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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

COALITION FOR ICANN TRANSPARENCY INC., a Delaware corporation, Plaintiff, v. VERISIGN, INC., a Delaware corporation; INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation, Defendants.	Case No. 5:05-CV-04826 (RMW) PVT REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERISIGN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6) Date: June 9, 2006 Time: 9:00 a.m. Crtrm: 6

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INTRODUCTION

In dismissing CFIT's original complaint, the Court gave CFIT a clear roadmap for how it might attempt to amend its complaint to correct its deficiencies, if correction were possible at all. Despite the clear admonitions in the Court's February 28, 2006 Order (the "Order"), the First Amended Complaint ("FAC") ignored them and CFIT's Opposition Memorandum ("Opposition") does likewise. The FAC does not correct the insufficiencies in CFIT's complaint that this Court already found to exist, and the Opposition fails to explain why the FAC ignored this Court's admonitions or how any further amendment to the complaint could cure its deficiencies. As a result, the FAC should be dismissed without leave to amend.

First, with respect to standing, the FAC fails to allege *any* facts sufficient to support the requirements for associational standing under *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333 (1977). Instead, CFIT's amendment to the complaint consisted of nothing more than a *pro forma* addition of the names of two CFIT members. Absent from the FAC is any allegation of how any CFIT members actually or imminently will be injured by the conduct alleged in the FAC; how any such injury arises in the relevant markets alleged in the FAC -- indeed, neither identified member participates in the pivotal Domain Name Registration Markets; how the association could have prudential standing to assert claims on behalf of myriad "Internet Stakeholders"; or even what business the identified member, Chambers, is in! Absent such essential allegations, CFIT's membership and the basis for its standing remains -- as this Court found was true with respect to the original complaint -- "shrouded in mystery." (Order at 14.)

Second, with respect to the Expiring Names Registration Services Market, the original complaint failed to allege that registered and unregistered domain names are not reasonably interchangeable. The Order held the complaint insufficient for this reason. (Order at 17.) Nonetheless, both the FAC and Opposition completely ignore the Court's admonition that such allegations are required to allege this market. Furthermore, the Opposition fails even to mention the two cases upon which the Court based its earlier decision, which directly reject CFIT's market definition and which the Court warned would "provide an additional bar to CFIT's Sherman Act claims." (*Id.* at 16.)

Equally fundamental, the FAC fails to allege predatory conduct, a necessary predicate to the antitrust claims. Instead, the real basis for CFIT's complaint is revealed in the first lines of the Opposition: CFIT believes that ICANN, the alleged regulator, is acting "[i]n contravention of its *mandate to create competition* in the domain name registration market." Such a "mandate," however, provides no basis for an antitrust or other claim. CFIT is not a third party beneficiary to the Memorandum of Understanding between ICANN and the Department of Commerce. Furthermore, antitrust law does not provide a basis for private plaintiffs to come to court merely to second guess alleged regulatory decisions by the Department of Commerce (which must approve the registry agreements) or ICANN, the alleged regulator it has chosen.

The FAC fails to cite a *single* antitrust or other case to support its claims that a price increase by VeriSign, an extension of the term of the registry agreements, or the supposed introduction of a new product in a market in which VeriSign does not now compete, could be an antitrust violation. Moreover, the Opposition fails to respond to, or even mention, the clear authorities cited in the Motion that establish that such price increases or new product introductions, even by an alleged monopolist, do *not* state an antitrust claim. CFIT also fails to cite a single case suggesting that the fact that an alleged regulator agreed to such actions changes in any way this analysis. To the contrary, the cases cited in the Motion firmly establish that such conduct by a non-competitor does not transform a price or product change into an antitrust violation.

This is CFIT's *second* attempt to state a valid claim for relief, with guidance from the Court. At this point, it is clear that CFIT has not and cannot state facts sufficient to support antitrust claims against VeriSign. CFIT's opposition has not proffered any basis on which its complaint could be amended further. Given CFIT's disregard for the Court's Order, and the lack of any indication further amendment would be fruitful, the FAC should be dismissed with prejudice.

