Appeal No. 13-55553

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAME.SPACE, INC.,

Plaintiff-Appellant,

vs.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
The Honorable Percy Anderson Presiding
(Case No. 2:12-cv-08676-PA-PLA)

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant name.space, Inc. ("name.space"), makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: September 9, 2013

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I. STATEMENT OF JURISDICTION

The District Court had original subject matter jurisdiction under 28 U.S.C. Sections 1331 and 1338(a) and (b), as well as diversity jurisdiction under 28 U.S.C. Section1332. The District Court also had supplemental jurisdiction over name.space's state law claims pursuant to 28 U.S.C. §1367(a).

On March 19, 2013, the District Court entered its final judgment dismissing name.space's claims under Section 2 of the Sherman Act with prejudice and dismissing the remainder of name.space's claims without prejudice. (Excerpts of Record filed herewith ("ER") 3.) name.space elected to stand on its complaint and timely filed its Notice of Appeal on April 4, 2013 pursuant to Federal Rule of Appellate Procedure, Rule 3. (ER 1.)

This Court has jurisdiction under 28 U.S.C. Section 1291. *See also WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1058 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 2713 (2012) (the Ninth Circuit "frequently review[s] dismissals without prejudice for failure to state a claim where a plaintiff elects not to amend and appeal standing on the complaint.").

II. STATEMENT OF THE ISSUES

(1) Whether the District Court erred in holding that name.space failed to state claims against Defendant Internet Corporation for Assigned Names and Numbers ("Defendant" or "ICANN") upon which relief may be granted under Section 1 of the Sherman Act, 15 U.S.C. § 1 and the Cartwright Act, California Business and Professions Code §§ 16720 *et seq*. (*See* ER 9-10.)

(2) Whether the District Court erred in dismissing name.space's claims against ICANN under Section 2 of the Sherman Act, 15 U.S.C. § 2, including on the ground that "whatever monopoly power ICANN possesses was given to it by the United States Department of Commerce and not the result of the 'willful acquisition' of monopoly power." (*See* ER 10-11.)

(3) Whether the District Court erred in holding that name.space "has not alleged sufficient facts to establish a justiciable case or controversy" under Section 43(a) of the Lanham Act, 15 U.S.C § 1125(a), common law trademark infringement, and common law unfair competition, including by holding that such claims were not ripe for review. (*See* ER 11-12.)

(4) Whether the District Court erred in holding that name.space failed to state claims against ICANN for tortious interference with contract, tortious interference with prospective economic advantage, and violation of California Business and Professions Code Section 17200. (*See* ER 12-13.)

(5) Whether the District Court erred in otherwise dismissing any claim for relief in name.space's Complaint.

III. STATEMENT OF THE FACTS

A. The Domain Name System and the Root Zone

The Internet is a worldwide network of interconnected servers, computers and other connected devices such as smartphones.

Given the size of the global Internet, the ability to locate individual devices is critical. Every device on the Internet is assigned an Internet Protocol ("IP") address which, much like a physical address, allows other devices to locate it in order to send it data. The currently prevalent IP standard, IPv4, assigns each computer on the Internet an IP address consisting of a string of four sets of numbers between 0 and 255, separated by periods (*e.g.*, 170.11.225.15).

The "Domain Name System," or "DNS," is a central database that acts as the critical chokepoint of the Internet's architecture. It links domain names, such as nytimes.com, to these IP addresses. (ER 21, Complaint dated Oct. 10, 2012, Docket No. 1, at ¶ 21.) Defendant ICANN exercises exclusive control over the DNS. 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. (ER 36 at ¶¶ 38-39.)

Only domain names with top level domains (*e.g.*, ".com", ".biz") 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 through this matching system. (ER 24-25 at ¶ 34.) Through its control of the DNS, ICANN has arbitrarily limited both the number of TLDs and the companies that are permitted to register domain names within those TLDs. ICANN's conduct allows it to extract sizeable fees from the few companies that it has permitted to compete in the market and to guarantee that it and those few companies will continue to earn monopoly profits to the detriment of competitors and consumers alike. (ER 22, 29 at ¶¶ 26, 57.)

B. Top-Level Domains

The DNS uses a hierarchical structure. The alphanumeric field to the far right is known as the "Top Level Domain" ("TLD"), such as .com, .net or .edu. The other, lower-level fields follow to the left of the TLD, separated by periods. The first field to the left of the TLD is the Second Level Domain ("SLD"). (ER 22 at ¶ 23.) In order to link a domain name to an IP address on what we commonly consider to be the Internet, the DNS server must have access to the ICANN-controlled "Root," which serves as the highest level of the DNS hierarchy and contains a "master list" of all the TLDs in ICANN's "Root Zone." (ER 22 at ¶ 24.) When an Internet user enters a URL into his or her web browser, the web browser

will by default look to the Root to resolve that URL. Thus, practically speaking, for 99.9% of the world, *the Root is the Internet*. (ER 24-25 at ¶ 34.)

Currently, the number of TLDs (other than country code TLDs, discussed below) has been arbitrarily limited. name.space has alleged, upon information and belief, that there are no financial, technical or other constraints to adding new TLDs to the current architecture of the Internet via access to the Root, and that recently added TLDs have not caused technical difficulties or interruptions. (ER 22 at ¶ 25.)

A limited number of corporations and organizations operate these TLDs—one operator per TLD. In order to do so, these corporations and organizations must enter into restrictive agreements with ICANN and pay ICANN a significant and ongoing fee. These organizations and corporations are "wholesale" providers of TLDs; they sell the ability to register a domain name with a particular TLD and maintain a "zone file," or registry, of all the domain names associated with that TLD. TLD wholesalers are commonly referred to as TLD "registries." (ER 22 at. ¶ 26.)

The "retail" sellers of domain names, called "registrars," are companies that sell the second-level domain names directly to the companies and content providers that want to create a website or provide other services. Registrars, such as "godaddy.com," must be approved by the TLD registries to sell domain names.

