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INTERNET CORPORATION FOR ASSIGNED
7 NAMES AND NUMBERS

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

10 VERISIGN, INC., a Delaware corporation,
11 Plaintiff,

12 v.

13 INTERNET CORPORATION FOR
14 ASSIGNED NAMES AND NUMBERS, a
California corporation; DOES 1-50,
15 Defendant.

16
17
18 and related cross-complaints.
19

CASE NO. BC320763

Assigned for all purposes to
Judge Rolf M. Treu

**DECLARATION OF SEAN W. JAQUEZ
SUBMITTED WITH REPLY TO
VERISIGN'S OPPOSITION TO ICANN'S
MOTION TO STAY LITIGATION
PENDING ARBITRATION**

Date: January 18, 2005
Time: 8:30 a.m.
Dept.: 58

Complaint filed: Aug. 27, 2004
ICANN Cross-Complaint filed: Nov. 12, 2004
VeriSign Cross-Complaint filed: Dec. 28, 2004

20
21 I, Sean W. Jaquez, declare:

22 1. I am an attorney licensed to practice law in the State of California with the law firm of
23 Jones Day, counsel of record for the Internet Corporation for Assigned Names and Numbers
24 ("ICANN"). I make this declaration in support of ICANN's Motion to Stay Litigation Pending
25 Arbitration.

26 2. Attached hereto as Exhibits A and B, respectively, are ICANN's Notice of Motion and
27 Motion to Dismiss Plaintiff's Amended First, Second, Third, Fourth, Fifth and Sixth Claims for
28 Relief Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and ICANN's Renewed

1 Special Motion to Strike VeriSign's Second, Third, Fourth, Fifth and Sixth Claims as Strategic
2 Lawsuits Against Public Participation, both of which were filed on July 6, 2004, in *VeriSign, Inc.*
3 v. *ICANN*, Case No. 2:04-CV-01292 AHM (CTx) (C.D. Cal).

4 3. Attached hereto as Exhibit C is Judge A. Howard Matz' Order in *VeriSign, Inc. v.*
5 *ICANN*, Case No. 2:04-CV-01292 AHM (CTx) (C.D. Cal), dated August 26, 2004.

6 I declare under penalty of perjury that the foregoing is true and correct. Executed
7 January 10, 2005, at Los Angeles, California.

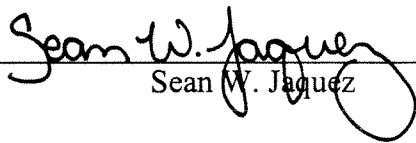
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12 Sean W. Jaquez
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EXHIBIT A

COPY

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VERISIGN, INC., a Delaware
corporation,

Plaintiff,

v.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,
a California corporation,

Defendant.

Case No. CV-04-1292 AHM (CTx)

**NOTICE OF MOTION AND
MOTION TO DISMISS
PLAINTIFF'S AMENDED
FIRST, SECOND, THIRD,
FOURTH, FIFTH, AND SIXTH
CLAIMS FOR RELIEF
PURSUANT TO RULE 12(B)(6)
OF THE FEDERAL RULES OF
CIVIL PROCEDURE;
MEMORANDUM OF POINTS
AND AUTHORITIES**

[Concurrently filed with Second
Supp. Request for Judicial Notice]

Date: August 23, 2004

Time: 10:00 a.m.

Honorable A. Howard Matz

1 PLEASE TAKE NOTICE that, on August 23, 2004, at 10:00 a.m. or as soon
2 thereafter as counsel may be heard at the courtroom of the Honorable A. Howard
3 Matz, United States District Judge, located at 312 North Spring Street,
4 Los Angeles, California, Defendant Internet Corporation for Assigned Names and
5 Numbers ("ICANN") will and hereby does move this Court, pursuant to
6 Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing
7 Plaintiff VeriSign, Inc.'s ("VeriSign") first claim for relief for violation of Section 1
8 of the Sherman Act, second claim for relief for injunctive relief for breach of
9 contract, third claim for relief for damages for breach of contract, fourth claim for
10 relief for interference with contractual relations, fifth claim for relief for specific
11 performance of contract and injunctive relief, and sixth claim for relief for damages
12 for breach of contract. None of these claims for relief states a claim upon which
13 relief may be granted.

14 This motion is made following the conference of counsel pursuant to Local
15 Rule 7-3, which took place on June 25, 2004. Counsel were unable to reach any
16 agreements that would obviate the need for the motion.

17 The motion is based upon this Notice of Motion and Motion, the
18 Memorandum of Points and Authorities attached hereto, the previously-filed and
19 concurrently-filed Requests for Judicial Notice, all the papers, pleadings, and
20 records on file herein, and on such other matters as may properly come before the
21 Court before or at the hearing.

22 Dated: July 6, 2004

JONES DAY

23
24 By: 

Jeffrey A. LeVee

25
26 Attorneys for Defendant
27 INTERNET CORPORATION FOR
28 ASSIGNED NAMES AND NUMBERS

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **INTRODUCTION**

3 VeriSign's original complaint was dismissed by this Court on May 18, 2004,
4 with leave to amend. VeriSign has now filed its first amended complaint ("FAC"),
5 and while the FAC is almost twice as long, most of the length reflects redundancy,
6 not added substance. VeriSign does not agree with ICANN's interpretation of
7 certain provisions of the agreement between the parties. With the FAC, what is
8 common knowledge in the ICANN community now becomes even obvious to the
9 Court: VeriSign does not agree with the way ICANN is structured or operates, and
10 quite frankly is unhappy that ICANN even exists. The fact that this collection of
11 technical experts, government representatives, non-profit organizations, and yes,
12 existing and potential competitors has *any* influence over VeriSign's commercial
13 exploitation of its stewardship over the two important domain name registries that it
14 operates is no doubt a constant source of annoyance and frustration to VeriSign.
15 But none of this corporate angst gives rise to an antitrust theory of liability.

16 The FAC has not cured the deficiencies of the original complaint. Despite
17 the Court's express instruction that it had to plead capture or control of ICANN by
18 its competitors in order to state a claim, VeriSign has not done so. Instead, what
19 VeriSign has done is stretched to find someone -- anyone -- that it could name to
20 meet this Court's instructions, but after all that effort, the best it can do is attempt to
21 allege capture of certain ICANN *subsidiary* entities, and it fails even in that
22 insufficient effort. Collaborative and collective action by all interested parties,
23 including competitors, is the very essence of ICANN's work as a consensus based
24 organization. But that fact does not mean, as VeriSign essentially alleges, that
25 every action ICANN takes amounts to an illegal conspiracy. The days are long past
26 when a simple allegation that competitor participation in a standards setting
27 organization would suffice to support a Section 1 complaint.
28

1 VeriSign actually alleges three different conspiracies: one among a group of
2 six registrar operators with respect to WLS, another involving a different set of
3 entities and individuals in the case of its wildcard technology, and still a third set of
4 alleged "co-conspirators" -- the Chinese and Taiwanese country code TLD
5 operators -- with respect to IDNs. This theory of shifting, transient "conspiracies"
6 is fundamentally at odds with the very notion of capture. Instead, what the FAC
7 demonstrates is the participation of multiple parties in the ICANN decisionmaking
8 process -- evidence of openness and collaboration, not conspiracy.