ARGUMENT

I. CFIT'S FIRST AMENDED COMPLAINT FAILS TO ESTABLISH ASSOCIATIONAL STANDING TO PURSUE THIS ACTION

VeriSign's moving papers demonstrate that the FAC fails to establish CFIT's standing to bring this action. The opposition concedes CFIT does not have standing in its own right, but must

rely on the standing of its members. However, the FAC fails properly to allege the standing of its two identified members to satisfy the requirements for associational standing under *Hunt,* 432 U.S. at 343 (associational standing requires individual member standing, germaneness to the organization's purpose, and absence of participation of individual members in the suit). CFIT's opposition does nothing to address the standing defects in the FAC that are raised in VeriSign's moving papers, and identifies no facts that could be added in a further pleading to correct those defects. Accordingly, the FAC should be dismissed without leave to amend for lack of standing. *See Warth v. Seldin*, 422 U.S. 490, 501-502 (1975) (a trial court may require plaintiff to supply, by amendment to the complaint, "further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.").

A. The FAC Lacks Particularized Allegations of Injury to CFIT's Members

To establish individual member standing under *Hunt*, CFIT must allege concrete injury that is actual or imminent, not hypothetical, that has a causal connection to VeriSign's conduct, and that is likely to be redressed by a favorable decision. *San Diego Cnty Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). The injury must also be ripe for adjudication, not one resting on contingent future events. *Texas v. United States*, 523 U.S. 296, 300 (1998). The FAC's mere identification of two members of CFIT falls far short of these requirements. *See DM Research, Inc. v. Coll. of Am. Pathologists,* 170 F.3d 53, 55 (1st Cir. 1999) (in antitrust litigation, "the price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings") (italics in original).[1]

[1] CFIT now appears to be a coalition of two -- Pool.com and R. Lee Chambers. Both were part of prior, unsuccessful challenges to the same conduct alleged in this action. Although CFIT's Opposition claims that CFIT has identified in discovery other association members, that is untrue. None of the alleged members went through the membership process, nor were they identified. Instead, CFIT has produced a list of random and meaningless email addresses -- *e.g.*, mania_xx69@hotmail.com, fongholio@lapdancegonebad.com, suck@rule.org -- and, according to CFIT, it also does not know the identify of these non-members. What is increasingly clear is that, in fact, there is no "coalition," but rather a disguise so that two failed litigants in other cases may attempt to avoid a *res judicata* bar to their claims.

The FAC alleges no facts whatsover that might establish a ripe or concrete injury, or causation, as to either identified member of CFIT in any of the alleged markets, much less each alleged market, as required by case law. (FAC, ¶ 7; Mot. at 10.) As to Pool.com, the FAC alleges only that it is a back order service provider and that VeriSign's proposed Central Listing Service ("CLS") will exclude all back order service providers from the supposed "expired names" market. (FAC, ¶ 49, 110, 112.) There are *no* allegations of (1) any existing or concrete injury to Pool.com or any imminent future injury, (2) any causal connection between an alleged injury and the 2006 .com Agreement, or (3) any injury to Pool.com, or even participation by Pool.com in, the supposed "Domain Name Registration Market." (*Id.*; *see* Mot. at 8-10.) As to R. Lee Chambers Company, LLC, there are simply *no* non-boilerplate allegations (*e.g.*, FAC, ¶¶ 118, 126, 136, 143, 153, 162) of harm, or even participation, in any alleged markets. CFIT added no substantive allegations in response to this Court's order.

Although the Opposition argues standing, it never directs the Court to a single allegation of likely harm to its two identified members, Pool.com, Inc. and R. Lee Chambers Company, LLC. (Opp'n at 5.) CFIT does not point to any allegation supporting the standing of any other purported members. (*Id.*) Indeed, there is not even a suggestion in the FAC that either Pool.com or Chambers does any business at all in the "Domain Name Registration Market," much less that either has suffered injury in that market; as a result, there could not be standing to assert antitrust claims based on that market. (Mot. at 10).

B. The Claims Alleged in the FAC Do Not Satisfy the Germaneness Requirement

CFIT concedes the FAC contains *no* allegations pertaining to germaneness. (Opp'n at 5-6.) Rather, CFIT relies on the conclusory non-plead argument that VeriSign is "well aware that CFIT's purpose is to challenge the conduct alleged in the Complaint" based on information purportedly available on CFIT's website. (*Id.* at 5-6 & n. 4.) The FAC's sufficiency to satisfy standing requirements is determined by the facts alleged in the FAC, not by extrinsic materials neither referred to nor referenced in the FAC.