The "registrants"—individuals and companies that purchase a domain name through the registrar—rent that domain name by paying an annual fee to the registrar. (ER 22-23 at ¶ 27.)

C. name.space Begins Operating as a Registry

In 1996, name.space, established a network of servers in five countries on two continents to provide a competing registry with that of Network Solutions, Inc. ("Network Solutions"), which, in 1992, had been granted exclusive control over the Root by the National Science Foundation ("NSF"), a U.S. government agency. In 1995, Network Solutions was permitted to operate for profit as a TLD registry, and began charging fees to register domain names on the Root's limited number of TLDs. (ER 24 at ¶ 32.)

In contrast to Network Solution's arbitrarily limited TLDs, name.space offered over five hundred different and "expressive" TLDs, such as .art, .food, .magic, .music, .now and .sucks. name.space's business model offered a wide array of TLDs for content providers, allowing for increased consumer accessibility to specific Internet sites, as well as stronger expressiveness, marketability and branding. (ER 24 at ¶ 33.) name.space offers its registry services through an alternate root zone on the Internet, *not* on an alternative Internet. While non-ICANN root zones, such as name.space's network, are often referred to as "alternate" root zones, that is not to suggest that these root zones result in

"alternative" Internets. The name.space root zone is accessible by any computer on the Internet, and does not require that a user connect to any alternative Internet in order to access the name.space gTLDs. (*See* ER 24-25 at ¶ 34.)

D. ICANN's Exclusive Authority To Manage the Domain Name System

1. ICANN Takes over Management of the DNS on the Root

In 1997, the U.S. government issued a report entitled "A Framework for Global Electronic Commerce," which transferred control of Internet governance from NSF to the Department of Commerce (the "DOC"). A select group of Internet engineers and enthusiasts, including individuals that had previously been responsible for administering the DNS, founded ICANN in order to meet the requirements set out by the white paper. (ER 25 at ¶ 35.)

Pursuant to its agreements with the U.S. government, ICANN has the authority to introduce new TLDs into the Internet's current DNS architecture. And ICANN also has the authority to determine what companies will operate as registries for these TLDs and on what terms. (ER 25 at ¶ 37.)

But ICANN's authority is not limitless. Instead, ICANN's "activities would need to be open to all persons who are directly affected by the entity, with *no undue financial barriers to participation* or *unreasonable restrictions on participation*" (ER 26 at ¶ 41(emphasis added).)

2. ICANN Was Not Granted Antitrust Immunity

According to the U.S. government white paper that addresses ICANN's role as the government-sanctioned gatekeeper to the Internet, "*[t]he new corporation [ICANN] does not need any special grant of immunity from the antitrust laws* so long as its policies and practices are reasonably based on, and no broader than necessary to promote the legitimate coordinating objectives of the new corporation." (ER 26 at ¶ 38) (emphasis added).

Further, the white paper states that "[a]pplicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation [ICANN] should anticipate this reality." (ER 26 at ¶ 39.) Regarding the process by which ICANN determines what new TLDs to authorize, the white paper states that: "the decision making process would need to reflect a balance of interests and should not be dominated by any single interest category." (ER 26 at ¶ 40.)

Similarly, a U.S. government "green paper" recognized that "the new corporation's [ICANN's] processes should be fair, open and pro-competitive. Its decision-making processes should be sound and transparent." (ER 26 at ¶ 42.) The green paper also warns ICANN to guard against "capture by a self-interested faction." (*Id.*)

E. The 2000 "Proof of Concept" Application Round

1. The 2000 Application Round Opens

In 2000, ICANN sought to launch a test program to determine whether it should expand the number of TLDs with access to the Root and adopted a policy for the introduction of new TLDs through an application process (the "2000 Application Round"). (ER 27 at ¶ 45.) The 2000 Application Round instructions were approximately seven pages long. (ER 27 at ¶ 46.) The application fee for the 2000 Application Round was $50,000, and applicants could submit multiple TLD strings in a single application without paying any additional fees. (ER 27 at ¶ 47.)

2. name.space Applies for 118 gTLDs

In 2000, as part of the 2000 Application Round, name.space submitted a complete and timely application with ICANN to operate as the registry for 118 gTLDs, and paid the $50,000 application fee. (ER 28 at ¶ 50.) ICANN accepted name.space's 2000 Application, and in fact selected name.space's 2000 Application as one of the "strong candidates" and one of the top-ten applications submitted in the 2000 Application Round. (ER 28 at ¶ 51.)

ICANN never rejected name.space's 2000 Application, but neither advanced name.space's 2000 Application for delegation nor awarded name.space the authority to operate any of name.space's TLDs over the DNS. (ER 28 at ¶ 53.) As one ICANN committee member stated with respect to name.space's 2000 Application, "we'll wait them out." (ER 87 at ¶ 54.) ICANN approved only seven

new TLDs: the gTLDs .biz and .info and the sTLDs .aero, .coop, .museum, .name and .pro. (ER 28 at ¶ 55.) ICANN awarded the overwhelming majority of the "new" TLDs to existing dominant firms in the TLD and domain name registrar industries. (ER 29 at ¶ 57.)

F. The 2012 Application Round

In 2008, following the 2000 Application Round, ICANN announced that it would expand the number of available TLDs, and between 2008 and 2012 the ICANN board met repeatedly to decide the details of the new gTLD application process. In contrast to the seven-page instruction manual from the 2000 Application Round, the rules and procedures for the 2012 Application Round that were ultimately adopted were set forth in a massive 349-page guidebook. (ER 30 at ¶ 64.) In order to apply in the 2012 Application Round, ICANN required applicants to pay a fee of $185,000 per TLD applied for—over three times more than the 2000 Application Round's $50,000 fee for an unlimited number of gTLDs. (ER 31 at ¶ 67.) Indeed, unlike the 2000 Application Round, ICANN forbid applicants from submitting multiple TLD strings in the same application. (*Id*.)