9 What VeriSign totally -- and fatally -- fails to allege in this long-winded
10 complaint is that the ICANN Board of Directors -- the only body that has the
11 authority to make decisions for ICANN -- has been captured or is controlled by any
12 or all of these various "conspirators." Indeed, the fact that ICANN has been *sued*
13 by some of these very same "co-conspirators" (because ICANN has sided with
14 *VeriSign* on WLS) is compelling proof that these alleged "co-conspirators" do not
15 control ICANN.¹ Because VeriSign has completely failed to allege the necessary
16 elements of a Section 1 violation, and obviously cannot honestly do so, the FAC
17 should be dismissed, this time with prejudice.

18 As to the non-antitrust claims, VeriSign's contract and tort claims are largely
19 unchanged from the original complaint and still fail to state viable causes of action.²
20 VeriSign's breach of contract claims rest on: (a) the assertion by ICANN of its
21 interpretation of the contract, and (b) ICANN's stated intention to use the dispute

22 ¹ See FAC ¶¶ 39-46; Request for Judicial Notice ("RJN") Ex. A (Judge
23 Walter's order, dated November 10, 2003, denying plaintiffs' motion for
24 preliminary injunction in the litigation styled *Dotster, Inc. et al. v. ICANN*, Case
25 No. CV 03-5045 JFW (MANx.), in which Dotster, GoDaddy, and eNom were
26 plaintiffs) ("Dotster Order")); RJN Ex. K (lawsuit filed by Pool.com against
ICANN in Ontario, Canada, styled *Pool.com v. ICANN*, in which Pool.com
complains about ICANN's actions to permit WLS ("Pool.com Statement of
Claim")).

27 ² Accordingly, ICANN does not repeat here its summary of VeriSign's
28 allegations or the citations therein to documents that may be properly judicially
noticed by this Court. See ICANN's original Motion to Dismiss ("Orig. MTD") at
2:8-7:14, incorporated herein by reference.

1 resolution mechanism of the contract if necessary. Such actions cannot amount to a
2 breach of contract. The only new assertion in this context is that ICANN is in
3 "anticipatory breach" of the contract because it allegedly conditioned performance
4 of its contract obligations on VeriSign's compliance with ICANN's interpretation.
5 But VeriSign has failed to identify a *single obligation* that ICANN refused to
6 perform (or even threatened to refuse to perform). The FAC alleges merely
7 ICANN's continued disagreement with VeriSign's interpretation of various contract
8 provisions. And VeriSign's tort claim continues to be barred by the litigation
9 privilege.

10 ARGUMENT

11 I. VERISIGN'S FIRST CAUSE OF ACTION STILL FAILS TO 12 STATE A SHERMAN ACT SECTION 1 CLAIM.

13 Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or
14 conspiracy, in restraint of trade." 15 U.S.C. § 1 (2004). To allege a Section 1
15 violation, VeriSign must allege: "(1) an agreement or conspiracy among two or
16 more persons or distinct business entities; (2) by which the persons or entities
17 intend to harm or restrain competition; and (3) which actually injures competition."
18 *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir.
19 1989); *Kingray, Inc. v. Nat'l Basketball Ass'n*, 188 F. Supp. 2d 1177, 1187, 1196-
20 1197 (S.D. Cal. 2002) (dismissing complaint for failure to adequately allege
21 conspiracy, intent to harm competition, and actual harm to competition). The
22 plaintiff must plead facts to support each element of the claim. Court's Order
23 dismissing complaint, May 18, 2004 ("Order"), 5:24-6:1 (citing Von Kalinowski,
24 Sullivan & McGuirl, *Antitrust Law and Trade Regulation* § 164.01 (Matthew
25 Bender 2002)). "The pleader may not evade these requirements by merely alleging
26 a bare legal conclusion." Order, 6:1-5 (citing *Rutman Wine Co. v. E. & J. Gallo*
27 *Winery*, 829 F.2d 729, 736 (9th Cir. 1987)).

1 VeriSign's FAC includes details that were not found in its original complaint,
2 but none of the details cures the flaws that caused this Court to dismiss the original
3 complaint. What VeriSign has done in the FAC may well have been cathartic,
4 since it recites a long list of events where it believes it was treated unfairly, and it
5 names the names of some of the persons or entities that it holds responsible for this
6 unfair treatment, but it is clearly insufficient to state a claim under Section 1. Once
7 the irrelevant hyperbole and conclusory allegations are distilled, all that is alleged is
8 that these persons or entities hold views different than VeriSign's and conveyed
9 them to ICANN for its consideration. Most are not competitors of VeriSign, and
10 some are not even competitors in the Internet space at all. And most importantly,
11 *none* of them sat on the ICANN Board, the only decisional entity within ICANN, at
12 any time relevant to these complaints.

13 In essence, VeriSign has alleged that those holding opposing views have
14 prevailed in some ICANN advisory bodies over VeriSign's preferred position, and
15 as a result those bodies have made recommendations that were not consistent with
16 VeriSign's interests. But none of those bodies has the right to bind ICANN; none
17 has the ability to make decisions for ICANN; and none is even alleged to have
18 taken control of the only decisional entity within ICANN, its Board of Directors.

19 **A. VeriSign Lacks Antitrust Standing.**

20 VeriSign has not cured the antitrust standing deficiencies of its original
21 complaint. As the Court stated in its Order dismissing that complaint, "[p]laintiffs
22 must prove antitrust injury, which is to say injury of the type the antitrust laws were
23 intended to prevent and that flows from that which makes defendants' acts
24 unlawful. The injury should reflect the anticompetitive effect either of the violation
25 or of anticompetitive acts made possible by the violation." Order, 6:6-15 (citing
26 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). These
27 requirements are referred to as "antitrust standing." Order, 6:16-17 (citing, *e.g.*,
28 *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001)). There is no

1 antitrust violation "[i]f the injury flows from aspects of the defendant's conduct that
2 are beneficial or neutral to competition [A]n act is deemed *anticompetitive* . . .
3 only when it harms both allocative efficiency *and* raises the prices of goods above
4 competitive levels or diminishes their quality." Order, 6:17-23 (citing *Rebel Oil*
5 *Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995), *cert. denied*, 516 U.S.
6 987 (1995) (emphasis in original)).

7 In dismissing VeriSign's original antitrust claim, the Court found that
8 "VeriSign has not alleged anything more than injury to its own business and,
9 therefore, does not have antitrust standing." Order, 13:3-4. Instead of alleging
10 injury to competition that would support antitrust standing, the Court found that
11 "the crux of VeriSign's injury is that it is being placed at a 'competitive
12 disadvantage' *vis-à-vis* other TLDs since ICANN prevents, delays, or restricts
13 VeriSign's ability to make new services its competitors offer from being made
14 available to customers in the .com gTLD it operates." Order, 12:15-19.