More importantly, CFIT does not dispute that germaneness cannot be satisfied where, as here, the association's requested relief provides a benefit to some of its members, but results in a clear

detriment to other purported members. (*See* Mot. at 10-11; Opp'n at 5-6.) CFIT's own authority on germaneness confirms that a conflict between members precludes associational standing. (Opp'n at 6 (citing *Appraisers Coalition v. Appraisal Inst.,* 845 F. Supp. 592, 600 (N.D. Ill. 1994)).) Nonetheless, CFIT does not deny the existence of a conflict of interest between its purported members. (Opp'n at 5-6.) Rather, CFIT tries only to minimize the issue by arguing that the germaneness test is "undemanding" and is easily satisfied because CFIT was organized solely for the purpose of bringing this suit. (*Id.*) As *Appraisers Coalition* makes clear, however, the germaneness requirement may be undemanding only in the *absence* of a conflict of interest. *Appraisers Coalition,* 845 F. Supp. at 600 (the germaneness requirement "has teeth" when a conflict of interest exists). Because the FAC necessarily admits the presence of serious conflicts between its purported members, assuming *arguendo* it has any members in reality, (*e.g.*, between registrars and registrants; registrars and back order providers; or among unspecified "Internet stakeholders") (Mot. at 11), CFIT fails the germaneness requirement for associational standing.

C. CFIT's Claims Will Require Participation of Individual Members

Antitrust claims similar to those asserted here require the participation of individual members to prove antitrust injury -- an inherently individualized question. *See Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n,* 830 F.2d 1374, 1381 (7th Cir. 1987); *Fin. & Sec. Prods. Ass'n v. Diebold, Inc.*, 2005 WL 1629813 at *3, n.3 (N.D. Cal. July 8, 2005) ("establishing antitrust injury involves complex questions of fact that will likely require proof from individual members"). (*See also* Mot. at 12 n.11.)

CFIT fails to respond to these authorities. Moreover, the FAC itself establishes that proof of CFIT's claims will require participation of individual members of the association. As demonstrated on the face of the FAC, the claims in this case are premised on allegations that members of the association will be put out of business by the CLS service and that other Internet stakeholders, such as registrars and registrants, will be injured by higher prices or other terms in the 2006 .com Agreement. Such allegations can only be proven individually, with facts concerning these parties's businesses or interests and the effect of the Agreement on them. CFIT offers no argument or allegation to the contrary, and fails to meet this element of the *Hunt* test. CFIT's only argument in

response to the established principle that associational standing cannot be established where individualized proof is required is the *non sequitur* that some cases have found that some forms of injunctive relief do not require participation by individual members. (Opp'n at 6). However, associations can have standing *only if neither* the *claim* nor the relief require individual participation. *Hunt,* 432 U.S. at 343. Here, the claims pled in the FAC on their face admit such proof will be required.

D. CFIT's Standing Does Not Satisfy Prudential Concerns

CFIT does not dispute the applicability of prudential requirements in determining whether it is the proper party to maintain this action. In fact, CFIT's opposition is completely silent on the issue and fails to address prudential standing at all.

Prudential standing requires an associational plaintiff to "assert an injury that is peculiar to . . . a distinct group of which [it] is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.'" *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979) (quoting *Warth*, 422 U.S. at 499). (*See also* Mot. at 12-13.) Here, CFIT purports to act on behalf of a broad and generalized group of "Internet stakeholders," "registrars, registrants, and back order service providers," with infinitely diverse, rather than unified, interests. (FAC, ¶¶ 7, 118) This is precisely the type of representation the prudential standing principles were intended to prevent. CFIT has no answer to the numerous problems created by purporting to litigate on behalf of such diverse interests (such as parties representing the interests of their customers or competitors, or seeking to protect individual competitors under the guise of an association). (*See* Mot. at 13.)

Because CFIT cannot satisfy either the Article III constitutional standing requirements embodied by the *Hunt* test, or prudential standing requirements, it is not the proper party to maintain this lawsuit and the FAC should be dismissed.

