Link to docs # 29 & 30

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-9514 PSG (JCGx)		Date	August 14, 2012
Title	Manwin Licensing International S.A.R.L., et al. v. ICM Registry, LLC, et al.			

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

Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

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

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

I.   Background

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

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[1] For purposes of these motions to dismiss, the Court accepts Plaintiff's allegations as true. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164

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Domain ("TLD"). *Id*. For example, in the domain name "YouPorn.com," the TLD is ".com." *Id*.

Most TLDs with three or more characters are referred to as generic TLDs. *FAC* ¶ 19. Generic TLDs can be sponsored or unsponsored. *FAC* ¶ 20. A sponsored, generic TLD is a specialized TLD that has a sponsor, usually an entity representing a narrower group or industry. *Id*. The sponsor makes policy decisions for the sponsored TLD. *Id*. For example, the sponsored TLD ".museum" is operated for the benefit of museums, museum associations, and museum professionals. *Id*. There are currently twenty-two generic TLDs, fourteen of which are sponsored TLDs. *FAC* ¶ 21.

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

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

In about 2000, Defendant ICM Registry, LLC ("ICM") first applied to ICANN for approval of a new .XXX TLD, intended primarily for adult content. *FAC* ¶ 34. ICANN rejected the application, finding there was no unmet need for the .XXX TLD and that some segments of the adult online content industry opposed establishing a .XXX TLD. *Id*. ICM applied for

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TLD. *Id.* ICM proposed an organization named the International Foundation for Online Responsibility ("International Foundation") as the sponsoring organization for the .XXX TLD. *FAC* ¶ 36. ICM claimed that the International Foundation represented a significant portion of the adult entertainment community. *Id.* However, the International Foundation was in fact created by ICM for the sole purpose of attempting to gain approval for the .XXX TLD and the International Foundation did not actually represent any significant portion of the adult entertainment community. *Id.* ICANN once again rejected the application for a .XXX TLD. *FAC* ¶ 37.

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

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

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

UNITED STATES DISTRICT COURT
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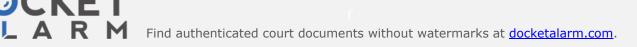| Case No.	CV 11-9514 PSG (JCGx)	Date	August 14, 2012
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in 2005 and could not then reconsider that decision. *Id.* In the proceedings, ICM again made false statements about the level of support for the .XXX TLD. *FAC* ¶ 45. A three member panel presided over the proceeding. *FAC* ¶ 46. The panel did not judge whether ICM had advanced misleading or fraudulent evidence of support for the .XXX TLD, nor did the panel consider antitrust or other competition issues related to the .XXX TLD. *Id.*

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

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

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

In November 2011, Plaintiffs Manwin Licensing International S.A.R.L. ("Manwin") and Digital Playground, Inc. ("Digital Playground") (collectively "Plaintiffs") filed this action against Defendants ICANN and ICM (collectively "Defendants"). Manwin owns and licenses

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world. *FAC* ¶ 4. Digital Playground is a leader in adult-oriented film making and interactive formats. *FAC* ¶ 5.

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

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

II.   Legal Standard

a.   Rule 12(b)(6)

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

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

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