15 VeriSign's FAC does not cure this flaw. VeriSign now attempts to
16 demonstrate antitrust standing by alleging injury to competition in four "relevant
17 product markets," instead of just one. FAC ¶¶ 106, 120, 140 169. But in each of
18 the alleged product markets, the claimed injury remains injury to VeriSign alone,
19 not injury to competition as required by *Brunswick*, its progeny, and this Court's
20 Order. *See, e.g.*, FAC ¶¶ 124, 154, 174. VeriSign's allegations regarding the three
21 newly alleged product markets also fall short because these alleged "markets" are
22 not appropriately defined for antitrust purposes. *See Tanaka v. Univ. of Southern*
23 *California*, 252 F.3d 1059, 1063-64 (9th Cir. 2001) (failure to appropriately define
24 a relevant product market is a proper ground for dismissing a Sherman Act claim);
25 *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 144, 146 (9th
26 Cir. 1989) (plaintiff bears burden of demonstrating market for antitrust purposes;
27 threshold requirement is properly raised at any stage of litigation).³

28 ³ VeriSign's repeated allegations of injury to itself instead of injury to
competition, along with its newly-alleged and implausible market definitions,

1 **1. There Is No Harm to Competition In The Alleged Market**
2 **For The Operation Of TLD Registries.**

3 VeriSign continues to allege that the "operation of TLD registries"
4 constitutes a relevant product market. FAC ¶¶ 120, 148, 173. VeriSign also
5 continues to allege that many of its competitors offer (or plan to offer) similar or
6 competitive services in this market. *Compare* Compl. ¶¶ 77-78 with FAC ¶¶ 77-78.
7 And VeriSign continues to allege that the reason its new services are important is to
8 enable *VeriSign* "to compete more effectively with operators of competitive gTLD
9 and ccTLD registries that are offering or intend to offer a similar service" by
10 making "the registration of domain names within the .com gTLD more desirable
11 and attractive." *Compare* Compl. ¶¶ 32, 69 with FAC ¶¶ 31, 69.

12 These allegations do not constitute injury to competition, as the Court already
13 has ruled. Order, 12:22-28; *see Les Shockley Racing*, 884 F.2d at 508-09;
14 *McGlinchy*, 845 F.2d at 811-12 (it is "injury to the market or to competition in
15 general, not merely injury to individuals or individual firms that" is significant);
16 *Rutman Wine Co.*, 829 F.2d at 734-35. There are over 250 competing TLDs
17 registries. FAC ¶¶ 11, 19. VeriSign cannot allege that the limitations it asserts
18 have meaningfully impaired competition in a market for the "operation of TLD
19 registries."

20
21

(continued...)

22 reveal not only that VeriSign lacks antitrust standing but also that there is no
23 anticompetitive effect in any proposed relevant market -- a necessary element of
24 any Section 1 claim. *See Tanaka*, 252 F.3d at 1064; *McGlinchy v. Shell Chem.*
25 *Co.*, 845 F.2d 802, 812-13 (9th Cir. 1988). Oddly, VeriSign alleges that ICANN
26 has "market power" in certain unspecified relevant markets (FAC ¶ 89), but ICANN
27 does not (and cannot under its Bylaws) operate either a registry or a registrar.
28 VeriSign does not allege that ICANN is a participant in any of the alleged relevant
product markets (and ICANN is not). One can speculate that VeriSign means that
ICANN's decisions can affect competition in some markets, but even if this is the
case, it is not the same thing as "market power," which must at a minimum rest on
actual participation in those markets. *See, e.g., Rebel Oil Co., Inc.*, 51 F.3d at 1434,
1444 (market power may be shown in two ways, both of which require participation
in the relevant market).

1 2. **There Is No Harm To Competition In Any Of VeriSign's**
2 **Newly Alleged Relevant Product "Markets."**

3 In an obvious attempt to cure this deficiency, VeriSign alleges a number of
4 new proposed product markets, but there has been no injury to *competition* in any
5 of these "markets" either. Moreover, these new markets, some of which are
6 inconsistent with VeriSign's original alleged market, some of which are implausible
7 on their face, and some of which VeriSign has argued against in other related
8 litigation, are not appropriately defined for antitrust purposes.

9 **The "Secondary Domain Name Market."** With respect to VeriSign's
10 "WLS" allegations regarding expired (or soon-to-be expired domain names),
11 VeriSign alleges a relevant product market "for the provision of services for the
12 secondary domain name market, including the provision of domain name
13 'backorder' and similar services." FAC ¶ 106. The secondary domain name market,
14 VeriSign alleges, "includes the market for registered (or existing) domain names,
15 including various forms of direct sales and auctions," but apparently does *not*
16 include unregistered domain names. *Id.*

17 Even if a "secondary domain names" market was plausible, to allege antitrust
18 injury in the alleged relevant market, VeriSign must allege that ICANN's conduct
19 caused "harm[] to both allocative efficiency *and* raise[d] the prices of goods above
20 competitive levels or diminishe[d] their quality." Order, 6:17-23 (citing *Rebel Oil*
21 *Co.*, 51 F.3d at 1433 (emphasis in original)). VeriSign has made no *factual*
22 allegations as to how the unavailability of WLS as proposed by VeriSign has either
23 raised the prices of existing services above competitive levels (perhaps because
24 some of the companies do not charge for their services) or diminished the quality
25 (as opposed to the efficiency) of existing services.

26 VeriSign itself has acknowledged in other litigation that registered and
27 unregistered domain names cannot be placed in separate markets.⁴ For example, in

28 ⁴ Under the doctrine of judicial estoppel, VeriSign is precluded from arguing
differently in this litigation. The doctrine of judicial estoppel prevents VeriSign

1 *Syncalot, et al. v. VeriSign, et al.*, VeriSign moved to dismiss plaintiff's Section 2
2 claim against VeriSign, arguing:

3 a market for 'unregistered domain names' in the .com and .net TLDs *is*
4 *implausible as a matter of law* because Plaintiffs' market definition fails
5 to include domain names in other TLDs or registered domain names,
6 both of which are reasonably interchangeable with unregistered domain
7 names.

8 RJN Ex. G (VeriSign's Syncalot Motion), 6:12-16 (emphasis added).

9 In addition, in pending litigation against VeriSign and ICANN before Judge
10 Collins, in which the plaintiffs have moved for injunctive relief to *stop* WLS,
11 VeriSign argued in its motion to dismiss the antitrust claim that WLS does *not*
12 involve a distinct market from the services for the registration of domain names:

13 Plaintiffs assert that "WLS subscriptions and domain name services are
14 separate, distinct services." . . . However, they do not plead facts to
15 show whether *consumers* of "back order" services for currently-
16 registered domain names, such as those Plaintiffs offer, consider the
17 "back order" request to be a different service from the resulting domain
18 name registration.

19 RJN Ex. M (VeriSign's RegisterSite Motion to Dismiss) at 21:10-17.

20 Finally, various courts have rejected VeriSign's alleged market definition. In
21 *Weber v. National Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000), the
22 court dismissed plaintiffs' complaint after finding that *all* domain names must be
23 viewed as the relevant product market for Section 1 or Section 2 analysis. *Id.* at
24 674. In reaching this conclusion, the court stated that one must look to
25

26 (continued...)

27 from "playing fast and loose with the courts" by first asserting one position and
28 then seeking to gain a new-found advantage by asserting an inconsistent position.
Helfand v. Gerson, 105 F.3d 530, 534 (9th Cir. 1997).

1 "commodities reasonably interchangeable by consumers for the same purposes" to
2 frame the correct market. *Id.* (quoting *United States v. E.I. du Pont de Nemours &*
3 *Co.*, 351 U.S. 377, 395 (1956)).

