly notes that it involved a dismissal of the claim; rather, the Ninth Circuit affirmed a summary judgment ruling against the claim, which had previously *survived* a motion to dismiss challenge in this Court. 525 F.3d 822, 825-26 (9th Cir. 2008).

Likewise, name.space has alleged the required elements of a tortious interference with prospective economic advantage claim. Specifically, name.space has alleged: (1) that it maintains relationships with prospective customers; (2) ICANN has knowledge of these relationships; (3) ICANN wrongfully and intentionally structured the 2012 Application process to exclude name.space from the market for TLDs on the Root; (4) ICANN interfered with name.space's relationships with prospective customers by denying name.space access to the Root; and (5) ICANN's interference is the proximate cause of name.space's inability to offer its catalog of TLDs on the public Internet, resulting in damage to name.space's business. (Compl. ¶¶ 167-171.)

Additionally, name.space has satisfied the required allegation of wrongful conduct beyond the alleged act of interference. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003). As set forth above, name.space has sufficiently alleged multiple claims against ICANN, including antitrust violations, trademark infringement and unfair competition. name.space has thus adequately pled a claim for tortious interference with prospective economic advantage. *See Metal Lite, Inc. v. Brady Const. Innovations, Inc.*, 558 F. Supp. 2d 1084, 1095 (C.D. Cal. 2007) (claim for tortious interference with prospective economic advantage adequately alleged where plaintiff also stated plausible claims for false advertising, trade libel and unfair competition).

VII. ICANN IS LIABLE UNDER CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 17200.

ICANN is subject to liability under California Business and Professions Code Section 17200 because it engaged in "conduct that threatens an incipient violation of an antitrust law, or violates the spirit or policy of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008). Further, ICANN may also be held liable under Section

17200 because it violated name.space's rights under the Lanham Act. *See Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994) ("This Circuit has consistently held that state common law claims of unfair competition and actions pursuant to California Business and Professions Code § 17200 are 'substantially congruent' to claims made under the Lanham Act."). name.space has thus stated a claim against ICANN for relief under Section 17200.

VIII. NAME.SPACE REQUESTS LEAVE TO AMEND IF THE COURT GRANTS ALL OR PART OF ICANN'S MOTION.

Although ICANN's motion to dismiss should be denied in its entirety, if the Court grants ICANN's motion, name.space respectfully requests leave to amend the Complaint to cure any alleged pleading deficiencies. ICANN's arguments are based primarily on the alleged insufficiency of the facts asserted in the Complaint. Thus, were the Court to grant all or part of ICANN's motion, name.space should be allowed to amend its complaint to cure any alleged defects. *See, e.g., Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (reversing district court's denial of leave to amend, stating that policy of favoring amendments is applied with liberality); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").

CONCLUSION

For the foregoing reasons, Plaintiff name.space respectfully requests that the Court deny ICANN's motion to dismiss in its entirety.

Dated: January 4, 2013 MORRISON & FOERSTER LLP

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