Had name.space reapplied in the 2012 Application Round for delegation of the same 118 gTLDs that remain pending from name.space's 2000 Application, it

would have cost name.space almost $22 million, more than 436 times the price of name.space's 2000 Application for the same 118 gTLDs. (ER 31 at ¶ 68.)

On June 13, 2012, ICANN published its list of TLD strings for which applications were submitted to delegate those TLDs to the DNS. Included on this list were 189 TLDs that already resolve on the name.space network, including .art, .blog, .book, .design, .home, .now, .inc and .sucks. Further, applications for new gTLDs were dominated by large Internet companies and domain name industry insiders. In fact, six registries—Neustar, Demand Media, Afilias, Verisign, AusRegistry and Google—account for over 75% of the applications.

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. (ER 22 at ¶ 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. (ER 31-33, 96 at ¶¶ 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. (ER 24 at ¶¶ 79-80.) The Complaint expressly alleges that the 2012 Application Round was structured as it was as part of any agreement between ICANN and its co-conspirator industry insiders to restrict competition and to maintain ICANN's and others' market power. (ER 30, 33 and 38 at ¶¶ 65, 76, 97 and 98.)

G. ICANN's Conspiracies with Industry Insiders

ICANN has ties to and benefits from payments from the select few industry players that are able to operate domain name registries. Such conflicts of interest have been widely reported. Notably, Rod Beckstrom, ICANN's former president and CEO, has been quoted as stating: "ICANN must be able to act for the public good while placing commercial and financial interests in the appropriate context. How can it do this if all top leadership is from the very domain name industry it is supposed to coordinate independently?" (ER 29 at ¶ 60.)

name.space has alleged that, upon information and belief, ICANN board members with significant conflicts of interest include Chair Steve Crocker, who runs the consulting firm Shinkuro, which has a silent investment from domain name registry provider Afilias Limited ("Afilias"), the owner of .org and .info, and Vice-chair Bruce Tonkin, a senior executive with Melbourne IT, an Australian company that has advertised its ability to help clients secure gTLD registry accreditation from ICANN. (ER 29-30 at ¶ 61.) Ram Mohan, Afilias's Executive

Vice President and Chief Technology Officer, also sits on the ICANN board of directors. (*Id.*) Further, Peter Dengate Thrush, former Chairman of ICANN's board of directors, is now the Executive Chairman of Top Level Domain Holdings, Inc., which filed ninety-two applications for new gTLDs in 2012. (*Id.*)

IV. STATEMENT OF THE CASE

As set forth in the Complaint, ICANN has engaged in a conspiracy to prevent companies such as name.space from competing in the market for gTLDs—the foundation of the Internet architecture—with access to the ICANN-controlled DNS, 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—including by trying to sell to other companies the very gTLDs that name.space originated and has operated for paying customers for over fifteen years. ICANN has also tortiously interfered with name.space's existing and prospective contracts with customers .

A. name.space's Complaint

name.space filed its Complaint on October 10, 2012 (the "Complaint"). The Complaint includes thirty-five pages of detailed factual allegations supporting nine claims for relief, which can be summarized as follows:

First, name.space alleged that ICANN has violated Section 1 of the Sherman Act, as well as the Cartwright Act, through a conspiracy to restrain trade by excluding potential market entrants from the market to act as a gTLD registry with access to the DNS, the international market for domain names, and the market for blocking or defensive registrations. (ER 37-39 and 40 at ¶¶ 94-105 and 115-118.) This unlawful conduct involved unlawful agreements and conspiracies that were identified in the Complaint. (*Id.*)

Second, name.space alleged that ICANN violated Section 2 of the Sherman Act through its unlawful maintenance of monopoly power in three distinct and separate antitrust markets: the market to act as a gTLD registry with access to the DNS, the international market for domain names, and the market for blocking or defensive registrations. (ER 39-40 at ¶¶ 106-114.)

Third, name.space alleged that ICANN violated name.space's trademark rights, including violations of Section 43(a) of the Lanham Act, common law trademark infringement, and common law unfair competition. (ER 40-44 and 46-47 at ¶¶ 115-143 and 150-158.)

Fourth, name.space alleged tortious interference with contract and tortious interference with prospective economic advantage resulting from ICANN's attempts to subvert name.space's trademark rights by accepting applications for marks that are owned and operated by name.space and its customers. (ER 47-49 at ¶¶ 159-172.)

Fifth, name.space alleged that ICANN has violated California Business and Professions Code Section 17200 by engaging in unlawful and unfair business acts or practices resulting from a desire to exclude potential market entrants, and in particular name.space, from operating as a TLD registry. (ER 44-46 at ¶¶ 144-149.)

B. ICANN's Motion To Dismiss

On November 30, 2012 ICANN moved to dismiss name.space's Complaint on the grounds that it failed to state a valid claim for relief. (*See* ER 68 at Docket No. 19.) With respect to the Section 2 claims, ICANN moved to dismiss only those claims that related to the market to act as a gTLD registry with access to the DNS and not the other markets alleged in the Complaint (i.e., not as to the market for domain names and the market for blocking or defensive registration services). (*Id*.) ICANN also asserted that name.space had released ICANN from all claims. (*Id*.)

C. The Converted Summary Judgment Motion

In an opinion and order of January 15, 2013, Judge Anderson held that the he could not consider the 2000 Application on ICANN's Motion to Dismiss, because the claims asserted in name.space's Complaint "do not 'necessarily rely' on the 2000 Application." (ER 14.) Judge Anderson partially converted ICANN's Rule 12(b)(6) motion into a motion for summary judgment to permit the Court to consider the single piece of evidence that ICANN had submitted in support of its argument that "name.space has released ICANN for claims relating to [name.space's] 2000 Application . . . ." (ER 70 at Docket No. 34.) The Court ordered the parties to submit supplemental briefing to address the release issue. (ER 14.)