4 The court in *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159 (N.D.
5 Ala. 2001), also concluded that all domain names are interchangeable. In *Smith*, the
6 plaintiff alleged that expired domain names constituted the relevant market for
7 purposes of his Section 2 claim against NSI and VeriSign. The court instead ruled
8 the relevant market consists of *all* domain names. *Id.* at 1169-70. The court's
9 rationale was based on many factors, including recognition of the fact that there is
10 value inherent in every domain name. *Id.* The court found that, to the consumer,
11 there are "essentially unlimited" variations of "reasonable substitute[s]" for a
12 specific domain name. *Id.* at 1170. This shows the cross-elasticity of demand
13 among *all* domain names and requires them all to be viewed together for antitrust
14 analysis purposes. *Id.*

15 **The "Web Address Directory Assistance Services Market."** With respect
16 to its wildcard (*i.e.*, Site Finder) allegations, VeriSign proposes a separate relevant
17 product market "for the provision of Web address directory assistance services."
18 FAC ¶ 140. But VeriSign admits that there is significant competition in this
19 purported "market" (FAC ¶¶ 143, 144, 146), and VeriSign does not attempt to
20 allege how the absence of any incremental "competition" from VeriSign is injuring
21 consumers. In fact, if this is a market, it is obvious that it is already extremely
22 competitive *without* the participation of VeriSign, since it would include
23 google.com, yahoo.com and numerous other "Web address directory assistance
24 services." VeriSign argued as much in its motion to dismiss plaintiffs' Section 2
25 claim in the *Syncalot* matter:

26 Plaintiffs' final alleged relevant market is the market for "services of
27 assistance in locating web-sites where the exact domain name is not
28 known." FASC, ¶ 53. This alleged market is obviously contrived to fit

1 Site Finder and completely ignores the required standard of reasonable
2 interchangeability. The relevant market consists of "products that are in
3 competition with each other." *Intergraph Corp. v. Intel Corp.*, 195 F.3d
4 1346, 1355 (Fed. Cir. 1999). Here, Plaintiffs do not describe the
5 products that would be included within this purported market, and
6 ignore obvious substitute products, such as web search engines and
7 other Internet resources.

8 RJN, Ex. G (VeriSign's Syncalot Motion) at 6:24-7:2.

9 Thus, any limitation on VeriSign's participation in this "market" could not
10 possibly amount to an injury to competition. *See McDaniel v. Appraisal Inst.*, 117
11 F.3d 421, 423 (9th Cir. 1997) (competition not harmed by plaintiff's competitive
12 disadvantage relative to market's many competitors). In addition, VeriSign does
13 not allege that any of the "SiteFinder co-conspirators" is an actual competitor with
14 VeriSign in the relevant market. FAC ¶ 141. In order to state a Section 1 claim,
15 one or more of the conspirators must be alleged to participate in the relevant market
16 with the plaintiff. *See Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1376 (9th
17 Cir. 1996) ("The requirement that the alleged injury be related to anti-competitive
18 behavior requires, as a corollary, that the injured party be a participant in the same
19 market as the alleged malefactors."); *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467,
20 1470 (9th Cir. 1985).

21 **The "IDN market."** VeriSign also alleges that Internationalized Domain
22 Names or "IDNs" constitute a separate relevant product market. FAC ¶ 169. But,
23 VeriSign has not even attempted to allege harm to *competition* in this purported
24 relevant market. VeriSign alleges only that "VeriSign's IDN service was a small
25 fraction of the price charged by CNNIC prior to VeriSign's entry into the market."
26 FAC ¶ 179. But VeriSign does not make any allegations regarding efficiency, and
27 with respect to quality, VeriSign alleges only that its IDN product is "superior" to
28

1 one of the products available to consumers. FAC ¶ 179. These allegations are
2 insufficient to support antitrust injury.

3 * * * * *

4 As with its original complaint, VeriSign's "very theory of damage" in its
5 FAC "depends on and arises out of the fact that it has vigorous competitors who
6 will be able to compete more vigorously." Order, 12:20-21. Because VeriSign's
7 FAC continues "to be based on the unstated assumption that ICANN has a duty to
8 help it compete more effectively" (Order, 13:1-4), VeriSign lacks antitrust standing.

9 **B. VeriSign Does Not Allege That ICANN's Board or**
10 **Decisionmaking Has Been Captured.**

11 Having failed in its original attempt to plead an antitrust claim based on a
12 conspiracy by ICANN's "members" (in part because ICANN does not have
13 "members"), VeriSign now attempts to meet the standards set forth in this Court's
14 Order by alleging that certain of VeriSign's competitors have "captured" various
15 ICANN subsidiaries so as to compel ICANN to take actions that injure VeriSign.
16 But the conspiracy claim remains deficient.

17 First, and most significantly, VeriSign has alleged "capture" of the wrong
18 entities. As the Court already has ruled, to plead that a standard-setting
19 organization engaged in a conspiracy in violation of Section 1, VeriSign must
20 allege capture of ICANN's decisionmaking process. Order, 9:8-10; *see also Barry*
21 *v. Blue Cross of Cal.*, 805 F.2d 866, 869 (9th Cir. 1986) (plaintiff must show
22 capture of the entity with "final authority" over organization's decisions);
23 *Pennsylvania Dental Ass'n v. Med. Service Ass'n of Pa.*, 745 F.2d 248, 258 (3rd
24 Cir. 1984) (must show capture of entity with "ultimate responsibility" for
25 decisions); *Podiatrist Ass'n, Inc. v. La Cruz Azul De Puerto Rico, Inc.*, 332 F.3d 6,
26 16 (1st Cir. 2003) (no capture where competitors participated on committees but
27 "boards retained the ultimate say."). Since only the ICANN Board is responsible
28 for decisionmaking, VeriSign must allege "capture" of the Board. But VeriSign

1 obviously cannot honestly make any such allegation. It tries to obscure this
2 inability by alleging "capture" of a handful of subsidiary entities that have merely
3 advisory roles in the ICANN process. FAC ¶ 88 (certain members of ICANN's
4 "constituent groups and supporting organizations...combined and conspired to
5 restrain trade with respect to the WLS, SiteFinder service and IDN service.").

6 With respect to these subsidiary entities, VeriSign sees conspiracies
7 everywhere it turns. Indeed, from the FAC, it would appear that *all* of ICANN's
8 decisions that affect VeriSign are the result of anticompetitive conspiracies. What
9 VeriSign is actually alleging is that ICANN is what used to be called a "walking
10 conspiracy" -- an entity that, merely because it takes input from any interested
11 industry participant, was argued to be unable to act without constituting a
12 "conspiracy" in violation of the antitrust laws. However, the mere fact that ICANN
13 solicits and considers advice and recommendations from a wide range of participants
14 through a variety of subsidiary entities -- and those participants may include
15 VeriSign competitors -- is not an antitrust violation. This form of "violation by
16 association" was discarded by the courts years ago as impermissibly speculative
17 and conclusory, and it is insufficient here as well. *See Consolidated Metal Prods.,*
18 *Inc., v. American Petroleum Inst.*, 846 F.2d 284, 293-294 (5th Cir. 1988). ICANN,
19 by its very nature, involves collective, collaborative action by all interested parties
20 including some that may be competitors of each other and, yes, even VeriSign.
21 That is the very reason for its existence. "Nonetheless, [ICANN] is not by its
22 nature a 'walking conspiracy,' its every denial of some benefit amounting to an
23 unreasonable restraint of trade." *Id.*

24 It is only when a group of participants captures the organization's
25 decisionmaking to the exclusion of the views of others, with resulting harm to
26 competition, that antitrust laws may be violated. Thus, to plead a Section 1 claim,
27 VeriSign must allege that its competitors controlled -- not merely participated in --
28 the decisionmaking process. VeriSign has not alleged -- and obviously cannot

1 allege -- control of the ICANN Board or the specific decisions at issue here.
2 Moreover, it does not allege that it was in any way excluded from the
3 decisionmaking process, but merely that its views did not prevail.