II. CFIT HAS NOT PLEADED VALID SHERMAN ACT CLAIMS

A. The Issues Raised by VeriSign are Appropriate for Consideration On a Rule 12(b)(6) Motion

CFIT argues that VeriSign's Motion to Dismiss raises "fact intensive" issues that "cannot be resolved at this stage of the case." (Opp'n at 3.) Plaintiff identifies a number of sections in

VeriSign's Motion that it claims create factual disputes. (*Id.* at 3 & n.2.) The language in VeriSign's papers cited by CFIT does not raise questions of fact; VeriSign is merely comparing plaintiff's allegations purporting to characterize provisions in the written 2006 .com and 2005 .net Agreements to the *actual* language of those same Agreements, thereby demonstrating that those allegations are squarely contradicted by the plain terms of the Agreements themselves. That does not create an issue of fact. Otherwise, a plaintiff could defeat a motion to dismiss by blatantly mischaracterizing the documents on which its claims are based.

For example, plaintiff argues that the 2006 .com Agreement "allows" the introduction of CLS services. (Opp'n at 9.) However, as VeriSign points out in its Motion, CLS is nowhere mentioned in, much less approved, mandated or expressly allowed by, the Agreement. (*See* Mot. at 21 & n.19.) Similarly, plaintiff contends that changes to the renewal terms in the registry agreements "all but eliminate[]" the potential for competitive bidding. (FAC at 103.) In fact, the concept of a re-bid should VeriSign propose a price increase above the maximum price provisions still exists in the proposed 2006 .com Agreement. (*See* Mot. at 20.)

While courts must accept as true all *properly pleaded* allegations in considering a motion under Rule 12(b)(6), consideration of the pleading does not end there. A court need not accept as true "conclusory allegations of law and unwarranted inferences." *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). Indeed, courts may "disregard" allegations contradicted by facts in the complaint and exhibits thereto and by facts judicially noticed. *Sumner Peck Ranch, Inc., v. Bureau of Reclamation*, 823 F. Supp. 715, 720 (E.D. Cal. 1993) (citing *Durning v First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987)) ("[T]he court may disregard allegations in the complaint if contradicted by facts established by exhibits attached to the complaint.").

Here, CFIT seeks to close essential holes in its FAC by suggesting that the Court ignore the plain terms of the agreements underlying its claims or, at the least, conclude there is a factual dispute warranting discovery. The Court should reject this invitation. *Oceanic Cal., Inc. v. City of San Jose*, 497 F. Supp. 962, 964 (N.D. Cal. 1980) ("[T]he court is not bound to ignore legally significant facts disfavorable to plaintiff which appear on the face of the complaint or which are proper subjects of judicial notice."). Accepting *all* of the allegations properly pleaded in the FAC as true, as well as the

facts set forth in the documents referenced in the FAC (of which the Court has been requested to take judicial notice), reveals CFIT's ongoing failure to plead either standing or a proper antitrust claim.

B. CFIT Still Does Not Allege Harm to Competition Flowing From Anticompetitive or Predatory Conduct

CFIT does not dispute that it must plead harm to competition caused by an act prohibited by the antitrust laws in order to survive a motion to dismiss. (*See, e.g.*, Opp'n at 10 (citing approvingly *Newman v. Universal Pictures*, 813 F.2d 1519, 122 (9th Cir. 1987) for this proposition).) Nonetheless, the FAC fails to plead any predatory or "prohibited acts," as the law requires. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985). Indeed, without the citation of a single case to support its argument that such conduct might violate the antitrust laws, the Opposition merely reiterates the FAC's erroneous premise that it is somehow actionable under the antitrust laws for VeriSign to increase its prices, to extend the term of the Registry Agreements, and/or to introduce new products in markets in which it does not now compete. (*See, e.g.*, Opp'n at 7-8.) Even if true, under well established authorities to which CFIT never responds, these allegations do not plead the requisite predatory conduct necessary to support an antitrust claim. *See, e.g., Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1193 (9th Cir. 1984) (conduct is "exclusionary" or "predatory" if "it makes sense only because it eliminates competition"); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (exclusionary conduct defined as conduct that "has no rational business purpose other than its adverse effect on competitors").