D. Judge Anderson's March 4, 2013 Order Dismissing the Complaint

After extensive briefing on both ICANN's motion to dismiss and the converted summary judgment motion—but before the parties conducted any discovery—Judge Anderson advised the parties that the hearing on these pending motions was canceled. (ER 15.) Instead, Judge Anderson issued a ten page opinion and order on March 4, 2013 dismissing name.space's Complaint for failure to state a claim with respect to name.space's antitrust and state law claims and for failure to alleged a justiciable case or controversy with respect to name.space's

trademark claims. (ER 4-13.) Except for the dismissal of name.space's Section 2 claims, Judge Anderson's dismissal was expressly "without prejudice." (ER 3.)

Judge Anderson's short opinion is summarized below:

First, regarding name.space's Section 1 claims, Judge Anderson held that "Plaintiff has not alleged sufficient evidentiary facts in support of its antitrust conspiracy claims to satisfy the *Twombly* standard." (ER 9.) Judge Anderson also held that "Plaintiff has . . . not alleged sufficient facts explaining who it believes participated in the conspiracy, and what the alleged co-conspirators actually agreed to do in violation of the antitrust laws." (ER 10.)

Second, Judge Anderson dismissed name.space's claims under Section 2 of the Sherman Act on the grounds that "whatever monopoly power ICANN possess was 'thrust upon it' as the result of 'historic accident' rather than the result of 'willful acquisition'" (ER 10.) Judge Anderson also held that "the Complaint fails to allege sufficient facts to establish an antitrust injury." (ER 11.)

Third, regarding name.space's trademark claims Judge Anderson held that "Plaintiff has not alleged sufficient facts to establish a justiciable case or controversy." (ER 11-12.)

Fourth, Judge Anderson ruled that name.space failed to state claims for tortious interference with contract and tortious interference with prospective economic advantage. (ER 12-13.) Regarding name.space's tortious interference

with contract claim, Judge Anderson held that "the Complaint's conclusory allegations concerning ICANN's knowledge of Plaintiff's relationships with its clients do not satisfy the *Twombly* standard." (ER 12.) Regarding name.space's tortious interference with prospective economic advantage, Judge Anderson held that "because Plaintiff's antitrust and trademark infringement claims are insufficient to state viable claims, Plaintiff has not alleged the independent wrongfulness required for interference with prospective economic advantage." (ER 13.) For both claims, Judge Anderson held that "the Complaint fails to allege any intentional actions undertaken by ICANN 'designed to disrupt' the relationship Plaintiff has with its clients or evidentiary facts of actual disruption and resulting economic harm." (ER 12, 13.)

Fifth, Judge Anderson held that "[b]ecause the Court has concluded that [name.space's antitrust and trademark] claims allege insufficient facts to state viable claims, Plaintiff's [Cal. Bus. P. Code] section 17200 claim necessarily fails." (ER 13.)

V. STANDARD OF REVIEW

The District Court dismissed name.space's antitrust and state law claims pursuant to Fed. R. Civ. P. 12(b)(6). (ER 10-13.) A Court of Appeals "review[s] de novo a district court's order granting a motion to dismiss under Rule 12(b)(6)." *Coal. to Defend Affirmative Action v. Brow*n, 674 F.3d 1128, 1133 (9th Cir. 2012).

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). In addition, when considering the sufficiency of a complaint on a motion to dismiss "[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, 501 (9th Cir. 2010).

The District Court also dismissed name.space's trademark claims under Fed. R. Civ. P. 12(b)(1) for failing to allege "facts to establish a justiciable case or controversy." (ER 11-12.) A Court of Appeals "review[s] the district court's grant of a motion to dismiss under Rule 12(b)(1) de novo." *Viewtech, Inc. v. United States*, 653 F.3d 1102, 1103-04 (9th Cir. 2011).

VI. SUMMARY OF ARGUMENT

Point 1

The Complaint Pleaded Specific Facts to State a Claim Under Section 1 of the Sherman Act.

The District Court "conclude[d] that [name.space] has not alleged sufficient evidentiary facts in support of its antitrust conspiracy claims to satisfy the *Twombly* standard" and dismissed name.space's Section 1 claims without prejudice. (ER 9, 3.) But the District Court's myopic reading of the Complaint ignores name.space's detailed conspiracy allegations. Even a cursory reading of the Complaint reveals that name.space more than adequately pleaded the "who" (named current and former ICANN board members, as well as TLD registries), the "what" (to limit competition in order to retain their dominant market positions), and the "where and when" (specific meeting dates and locations) of the conspiracy. (ER 29-30 and 37 at ¶¶ 61, 95-96; ER 38 at ¶ 98; ER 30-31 at ¶ 66.)

Further, the District Court failed to consider the totality of name.space's allegations—that ICANN imposed a threefold price increase to the application fee while at the same time limiting applicants to apply for one TLD per application, and imposing other barriers to entry such as a binding dispute resolution process. (ER 32 at ¶ 71.) name.space is entitled to take discovery on these allegations, and to prove them at summary judgment or trial.

In sum, name.space's allegations are more than sufficient to state a under Section 1 of the Sherman Act and reversal is therefore warranted.

Point 2

The District Court Failed to Consider name.space's Claims That ICANN Unlawfully Maintained Monopoly Power and Ignored name.space's Allegations of an Antitrust Injury.

A monopolization claim under Section 2 of the Sherman Act requires that the Complaint allege facts sufficient to show "the willful acquisition *or maintenance* of [monopoly] power" *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 998 (9th Cir. 2010) (emphasis added). The District Court, however, failed to consider name.space's allegations that ICANN has unlawfully *maintained* monopoly power, dismissing name.space's Section 2 claims on the sole ground that "whatever monopoly power ICANN possesses was given to it by the United States Department of Commerce and not the result of the 'willful acquisition' of monopoly power." (ER 10.) The District Court's failure to consider name.space's monopoly *maintenance* claims—and, in the process, effectively giving ICANN antitrust immunity—is therefore grounds for reversal.