4 Second, even the "capture" allegations that VeriSign does make -- though
5 irrelevant -- are inadequate because there are no facts alleged regarding the
6 particular role played by any of the alleged conspirators in the decisionmaking
7 process. *See Les Shockley Racing*, 884 F.2d at 508 (plaintiff "must, at a minimum,
8 sketch the outline of the antitrust violation with allegations of supporting factual
9 detail"); *Kingray*, 188 F. Supp. 2d at 1186 ("essential elements of a private antitrust
10 claim must be alleged in more than vague and conclusory terms"). While VeriSign
11 identifies certain alleged competitors for the three services that are the subject of its
12 Section 1 claim, VeriSign provides no detail concerning the role of those persons or
13 entities within the subsidiary organizations which they are alleged to "control." Nor
14 does it allege or provide any factual allegations concerning the role or actions of the
15 alleged "co-conspirators" in ICANN's decisionmaking process. Thus, even if the
16 capture of ICANN's subsidiary entities were sufficient to plead a Section 1 claim,
17 VeriSign's complaint would still be completely inadequate.

18 **WLS Allegations.** In the case of the WLS -- for which VeriSign provides
19 the most (but still inadequate) detail -- VeriSign identifies six members of ICANN's
20 Registrar Constituency that allegedly combined and conspired to "delay and impose
21 anti-competitive conditions" on WLS: GoDaddy Software; Alice's Registry; eNom;
22 Dotster; Pool.com, and TuCows. FAC ¶ 90. But there is no allegation that these
23 entities "captured" the Board, the entity that VeriSign admits was responsible for
24 making the decision regarding WLS. FAC ¶ 104. In fact, VeriSign provides no
25 facts at all concerning the role or conduct of *those particular entities* in the WLS
26 decisionmaking process. According to the FAC, the *Registrar Constituency* issued
27 a position paper; the *Board* initiated a Consensus Review Process; the *DNSO*
28 appointed a Task Force; the *Task Force* issued a report; and the *Board* made a

1 decision. FAC ¶ 104. This is the sum and substance of the FAC allegations. There
2 are no details concerning the specific involvement of the alleged "co-conspirators"
3 in these events and, apart from the fact that the "co-conspirators" are members of
4 the Registrar Constituency, there is no factual detail concerning the relationship of
5 the alleged co-conspirators to any of the other groups involved in the
6 decisionmaking process.

7 The FAC contains the bare legal conclusion that the Registrar Constituency,
8 the DNSO and the Task Force were "captured and controlled" by the alleged co-
9 conspirators. Even if the capture of subsidiary entities was sufficient, which it is
10 not, there are no facts to support an inference that any of the six alleged
11 conspirators ever made contact with, much less exerted influence over, any of those
12 groups, and no allegation (much less any supporting facts) that these groups
13 controlled or even influenced the ICANN Board decision.

14 VeriSign does allege that, pursuant to ICANN's Bylaws, the Board "was
15 bound to accept the DNSO's recommendations," but this allegation is demonstrably
16 false: the bylaws in effect at the time make clear that the Board had the final
17 authority to accept or reject a recommendation from its supporting organizations
18 and advisory committees. RJN Ex. L (Feb. 12, 2002 Bylaws) Art. VI § 2(b) ("The
19 Supporting Organizations shall serve as advisory bodies to the Board."); *id.* at
20 § 2(e) ("No recommendation of a Supporting Organization shall be adopted unless
21 the votes in favor of adoption would be sufficient for adoption by the Board without
22 taking account of either the Directors selected by the Supporting Organizations or
23 their votes."); *id.* at § 2(g) ("Nothing in this Section 2 is intended to limit the
24 powers of the Board or the Corporation . . ."). Indeed, the most compelling
25 evidence that the Board was not controlled by these groups is the fact that the Board
26 *rejected* the recommendation of the DNSO that ICANN not permit WLS to
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1 proceed, which was quickly followed by many of the alleged "co-conspirators"
2 filing lawsuits against ICANN trying to stop WLS!⁵

3 Since the FAC does not allege that the ICANN Board was captured or
4 controlled by the alleged conspirators, VeriSign's WLS conspiracy claim fails. *See*
5 *e.g., Barry*, 805 F.2d at 869 (plaintiff must show capture of the entity with "final
6 authority" over organization's decisions)

7 **Wildcard Allegations.** The allegations concerning VeriSign's wildcard
8 product (which it calls Site Finder) and IDNs are even thinner than those
9 concerning the WLS. In the case of the wildcard product, VeriSign identifies four
10 alleged co-conspirators -- Afilias, Alice's Registry, Paul Vixie, and Steve Crocker --
11 which it asserts are all members of ICANN's Security and Stability Advisory
12 Committee ("SSAC"). FAC ¶ 128. But SSAC, as its name makes clear, is simply a
13 body of volunteer technical experts that gives advice to ICANN and its Board.
14 Apart from listing their names, VeriSign provides no supporting facts from which
15 one could infer that these individuals and entities did anything more than state their
16 views or opinions about the VeriSign wildcard, which is exactly what they are
17 *supposed* to do.

18 VeriSign offers no allegations as to how these individuals and entities
19 controlled or captured ICANN or its decisionmaking processes. VeriSign points
20 only to a September 22, 2003 message from SSAC to the ICANN Board in which
21 SSAC recommended that VeriSign suspend its wildcard service.⁶ FAC ¶¶ 134-135.
22 The remainder of VeriSign's allegations merely criticize SSAC, its processes and its
23 findings and statements. But none of these allegations could support an inference,
24

25 ⁵ *See* RJN Ex. A (Dotster Order); RJN Ex. K (Pool.com Statement of Claim).

26 ⁶ VeriSign claims that SSAC recommended, without written justification, that
27 its wildcard service be "immediately terminated." In fact, SSAC's request was far
28 more benign. SSAC explained that it was in the process of examining potential
problems associated with SiteFinder and "call[ed] on VeriSign to voluntarily
suspend the service and participate in the various review processes now underway."
RJN Ex. N (Sept. 22, 2003 SSAC Message) at 2.

1 much less a finding, that the four "SiteFinder co-conspirators," none of which is
2 alleged to compete with VeriSign's Site Finder, somehow controlled ICANN. To
3 the contrary, VeriSign acknowledges that ICANN -- not SSAC -- made the
4 wildcard decisions. FAC ¶ 136 ("ICANN . . . took action based on the SSAC
5 Report" and required VeriSign to suspend the service). And since the only
6 "decision" that allegedly caused injury to VeriSign was the "decision" to send the
7 October 3 letter that "caused" VeriSign to shut down the wildcard service, VeriSign
8 needed to allege facts connecting the co-conspirators to *that* decision. The FAC
9 contains no such allegations, nor could it, because it never happened.