Relaxation of the Price Cap. Accepting CFIT's allegations as true, the FAC asserts that the proposed 2006 .com Agreement will replace the price cap in the existing .com Agreement with a cap that allows for certain increases in the maximum price over the term of the Agreement. The FAC does not allege that the existing price cap agreement is illegal. Nor does CFIT claim that the *reduction* in the price cap it seeks through this lawsuit would be an antitrust violation. In other words, it is not the price cap as a concept that CFIT alleges violates the antitrust laws, but rather the particular price cap set forth in the proposed 2006 .com Agreement. The FAC confirms this is CFIT's position: "VeriSign is now using its monopoly power to raise prices" under the new Agreements. (FAC ¶ 81.)

Putting aside that the new Agreement is not yet operative and no price changes have occurred or can occur without the approval of the Department of Commerce, the law is clear that an agreement between two non-competing parties to set a price cannot constitute an antitrust violation. (*See* Mot. at 19.) Were the law otherwise, antitrust claims potentially could reach nearly all pricing decisions, which, of course, almost always harm purchasers just as CFIT claims to be harmed here. The same legal and economic principles apply where one of the parties to the price agreement is an alleged monopolist. Alleging that a monopolist is charging a "high" or "supra-competitive" price is not sufficient to state an antitrust claim. (*See id.* at 18). CFIT neither responds to the clear authorities cited in the moving papers, nor cites any authority on this pivotal issue.[2]

Contract Renewal. CFIT's claims regarding what it alleges is a "perpetual" renewal provision in the proposed Agreement are derivative of its price claims, and are defective for the same reasons. Two non-competing parties may agree to the term of an agreement between them without fear of antitrust liability. *See, e.g. 49er Chevrolet Inc. v. Gen. Motors Corp.,* 803 F.2d 1463, 1468 (9th Cir. 1986). In addition, the decision to extend the tenure of an exclusive service provider cannot be a predatory act and has no anti-competitive effect where there would not otherwise be competition. (*See* Mot. at 20-21.) CFIT specifically alleges that "there can only be *one* registry operator at a time for each TLD registry" and "*there is no competition.*" (FAC ¶ 35 (emphasis added).) Thus, there can be no proper claim that the change in the term of an agreement has reduced competition. CFIT's Opposition totally ignores this points.

C. The "Expiring Names Registration Services Market" is Not a Relevant Market

In dismissing CFIT's first complaint, the Court provided explicit guidance to as to the kinds of allegations that are required to state a Sherman Act claim. Specifically, CFIT must allege a relevant product market consisting of "all 'commodities reasonably interchangeable by consumers for the same purpose.'" (Order at 15 (citing *United States v. E.I. de Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)).) Recognizing that the two cases to consider purported relevant markets based on

[2] At various points in its papers, CFIT argues that ICANN and the Department of Commerce have failed in the exercise of their regulatory or oversight roles (*see, e.g.,* FAC ¶¶ 85-87). But CFIT does not allege that it is a third-party beneficiary of ICANN's agreement with the Department of Commerce and, in any event, such allegations do not make out an antitrust claim.

subsets of domain names have rejected such alleged "markets" and the antitrust claims based on them, as a matter of law, the Court warned that these cases "provide an additional bar to CFIT's Sherman Act claims with respect to the Expiring Names Registration Services Market," even if CFIT were able to plead standing. (*Id.* at 16.) While "unlikely," the Court found it "theoretically possible" that CFIT's amended complaint could adequately allege this relevant market. (*Id.* at 17.) The Court admonished, however, that to state a claim, CFIT needed to make "detailed allegations tending to show that registered and unregistered domain names are not reasonably interchangeable." (*Id.*) Moreover, the sort of "conclusory statements" unsupported by factual allegations alleged in CFIT's original complaint would not be sufficient. (*Id.* at 16). Despite this chance for a "second bite at the apple," CFIT completely ignored the Court's admonitions: The FAC fails to set forth any factual allegations from which the Court might infer that expired, registered and never-registered domain names are "not reasonably interchangeable." All that CFIT offers is a conclusory assertion that the "Expiring Names Registration Services Market" that it posits is "competitive." (Opp'n at 11; FAC ¶¶ 49-50, 92-98, 108- 12.) Absent factual allegations of a relevant market in expired domain names, allegations regarding the existence of companies and competition relating to the acquisition of expired domain names are irrelevant to market definition.