Further, the District Court improperly ignored name.space's allegations of an antitrust injury and erroneously made a factual determination when it dismissed name.space's Section 2 claims. *First*, the District Court failed to even acknowledge name.space's numerous allegations of competitive harm including

that: (a) ICANN limits consumer choice, despite consumer demand (ER 33 and 38 at ¶¶ 78 and 99); (b) ICANN's unlawful actions have resulted in artificially high prices (ER 38 at ¶ 100); (c) ICANN's anticompetitive conduct forces content producers to "spend enormous amounts of money to 'defensively' register domain names." (ER 38 at ¶ 100); and (d) ICANN suppressed or eliminated competition in the TLD registry market (ER 31-33, 38 and 39 at ¶¶ 67-76, 97 and 112.) name.space properly alleges that it has been excluded from participation in each of the relevant markets, and therefore has suffered antitrust injury as a result. *Second*, the District Court's vague reference to the fact that "many entities" participated in the 2012 Application Round misconstrues name.space's allegations and impermissibly makes a factual determination on a motion to dismiss. *See Campanelli v. Bockrath*, 100 F.3d 1476, 1484 (9th Cir. 1996) (reversing dismissal where "the district court impermissibly went beyond the allegations of the complaint to play factfinder at the 12(b)(6) stage"). Nothing in the Complaint supports this finding. In fact, the Complaint explicitly alleged that the number of potential competitors—*i.e.* applicants—in the market was unlawfully restricted by ICANN's actions. The District Court, however, conflated the number of *applications* with the number of *applicants*, making an improper factual determination at the pleading stage. Reversal is therefore appropriate.

Point 3

name.space's Lanham Act, Common Law Trademark Infringement and Common Law Unfair Competition Claims Are Ripe.

Contrary to the District Court's holding, name.space alleged an actual, not speculative, injury due to ICANN's actions: ICANN accepted applications, along with $185,000 application fees, for 189 of the TLDs that are currently offered on name.space's network. (ER 36 at ¶ 88; ER 40-42 at ¶¶ 119-131.) name.space is seeking immediate injunctive relief and monetary damages as a remedy for ICANN's *already infringing acts*, including offering name.space TLDs for sale in the 2012 Application Round in exchange for sizeable fees. (ER 41 and 43 at ¶¶ 123 and 136.) ICANN's sale of name.space's TLDs is an act capable of causing a likelihood of confusion sufficient to prevail on a claim for unfair competition and trademark infringement.

Further, name.space's trademark and unfair competition claims are ripe because there is a clear case or controversy regarding ICANN's acceptance of applications and fees for name.space's TLDs. name.space's claims are premised on these unlawful acts, which have already transpired, and are not dependent on any future conduct by ICANN. (ER 41 at ¶ 123.) Whether ICANN ultimately grants a TLD application is irrelevant to the sufficiency of name.space's claims because name.space has alleged that the likelihood of confusion exists right now. Accordingly, reversal is warranted.

Point 4

name.space Adequately Pleaded Claims for Tortious Interference with Contract and Prospective Economic Advantage Under California Law.

The District Court's dismissal of name.space's tortious interference with contract and tortious interference with prospective economic advantage should be reversed because name.space adequately pleaded each element of these claims under California law. (ER 47-48 at ¶¶ 160-164; ER 48-49 at ¶¶ 167-171.) *First*, name.space's claims that ICANN allowed 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 sufficient to state a claim for tortious interference with contract: ICANN's actions disrupted name.space's contractual relations with its customers by creating a situation in which gTLDs that name.space's customers expect to resolve on the name.space network will also resolvable on the ICANN-controlled DNS. *See Conte v. Jakks Pac., Inc.*, No. 1:12-CV-00006, 2012 U.S. Dist. LEXIS 174716 (E.D. Cal. Dec. 10, 2012) *Second*, name.space's tortious interference with prospective economic advantage claims are sufficient because name.space adequately pleaded claims for violations of the antitrust and trademark laws. *See Metal Lite, Inc. v. Brady Constr. Innovations, Inc.*, 558 F. Supp. 2d 1084, 1095 (C.D. Cal. 2007) Thus, reversal is appropriate.

Point 5

Because name.space Adequately Stated Claims For Violations of the Antitrust Laws and Trademark Infringement, the California Business and Professions Code Section 17200 Claim Should Be Reinstated.

Under well-established precedent, where, as here, a plaintiff adequately states a claim for violations of the antitrust laws, trademark infringement, and unfair competition, a claim also exists for violations of California Business and Professions Code Section 17200. *See Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008); *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994). Accordingly, the District Court erroneously dismissed name.space's Section 17200 claim.

VII. ARGUMENT

A. The District Court Erred in Dismissing name.space's Section 1 Claims Because It Ignored the Complaint's Detailed Factual Allegations.

The District Court "conclude[d] that [name.space] has not alleged sufficient evidentiary facts in support of its antitrust conspiracy claims to satisfy the *Twombly* standard." (ER 9.) It therefore dismissed name.space's Section 1 claims without prejudice. (ER 3.) The District Court stated that name.space's Complaint "must allege facts such as a specific time, place or person involved in the alleged conspiracies to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." (ER 9 (citing *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (internal quotation marks omitted).)

But that is precisely what the Complaint does.

The conspiracy detailed 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* ER 29, 30, 37 and 38 at ¶¶ 61, 65 and 96-97.) These allegations are more than sufficient to state a Section 1 claim and reversal is therefore warranted.

name.space has pleaded sufficient facts to support each element of its claim.[1] *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. (ER 29-30 and 37 at ¶¶ 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.

[1] To state a claim under Section 1, a plaintiff must plead facts sufficient to show "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *See Kendall*, 518 F.3d at 1047. "The analysis under California's antitrust law mirrors the analysis under federal law because the Cartwright Act [ ] was modeled after the Sherman Act." *Cnty. of Tuolumne v. Sonora Cmty. Hosp.* 236 F.3d 1148, 1160 (9th Cir. 2001)(citations omitted).

(ER 38 at ¶¶ 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. (ER 38 at ¶¶ 99-100.)