10 **IDN Allegations.** Finally, with respect to IDNs, VeriSign identifies only two
11 alleged conspirators, the China Internet Network Information Center ("CNNIC")
12 and the Taiwan Network Information Center ("TWNIC"). FAC ¶ 157. Neither is
13 alleged to have served on the ICANN Board during any relevant time period, and
14 thus it is hard to imagine how these two entities (which are only two of about 240
15 country code TLD operators) could possibly have controlled any of the Board's
16 actions on this subject. The FAC provides no factual detail concerning the role of
17 those particular entities in the decisionmaking process of ICANN. Instead,
18 VeriSign points only to these entities' participation on the Registry Implementation
19 Committee ("RIC"), another advisory body to ICANN, but VeriSign is forced to
20 concede that the Committee had other members besides CCNIC and TWNIC,
21 *including VeriSign*. FAC ¶ 159. VeriSign also admits that ICANN, not the alleged
22 co-conspirators or the RIC, took the actions with regard to IDN that allegedly
23 injured VeriSign. FAC ¶¶ 158, 162-164. The FAC does not allege that CCNIC and
24 TWNIC captured or controlled the ICANN Board (because they did not).

25 In truth, VeriSign's allegations establish only that these so-called
26 "conspirators" participated in the decisionmaking process by providing input to the
27 Board, and the Board, after considering that input, reached a decision. Obviously,
28 participation is not control. *Barry*, 805 F.2d at 868-869; *Podiatrist Ass'n, Inc.*, 332

1 F.3d at 15 ("mere fact that physicians have some input . . . does not show control";
2 plaintiffs must show "that physician input metamorphosed into physician
3 dominance"). ICANN's solicitation and consideration of input from different
4 groups is hardly evidence of conspiracy and capture; rather, it is evidence of a
5 consensus-based organization working exactly as intended, which is clearly the real
6 gravamen of VeriSign's complaint.

7 **II. VERISIGN'S SECOND THROUGH SIXTH CLAIMS FOR RELIEF**
8 **FAIL TO STATE A CLAIM.**

9 VeriSign's second through sixth claims for relief in its FAC remain largely
10 unchanged from the original complaint.⁷ They are still premised on the notion that
11 ICANN's assertion of its interpretation of the parties' contract can somehow
12 constitute a breach of contract or a tort. Because this is incorrect as a matter of law,
13 they must be dismissed as failing to state a claim.

14 **A. VeriSign's Contract Claims Allege Differing Interpretations Of**
15 **The Registry Agreement, Not A Breach Of Any ICANN**
16 **Obligation.**

17 In order to establish a claim for breach of contract, VeriSign must allege facts
18 demonstrating a breach of *ICANN's obligations*. See *Hentzel v. Singer Co.*, 138
19 Cal. App. 3d 290, 305 (1982). The FAC, like the original complaint, fails to
20 identify a single breach by ICANN.

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25 ⁷ In its Order, the Court stated that "If, in any First Amended Complaint,
26 VeriSign sufficiently states an antitrust claim, but does not change any of the
27 allegations pertaining to claims two through six, the parties shall incorporate into
28 their respective motion papers the precise language and arguments they made in
their respective current motion papers." Order, 13:19-22. Because VeriSign has
changed some aspects of its allegations pertaining to claims two through six,
ICANN has tailored the arguments it made in its prior motion to dismiss to address
those changes.

1 **1. VeriSign's Second and Third Claims Are Based Entirely On**
2 **ICANN's Sending Of The October 3 Letter.**

3 VeriSign's second and third claims are based entirely on ICANN's sending of
4 the October 3 letter, which announced that ICANN would seek to enforce
5 VeriSign's obligations under the parties' agreement unless VeriSign suspended the
6 wildcard. FAC ¶¶ 36, 190, 197. Sending a letter complaining that *VeriSign* has
7 breached its obligations, and threatening to utilize the dispute resolution provisions
8 of the contract if necessary, cannot constitute a breach of the contract *by ICANN*.
9 There is no obligation in the Registry Agreement, nor under contract law, that
10 requires ICANN to refrain from sending letters to VeriSign expressing ICANN's
11 position that VeriSign is breaching the contract.⁸ A threat to do that which one has
12 the legal right to do is not actionable by itself. *See Konecko v. Konecko*, 164 Cal.
13 App. 2d 249 (1958).

14 Nor was the October 3 letter a threat to "VeriSign's continuing operation of
15 the .com registry."⁹ FAC ¶¶ 36, 37. The October 3 letter did nothing more than
16 assert a position and state that ICANN would seek to enforce its rights under the
17 contract if necessary. VeriSign then elected -- voluntarily -- to suspend its wildcard
18 (presumably based on the assessment of the strength of ICANN's position).
19 VeriSign could have taken advantage of the dispute resolution provisions of the
20 contract to resolve any disagreement, but chose not to. And since VeriSign
21 contends that the Registry Agreement does not even apply to the wildcard (*see*

22 ⁸ *See Bill's Coal Co. v. Bd. of Public Utilities*, 682 F.2d 883, 885 (10th Cir.
23 1982) (the urging of a particular interpretation of a contract clause, even if in bad
24 faith, "is neither a failure to perform contract obligations (breach) nor an indication
25 those obligations will not be performed in the future (repudiation)."); *Kimel v.*
26 *Missouri State Life Ins. Co.*, 71 F.2d 921, 923 (10th Cir. 1934).

27 ⁹ Under the Registry Agreement, ICANN can terminate for breach only
28 when: (1) There is a litigation or arbitration of a dispute; (2) a court judgment or
arbitration award is issued specifically enforcing a provision of the agreement or
declaring the parties' rights or obligations under the agreement; (3) ICANN
demands that VeriSign comply with the judgment or award; (4) VeriSign does not
comply within 90 days; and (5) ICANN gives notice of termination. *See* RJN
Ex. E, § II.16.A. At this point, the parties are at stage 1.

1 section II.A.3. below), VeriSign (assuming it was confident in its interpretation)
2 could have chosen to ignore ICANN's assertion, as it has with respect to
3 ConsoliDate and other services.¹⁰

4 VeriSign's second and third claims are not saved by VeriSign's new
5 allegations that the October 3 letter "conditioned ICANN's performance" on
6 compliance with ICANN's demands. FAC ¶¶ 36, 68, 70, 190, 197. First, these
7 allegations are false; the letter does not contain any conditions. *See* RJN Ex. F.
8 Second, even if the letter did include conditions, VeriSign has not alleged facts, as
9 it must, demonstrating an express repudiation of *ICANN's obligations*.¹¹ *Taylor v.*
10 *Johnston*, 15 Cal. 3d 130, 137 (1975) ("repudiation is a clear, positive, unequivocal
11 refusal to perform") (emphasis added); *see Inamed Corp. v. Kuzmak*, 275 F. Supp.
12 2d 1100, 1130 (C.D. Cal. 2002) (same); *Salot v. Wershow*, 157 Cal. App. 2d 352,
13 357 (1958). VeriSign must also allege that "the refusal to perform [was] of the
14 whole contract . . . and [was] distinct, unequivocal and absolute." *Taylor*, 15 Cal.
15 3d at 140 (emphasis added) (citation omitted); *see also Golden West Baseball Co.*
16 *v. City of Anaheim*, 25 Cal. App. 4th 11, 49 (1994) (express repudiation must be of
17 the *entire* agreement). ICANN's contractual obligations do not include accepting
18 any interpretation, however much at odds with the words of the contract, that
19 VeriSign advances.¹²

20 ¹⁰ As in its original complaint, VeriSign has not stated a breach of the implied
21 covenant of good faith and fair dealing. *See* Orig. MTD at 19:1-16, incorporated
22 herein by reference. In addition, as set forth in the original Motion to Dismiss, and
incorporated herein by reference, VeriSign has no basis to request attorneys' fees
pursuant to the Registry Agreement. *See* Orig. MTD at 20:20-28 n.12.