Remarkably, CFIT does not even attempt to address the only two cases directly on point, cited by both VeriSign and the Court, which demonstrate that an "Expiring Names Registration Services Market" is not a legally cognizable relevant market. (Mot. at 14-16; Order at 15-17 (citing *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159 (N.D. Ala. 2001) and *Weber v. Nat'l Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000).) As the *Smith* court concluded "there is no inherent difference in character, for purposes of interchangeability and cross-elasticity of demand, between domain names that are 'expired' and [] those that are not." 135 F. Supp. 2d at 1169. Both courts concluded that, because the number of domain names is essentially limitless, there always will be reasonably available substitute domain names, and the relevant market therefore must be defined in terms of domain names in general. *Id.* at 1170; *Weber*, 112 F. Supp. 2d at 674. CFIT does not cite any cases that accept an alleged market of expiring domain names, or any domain name product market more narrow than domain names generally, and VeriSign is aware of none.

Further, CFIT's claim that VeriSign has previously argued the existence of the very markets that CFIT posits is simply wrong. (Opp'n at 12-13.) VeriSign has never argued that there is an "Expired Names Registration Services Market," and VeriSign's suit against ICANN provides no support for CFIT's alleged relevant markets. Instead, VeriSign's alleged relevant market included all registered domain names. (CFIT RFJN, Ex. A (FAC ¶ 106).)[3]

Where, as here, plaintiffs have failed to allege a proper relevant market, the corresponding antitrust claims should be dismissed. *See, e.g., Tanaka v. USC,* 252 F.3d 1059, 1063 (9th Cir. 2001). (*See also* Mot. at 16 & n.15.) Accordingly, Claims III-VI must be dismissed to the extent they rely on an "Expiring Names Registration Services Market."

III. THE FAC SHOULD BE DISMISSED WITH PREJUDICE

In dismissing CFIT's original complaint with leave to amend, the Court's order required that CFIT plead particularized facts with respect to both standing and aspects of the antitrust claims if it elected to amend its pleadings. (Order at 11-17.) Yet, in amending the complaint, CFIT chose to disregard the Court's direction. The FAC fails to set forth any particularized allegations of fact with respect to CFIT's members, or the specifics of any claims they may have, or the purported basis for the Expired Names Registration Services Market. Thus, the FAC suffers from the same fatal pleading deficiencies as the original complaint did, and it should likewise be dismissed.

CFIT requests an opportunity to amend its complaint a second time. (Opp'n at 16 & n.8.) It has made no showing, however, as to why it failed to correct its pleadings at the *first* opportunity, nor what it would now allege that it has not already alleged, notwithstanding this Court's prior guidance on these issues. CFIT also has failed to demonstrate how any additional amendments could cure the defects that it could not and did not cure when given the opportunity to do so. Where plaintiff has "presented no new facts . . . and [has] provided no satisfactory explanation for [its] failure to fully develop [its] contentions originally" its request for leave to amend is properly denied. *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990). *See also Warth*, 422 U.S. at 501-02 ("If, after this

[3] Nor in its complaint against ICANN did VeriSign allege a .com market; rather, the market alleged included all TLDs. (*Id.* at 120).) With respect to its market for the "operation of TLD registries," VeriSign specifically alleged that its .com revenues are a function of the desirability of .com "as compared with other TLDs." (*Id.* ¶¶ 120, 122.)

opportunity [to amend its standing allegations], the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed."); *Am. Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 859-60, 865 (E.D. Va. 1999) (dismissing antitrust claims without leave to amend for failure to properly allege relevant market, exclusionary conduct, or causal antitrust injury).

CFIT already has enjoyed two opportunities to state a claim. Two different law firms have tried to plead a cause of action. And, even in the face of a clear roadmap provided by the Court, CFIT still has not (and cannot) state sufficient facts to demonstrate standing or to support its claims for relief. There is no indication that a further amendment could render a different result, and every indication that such an amendment would prove futile. The FAC should be dismissed without leave to amend.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in VeriSign's moving papers, VeriSign respectfully requests that its Motion to Dismiss the First Amended Complaint be granted without further leave to amend.

DATED: May 26, 2006

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