Moreover, 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. (ER 29-30 at ¶ 61.) name.space also specifically alleges that other industry members, not just board members, participated in the conspiracy. (ER 33 and 37 at ¶¶ 76 and 95.) And name.space identifies nine specific meetings—including where and when the meetings took place—where ICANN and the co-conspirators furthered their conspiracy. (ER 30-31 at ¶ 66.)[2] 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

[2] *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 Emp. 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).

a conspiracy to "limit competition to the TLD registry market in order to retain their dominant market positions." (ER 38 at ¶ 98.) They did so by agreeing to create and adopt the various rules and procedures that applied to the 2012 Application Round.

The Supreme Court's reasoning in *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) provides further support for name.space's conspiracy claims. A "standard setting organization like [ICANN] can be rife with opportunities for anticompetitive activity," and 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." 456 U.S. at 571, 574; *see TruePosition, Inc. v. LM Ericsson Tel. Co.*, 899 F. Supp. 2d 356, 363-64 (E.D. Pa. 2012) (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 Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, No. CV-11-9514, 2012 U.S. Dist. LEXIS 125126, at *18 (C.D. Cal. Aug. 14, 2012); *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.").

Here, name.space's allegations are legally sufficient under *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.* because 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." (ER 29 and 30 at ¶¶ 61 and 65.) name.space specifically alleges that ICANN's directors were acting in their own self-interest, not in furtherance of their obligations to ICANN. (ER 28 at ¶ 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.[3] (ER 26-27, 29-30 and 37 at ¶¶ 44, 61 and 95.) And name.space expressly alleges that non-board members are part of the conspiracy. (ER 37 at ¶ 95.) There is nothing implausible about name.space's allegations that ICANN and the co-

[3] 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. Since his resignation, Pritz has offered advisory services to new gTLD applicants. 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 (last visited Sept. 5, 2013).

conspirators structured the 2012 Application Round with barriers designed to entrench the power of the dominant players. (ER 31-33, 38 at ¶¶ 69-71, 97.)

The District Court, however, failed to consider any of name.space's specific conspiracy allegations. Instead, the District Court held that "[t]he Complaint really has alleged nothing more than that ICANN set the application fee for the 2012 Application Round at a higher amount than Plaintiff was willing to pay." (ER 9.) But the District Court's narrow focus on the price of the 2012 application fails to consider the context—that ICANN imposed a threefold price increase to the application fee while at the same time limiting applicants to apply for one TLD per application, and imposing other barriers to entry such as a binding dispute resolution process. (ER 32 at ¶ 71.)[4] name.space is entitled to the opportunity to take discovery on these allegations, and to prove them at summary judgment or trial.

At heart, the District Court erroneously failed to recognize that *the totality of* ICANN's actions in structuring the 2012 Application Round was a way to maintain and expand ICANN's market power to the co-conspirators. ICANN's imposition

[4] The District Court also improperly focused on the fact that there were at least 189 applications in the 2012 Application Round. (ER 9-10.) Not only does the Court's reasoning fail to explain how that raw number alone weighs against finding that ICANN restrained trade as a matter of law, but it ignores the fact that, as name.space alleged, the application process was dominated by industry insiders. That is in fact what happened: six firms, five of which have ties to ICANN, accounted for over 75% of the applications submitted in the 2012 Application Round.

of these barriers to entry as part of an unlawful conspiracy can be explained as an attempt to render name.space's business model impossible and to maintain the monopoly positions of the co-conspirators in the gTLD, international domain name and defensive registration markets. (*See* ER 31-32, 38 and 39-40 at ¶¶ 69, 102 and 112-113.) And that is what happened: the 2012 Application Round was dominated by industry insiders with ties to ICANN. These allegations are more than sufficient to survive a motion to dismiss. *See, e.g.*, *Black Box Corp. v. Avaya, Inc.*, No. 07-6161 (GEB)(JJH), 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).

The Complaint therefore more than satisfies its pleading obligations. "[A]lthough *Twombly* and *Iqbal* require 'factual amplification [where] needed to render a claim plausible,' . . . *Twombly* 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)).

B. The District Court Erred in Dismissing name.space's Section 2 Claims Because It Applied the Wrong Legal Standard and Failed To Consider the Complaint's Allegations of an Antitrust Injury.

The district court erred in dismissing name.space's claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, because it applied the wrong legal framework to assess name.space's allegations and ignored name.space's allegations that ICANN's anticompetitive conduct harms both consumers and competition.

1. The District Court Erroneously Failed To Address Name.Space's Claims that ICANN Is Liable for Unlawful Maintenance of Its Monopoly Power.

The District Court dismissed name.space's Section 2 claims on the grounds that "whatever monopoly power ICANN possesses was given to it by the United States Department of Commerce and not the result of the 'willful acquisition' of monopoly power." (ER 10.) But a monopolization claim under Section 2 requires

that the Complaint allege facts sufficient to show "the willful acquisition *or maintenance* of [monopoly] power." *Allied Orthopedic Appliances, Inc.*, 592 F.3d at 998 (emphasis added). The District Court, however, only considered the first part of the statute—the circumstances in which ICANN *acquired* its monopoly power. The District Court's failure to address name.space's allegations that ICANN unlawfully *maintained* its monopoly power—or to even reference that part of the statute—is therefore grounds for reversal. Section 2 protects 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. As the Complaint alleges, the rules and procedures of the 2012 Application Process were the result of a conspiracy between ICANN and its co-conspirators, and were created to let ICANN *maintain* its monopoly power (and the power of its co-conspirators in the unlawful conspiracy and conspiracy to monopolize) by maintaining the existence of a monopoly in each and every gTLD delegated by ICANN. (ER 39-40 at ¶¶ 106-114.) Absent ICANN's exclusionary conduct, there would be thriving markets for both TLDs and second-level domains. (ER at ¶ 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. 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. (ER 39-40 at ¶¶ 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. (ER 39-40 at ¶¶ 80, 113-14.) The result of the conspiracy was the imposition of procedural and financial barriers in the 2012 Application Round that eliminated competition. (ER 39 at ¶ 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).