23 ¹¹ VeriSign has not alleged that ICANN rendered ICANN's performance of
24 the Registry Agreement impossible, so there is no implied repudiation. *Taylor*, 15
25 Cal. 3d at 137 ("An express repudiation is a clear, positive, unequivocal refusal to
perform; an implied repudiation results from conduct where the promisor puts it out
of his power to perform so as to make substantial performance of his promise
impossible.") (internal citations omitted).

26 ¹² VeriSign's argument that ICANN's threat constituted a breach because it
27 *effectively* conditioned ICANN's performance on the removal of the wildcard is
28 wrong legally and factually. *Taylor*, 15 Cal. 3d at 140; *Salot*, 157 Cal. App. 2d at
357. To state a claim for repudiation, VeriSign must allege that ICANN *expressly*
conditioned its performance. *Id.* VeriSign has alleged nothing more than a dispute
over the meaning of certain terms of the agreement, which does not amount to a

1 **2. VeriSign's Fifth and Sixth Claims Do Not Allege A**
2 **Breach Of Contract.**

3 VeriSign's fifth and sixth claims for breach of contract assert that ICANN has
4 breached certain "express" provisions in the Registry Agreement. FAC ¶¶ 211,
5 220. But the Court can simply read those provisions to determine that VeriSign's
6 "interpretations" make no sense. Claims regarding the meaning of a contract cannot
7 survive if they are obviously contrary to the words of the contract. *See* Cal. Civ.
8 Code § 1638 (express written terms of contract govern); *General Star Indem. Co. v.*
9 *Schools Excess Liab. Fund*, 888 F. Supp. 1022, 1028 (N. D. Cal. 1995) (dismissing
10 complaint with prejudice because allegations contrary to clear and explicit language
11 of contract).

12 For example, VeriSign alleges that ICANN breached the Registry Agreement
13 by failing to establish independent review policies. FAC ¶¶ 211, 220. However,
14 the Registry Agreement requires only that ICANN have "appeal procedures," which
15 can be satisfied by means other than independent review. RJN Ex. E, § II.4.D
16 (ICANN shall "ensure, through its reconsideration and independent review
17 policies . . . adequate appeal procedures . . ."). Indeed, the agreement explicitly
18 contemplates that ICANN may *not* have an Independent Review Panel in place.
19 *See* RJN Ex. E, § I.1.F ("In the event . . . ICANN does not have in place an
20 Independent Review Panel established under ICANN's bylaws . . ."). Where a
21 condition in a contract is non-mandatory, it cannot be grounds for a breach.
22 *Overland Plumbing, Inc. v. Transamerica Ins. Co.*, 119 Cal. App. 3d 476, 481
23 (1981).

24 Similarly, VeriSign alleges that ICANN has an obligation in the Registry
25 Agreement to enter into registry agreements with competing ccTLD registries.

26
27 _____
(continued...)

28 repudiation. *Golden West Baseball Co.*, 25 Cal. App. 4th at 49 n.43 ("a good faith
dispute [as to] some of the contract terms [is] a far cry from repudiation.").

1 FAC ¶¶ 211, 220. But there is *no* such obligation in the agreement. Cf. RJN Ex. E,
2 § II.18.B (setting forth terms relevant to whether VeriSign can terminate the
3 agreement with Department of Commerce approval).

4 VeriSign also alleges that ICANN failed to act in an open and transparent
5 manner and refrain from "unreasonably restraining competition" or singling out
6 VeriSign for disparate treatment regarding its proposed services. FAC ¶¶ 211, 220.
7 But because VeriSign alleges that these matters "are not properly the subject of the
8 .com Registry Agreement" (FAC ¶ 73), VeriSign cannot allege that ICANN had an
9 obligation to be open and transparent, equitable, or refrain from "unreasonably
10 restraining competition" in its conduct respecting those matters. If they are not
11 subject to the contract between the parties, and ICANN acts in some way
12 inconsistent with that fact, the contract contains dispute resolution provisions that
13 VeriSign is free to take advantage of.

14 **3. VeriSign's Allegations That The Proposed "Services"**
15 **Are Not Even Subject To The Registry Agreement**
16 **Defeats All Of Its Contract Claims.**

17 VeriSign alleges that the proposed "services" it has sought to offer are not the
18 subject of the Registry Agreement. FAC ¶ 73. Yet, the basis for VeriSign's second,
19 third, fifth, and sixth claims is that ICANN's conduct with respect to those proposed
20 services constitutes a *breach* of the Registry Agreement. FAC ¶¶ 77-82. This
21 makes no sense: if these services are not "subject to" the Registry Agreement, then
22 ICANN cannot have breached the agreement by articulating positions regarding the
23 services. Either VeriSign's actions are properly the subject of the Registry
24 Agreement (which ICANN contends), or they are not. VeriSign's inconsistent
25 pleading cannot survive a motion to dismiss. *Steiner v. Twentieth Century-Fox*
26 *Film Corp.*, 140 F. Supp. 906, 908 (S.D. Cal. 1953), *rev'd on other grounds*, 232
27 F.2d 190 (9th Cir. 1956) (dismissing claim where inconsistent allegations are pled
28

1 in the same claim); *Eichman v. Fotomat Corp.*, 880 F.2d 149, 164 (9th Cir. 1989)
2 (party cannot claim a breach of contract for obligations not within the contract).

3 **B. ICANN's Contract Interpretation Is Not A Tort.**

4 VeriSign makes the naked assertion that, when ICANN sent VeriSign the
5 October 3 letter, ICANN "intended to disrupt [its] contractual relationship [with
6 Provider]."¹³ Just as ICANN's mere assertion of its interpretation of the contract
7 cannot constitute a breach of contract, nor can it be a tortious act. *See Konecko*,
8 164 Cal. App. 2d 249. It cannot be the case that ICANN's attempts to assert its
9 rights under its contract with VeriSign can subject it to liability for interference
10 with a separate contract VeriSign *subsequently* entered into with a different party.¹⁴
11 And since VeriSign voluntarily chose to withdraw its wildcard, any effects on any
12 subsequent contracts it may have entered are of its own making.

13 The October 3 pre-litigation demand letter also is a privileged
14 communication.¹⁵ A communication is privileged under California Civil Code
15 section 47(b) if made in, or in anticipation of, litigation by litigants or authorized
16

17
18 ¹³ VeriSign's allegation is contradicted by the October 3 letter itself.
19 According to VeriSign, ICANN sent a letter to VeriSign asserting that ICANN
20 intended to enforce its rights under ICANN's contract with VeriSign. FAC ¶ 36.
21 VeriSign made a choice to suspend the wildcard and not to protect its relationship
22 with Provider. The absence of any *factual* allegations that ICANN intended to
23 interfere with VeriSign's relationship with Provider constitutes an independent
24 ground for dismissal of VeriSign's fourth claim.