Finally, ICANN moved against name.space's Section 2 claims only as to the 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 did not dispute the sufficiency of name.space's Complaint. (ER 34 at ¶¶ 79-80); *Manwin*, 2012 U.S. Dist. LEXIS 125126, at *21 (denying motion to dismiss antitrust claims in defensive registration market). The District Court's order presumably dismissed the claims as to these other two markets, but nowhere explained how its holding applied to these other two markets. It therefore is subject to reversal.

2. ICANN'S Conduct Has Resulted in an Antitrust Injury.

The District Court improperly ignored name.space's allegations of an antitrust injury and erroneously made a factual determination when it dismissed name.space's Section 2 claims on the grounds that "because many entities did participate in the 2012 Application Round, Plaintiff's conclusory allegations do not support even an inference that the 2012 Application Round's application fee has restrained trade." (ER 10.)

First, in stating that name.space "alleges no evidentiary facts suggesting that the fee has actually injured competition," the District Court 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 (ER 33 and 38 at ¶¶ 78 and 99); (b) because of ICANN's

exclusionary conduct, "the price of registering a TLD is artificially high" (ER 38 at ¶ 100); and (c) ICANN's anticompetitive conduct forces content producers to "spend enormous amounts of money to 'defensively' register domain names." (ER 38 at ¶ 100.) 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." (ER 31-33, 38 and 39 at ¶¶ 67-76, 97 and 112.) The allegations apply to all three relevant markets identified in the Complaint: the market to act as a gTLD registry with access to the DNS, the international market for domain names, and the market for blocking or defensive registrations. (ER 37-39 and 40 at ¶¶ 94-105 and 115-118.)

A recent Central District of California decision found against ICANN on this very issue. In *Manwin*, the court found allegations that ICANN's conduct "suppress[ed] or eliminat[ed] 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.").[5] name.space makes the same allegations: by imposing procedural and financial hurdles in the 2012 Application Round, ICANN

[5] 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.

suppressed or eliminated competition in the relevant markets. (ER 33, 38 and 39 at ¶¶ 76, 97 and 112.) The District Court's failure to consider name.space's allegations that ICANN suppressed competition warrants reversal.

Second, the District Court's vague reference to the fact that "many entities" participated in the 2012 Application Round misconstrues name.space's allegations and impermissibly makes a factual determination on a motion to dismiss. *See Campanelli*, 100 F.3d at1484 (9th Cir. 1996) (reversing dismissal where "the district court impermissibly went beyond the allegations of the complaint to play factfinder at the 12(b)(6) stage"). The District Court's sole support for the fact that "many entities did participate in the 2012 Application Round" comes from name.space's allegation that 189 applications were filed in the 2012 Application Round to operate gTLDs that name.space has resolved on its own network since 1996. (*Compare* ER 10 *with* ER 36 at ¶ 88.) But the District Court fails to provide any specific support for its finding that "many entities" participated in the 2012 Application Round. name.space's Complaint references the number of *applications*, not the number of *applicants*. By conflating the number of applications filed with the number of applicants, the District Court misconstrued name.space's specific allegations that the number of applicants was actually quite low and that these applicants were overwhelmingly insiders connected to ICANN. In other words, name.space explicitly alleged that the number of potential

competitors—*i.e.* applicants—in the market was unlawfully restricted by ICANN's actions. The District Court, however, ignored name.space's allegations and made an unsupported factual determination. Reversal is therefore appropriate.

At heart, name.space is claiming injury due to ICANN's exclusionary conduct, which has suppressed 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 name.space presently does not—and cannot—compete in that market. (ER 24-25 at ¶¶ 32-34.)

C. The District Court Erroneously Determined That name.space's Lanham Act, Common Law Trademark Infringement and Common Law Unfair Competition Claims Are Not Ripe.

The District Court incorrectly relied on *Swedlow*, as well as the recent dismissal of *Image Online's* substantially different claims, to dismiss name.space's trademark claims under Section 43(a) of the Lanham Act, common law trademark infringement, and common law unfair competition. Because the Complaint specifically alleges actual and imminent infringement of name.space's trademark rights, name.space's claims are ripe and the District Court's dismissal of these claims should be reversed.

name.space alleges actual, not speculative, harm caused by ICANN's behavior: ICANN has accepted applications, along with $185,000 application fees, for 189 of the TLDs that are currently offered on the name.space network. (ER 36 at ¶ 88; ER 40-42 at ¶¶ 119-131.) The District Court'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 (2007) is therefore 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. *Swedlow*, 455 F.2d 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. However, name.space is not seeking relief under the Declaratory Judgment Act to guard against future infringement. name.space is seeking injunctive relief and monetary damages as a remedy for ICANN's already infringing acts. Regardless, ICANN's actions meet *Swedlow*'s "actual or imminent infringement" standard. *Id.* at 886. ICANN 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.

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." (ER 41 and 43 at ¶¶ 123 and 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 (N.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. 12CV1063-MMA (JMA), 2012 U.S. Dist. LEXIS 147528, at *3 (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."). While the future delegation of name.space's gTLDs to the Root would also be

actionable, that is not the basis of name.space's claims here, which a plain reading of the Complaint confirms. (ER 41, 43 and 46 at ¶¶ 123, 136 and 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.[6] 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.

The District Court's reliance on *Image Online* is similarly misplaced. *Image Online Design, Inc. v. Internet Corp. for Assigned Names & Nos.*, No. CV 12-08968 DDP (JCx), 2013 WL 489899 (C.D. Cal. Feb. 7, 2013) ("Image Online"). Image Online's trademark infringement claims differ materially from name.space's

[6] *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 Pharms. 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). In fact, name.space has now delegated the .nyc TLD—which has been operated by name.space continuously since 1997—to the New York City government and a contractor, Neustar, in violation of name.space's trademark rights. It is now even more abundantly clear that the two parties are on a collision course.

claims. Image Online acknowledged that its trademark claims were based on ICANN's future intention to delegate the .WEB registry to someone other than Image Online, stating that "it is 'plausible' that ICANN's intent will be realized." *Id.* at *5. It was on this basis that Judge Pregerson ruled that "[Image Online] has not alleged use of the trademark or 'immediate capability and intent' to infringe, and therefore [Image Online's] trademark infringement claim is not ripe for adjudication." *Id.* In other words, Image Online alleged that its trademark would be infringed only when the .WEB registry was delegated to someone other than Image Online, and sued based on ICANN's purported intent to accomplish that delegation in the future. By contrast, name.space's claims *do not require or depend on any future conduct*. name.space's trademark claims are based on ICANN's acceptance of substantial application fees in exchange for its "willingness to allow competing TLD registries to use the identical gTLDs in commerce on the ICANN-controlled DNS." (ER 41 at ¶ 123.) Whether ICANN ultimately grants a TLD application is irrelevant to the sufficiency of name.space's claims because name.space has alleged that the likelihood of confusion already exists right now. Nothing more needs to happen. As a result, name.space's claims are clearly ripe, and the District Court's dismissal of name.space's trademark and unfair competition claims should be reversed.

D. The District Court Erred in Dismissing name.space's Tortious Interference with Contract and Prospective Economic Advantage Claims.

1. Tortious Interference with Contract

The District Court erred in calling name.space's allegations concerning ICANN's knowledge of Plaintiff's relationships with clients "conclusory" and thus dismissing name.space's claim. In support of its tortious interference with contractual relations claims, name.space has alleged (1) its maintenance of 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 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. (ER 47-48 at ¶¶ 160-164.) name.space was not required to supplement its Complaint by adding the names of each of its customers, and a summary of the terms of those agreements—the information that name.space did plead put ICANN sufficiently on notice of the claims against it under California

law. *See Quelimane Co., Inc. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 55 (1998).[7]

A recent case in the Eastern District of California is instructive. In *Conte v. Jakks Pac., Inc.*, plaintiffs alleged patent infringement against the defendant doll company. 2012 U.S. Dist. LEXIS 174716. 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. 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

[7] 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).

network. (ER 47-48 at ¶ 162.) name.space has thus sufficiently pleaded a claim for tortious interference with contractual relations, and the District Court's dismissal should be reversed.

2. Tortious Interference with Prospective Economic Advantage

Likewise, name.space has alleged the required elements of a tortious interference with prospective economic advantage claim. Specifically, name.space has alleged that: (1) 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. (ER 48-49 at ¶¶ 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). name.space has sufficiently alleged multiple claims against ICANN, including antitrust violations, trademark infringement and unfair competition. Reversal is therefore appropriate because name.space has thus adequately pleaded a claim for tortious interference with

prospective economic advantage. *See Metal Lite, Inc. v. Brady Constr. Innovations, Inc.*, 558 F. Supp. 2d at 1095 (claim for tortious interference with prospective economic advantage adequately alleged where plaintiff also stated plausible claims for false advertising, trade libel and unfair competition).

E. The District Court Erred in Dismissing name.space's California Business and Professions Code Section 17200 Claims.

The District Court dismissed name.space's claims under California Business and Professions Code Section 17200 on the grounds that such claims rely "on the Complaint's claims for antitrust violations and trademark infringement to supply the required 'unlawful' business practices to state a claim." (ER 13.) Since name.space has alleged sufficient claims for ICANN's antitrust violations and trademark infringement, *supra*, the District Court's dismissal of name.space's Section 17200 claims should be reversed.

ICANN is subject to liability under California Business and Professions Code Section 17200 because ICANN 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*, 517 F.3d at 1152. Further, ICANN may also be held liable under Section 17200 because it violated name.space's rights under the Lanham Act. *See Cleary*, 30 F.3d at 1262-63 ("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 and reversal is therefore appropriate.

VIII. CONCLUSION

For the foregoing reasons, the District Court judgment should be reversed.

Dated: September 9, 2013

MORRISON & FOERSTER LLP

By: /s/ Michael B. Miller
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COMBINED CERTIFICATIONS

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby certify that I am not aware of any related cases that are currently pending before this Court.

WORD COUNT AND TYPEFACE CERTIFICATIONS

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify as follows:

1. This brief complies with the type volume limitation of Rule 32(a)(7)(B) because it contains 10,661 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

Dated: September 9, 2013

MORRISON & FOERSTER LLP

By: /s/ Michael B. Miller
Michael B. Miller
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NAME.SPACE, INC.

Circuit Rule 28-2.7

STATUTORY ADDENDUM

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STATUTORY ADDENDUM

15 U.S.C. § 1

TITLE 15. COMMERCE AND TRADE
CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

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STATUTORY ADDENDUM

15 U.S.C. § 2

TITLE 15. COMMERCE AND TRADE
CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

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15 USCS § 1125

TITLE 15. COMMERCE AND TRADE
CHAPTER 22. TRADEMARKS
GENERAL PROVISIONS

§ 1125. False designations of origin, false descriptions, and dilution forbidden

(a) Civil action.

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this Act for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

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Cal. Bus & Prof Code § 16720 (2013)

BUSINESS & PROFESSIONS CODE
Division 7. General Business Regulations
Part 2. Preservation and Regulation of Competition
Chapter 2. Combinations in Restraint of Trade
Article 2. Prohibited Restraints on Competition

§ 16720. What constitutes a trust

A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

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Cal. Bus & Prof Code § 17200 (2013)

BUSINESS & PROFESSIONS CODE
Division 7. General Business Regulations
Part 2. Preservation and Regulation of Competition
Chapter 5. Enforcement

§ 17200. Definition

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with *Section 17500) of Part 3 of Division 7 of the Business and Professions Code.*

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2013, I electronically filed the foregoing BRIEF OF APPELLANT NAME.SPACE, INC. and APPELLANT'S EXCERPTS OF RECORD with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Pursuant to Ninth Circuit Rule 31-1, paper copies of the foregoing BRIEF OF APPELLANT NAME.SPACE, INC. and APPELLANT'S EXCERPTS OF RECORD will be submitted to the Court at the direction of the Clerk of the Court.

Dated: September 9, 2013

/s/ Michael B. Miller
Michael B. Miller