25 ¹⁴ *See Weststeyn Dairy 2 v. Eades Commodities Co.*, 280 F. Supp. 2d 1044,
26 1089 (E.D. Cal. 2003); *see also Restatement (Second) of Torts* § 766, cmt. j (1979)
27 ("If the actor is not acting criminally nor with fraud or violence or other means
28 wrongful in themselves but is endeavoring to advance some interest of his own, the
fact that he is aware that he will cause interference with the plaintiff's contract may
be regarded as such a minor and incidental consequence and so far removed from
the defendant's objective that as against the plaintiff the interference may be found
to be not improper.").

¹⁵ The litigation privilege is also a basis for dismissing VeriSign's breach of
contract claims. *See Laborde v. Aronson*, 92 Cal. App. 4th 459, 463-65 (2001)
(litigation privilege provided complete defense to all claims, including breach of
contract claims); *Pollock v. Superior Court*, 229 Cal. App. 3d 26, 29-30 (1991)
(issuing writ sustaining demurrer to breach of contract claim without leave to
amend based on litigation privilege).

1 participants.¹⁶ See *Knoell v. Petrovich*, 76 Cal. App. 4th 164, 166 (1999) (litigation
2 privilege barred claim based on pre-litigation demand letter); *Rothman v. Jackson*,
3 49 Cal. App. 4th 1134, 1145 (1996) (pre-litigation demand letters fall within the
4 protection of the litigation privilege)(citation omitted). "Any doubt about whether
5 the privilege applies is resolved in favor of applying it." *Kashian v. Harriman*, 98
6 Cal. App. 4th 892, 913 (2002) (citation omitted).

7 The record before the Court makes plain that ICANN was seriously and in
8 good faith contemplating its legally viable claims against VeriSign when it sent the
9 October 3 letter:

- 10 • The October 3 letter states that the introduction of the wildcard violated
11 the Registry Agreement, that VeriSign must suspend the change, and that
12 failure to suspend would cause ICANN "to seek promptly to enforce
13 VeriSign's contractual obligations." See RJN Ex. F (October 3 letter).
- 14 • The FAC alleges that the October 3 letter constituted a "Suspension
15 Ultimatum," by which ICANN "threatened VeriSign that, unless Site
16 Finder was suspended forthwith, ICANN would initiate legal proceedings
17 against VeriSign" (FAC ¶ 36) and that as a direct result VeriSign had no
18 choice but to suspend SiteFinder (FAC ¶ 37).
- 19 • Under the Registry Agreement, § II.16(A), ICANN could only enforce
20 VeriSign's obligations by first obtaining a judgment or arbitration award
21 that VeriSign's behavior violated the agreement. RJN Ex. E, § II.16.A.

22 Although VeriSign alleges that ICANN issued its October 3 letter "without
23 any proper ground therefor" (FAC ¶¶ 190, 197), VeriSign alleges no *facts* in
24 support of that conclusory allegation. And, more importantly, the California
25 Supreme Court has stated that a party's motives for threatening litigation are not

26
27 ¹⁶ See also *eCash Technologies v. Guagliardo*, 210 F. Supp. 2d 1138, 1154
28 (C.D. Cal. 2001) (dismissing claims because litigation privilege applied to pre-
litigation letter); *Dove Audio, Inc. v. Rosenfeld*, 47 Cal. App. 4th 777 (1996)
(same); *Larmour v. Campanale*, 96 Cal. App. 3d 566 (1979) (same).

relevant to whether the litigation privilege applies. *See Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990); *Kashian*, 98 Cal. App. 4th at 913 ("application of the privilege does not depend on the publisher's 'motives, morals, ethics or intent.'") (citation omitted).

III. VERISIGN'S ANTITRUST, CONTRACT, AND TORT CLAIMS ARE NOT RIPE.

Finally, VeriSign's first six claims should be dismissed because none is ripe. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)). The "basic rationale" of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

VeriSign's first six claims are not ripe because each requires a predicate finding that ICANN's asserted position on the underlying dispute with respect to VeriSign's proposed services is incorrect. If ICANN is right, ICANN's assertion of valid rights under the contract could in no way be anticompetitive or a breach of the contract.¹⁷ The Court cannot decide claims 1-6 in the absence of a determination on the central dispute between the parties (*i.e.*, whether the contract applies to VeriSign's "services"). *See, e.g., Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1383 (D.C. Cir. 1998) (contract claim unripe because premised on unactualized possibility); *Johnson v. Greater Southeast Cmty. Hosp. Corp.*, 951 F.2d 1268, 1273 (D.C. Cir. 1991).

¹⁷ ICANN's alleged "threat to initiate legal proceedings" under the Registry Agreement (FAC ¶ 36) also is protected from a Sherman Act attack by the *Noerr-Pennington* doctrine. *See Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) (the litigator is not protected only when he strikes without warning: "If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.").

1 Courts do not allow the interposition of antitrust issues into contractual
2 disputes because the factual and legal complexity of antitrust claims would "convert
3 a fairly simple contract dispute into such an unwieldy process." *Dickstein v.*
4 *duPont*, 443 F.2d 783, 786 (1st Cir. 1971); *accord, e.g., Viacom Int'l, Inc. v.*
5 *Tandem Prods., Inc.*, 526 F.2d 593, 599 (2d Cir. 1975) (refusing to "convert a
6 facially simple litigation [over a contract] into one involving the complexities of
7 antitrust law"). Allowing antitrust issues to be introduced into contract disputes
8 "would threaten to involve parties claiming under the contract in litigation so
9 protracted and expensive that they might be coerced into unsatisfactory settlements
10 or be compelled to forego any prosecution of their claims." *Id.* at 599. Thus, even
11 where parties attempt to assert antitrust claims as a *defense* in contract actions,
12 courts often preclude them from doing so. *See id.*; *Arkla Air Conditioning Co. v.*
13 *Famous Supply Co.*, 551 F.2d 125, 127 (6th Cir. 1977). To the extent the Court
14 views any of the first six claims as stating a claim, those claims nevertheless should
15 be dismissed as not ripe.

16 CONCLUSION

17 VeriSign's first six claims for relief are deficient as a matter of law, and the
18 deficiencies cannot be cured by amendment. Therefore, ICANN urges the Court to
19 dismiss VeriSign's first six claims for relief with prejudice.

20 Dated: July 6, 2004

JONES DAY

21
22 By: 

23 Jeffrey A. LeVee

24 Attorneys for Defendant
25 INTERNET CORPORATION FOR
26 ASSIGNED NAMES AND NUMBERS
27
28

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:**

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013.

5 On July 6, 2004, I caused to be served the document described as:

6 **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S AMENDED**
7 **FIRST, SECOND, THIRD, FOURTH, FIFTH, AND SIXTH CLAIMS FOR RELIEF**
8 **PURSUANT TO RULE 12(B)(6) OF THE FED. RULE OF CIV. PROC.;**
9 **MEMORANDUM OF POINTS AND AUTHORITIES**

on the interested parties in this action.

10 _____ BY (U.S. MAIL) I placed _____ the original _____ a true copy thereof enclosed in sealed
11 envelope(s) to the addressee(s) as follows:

12 XX BY PERSONAL SERVICE. I placed _____ the original X true copies thereof enclosed
13 in sealed envelope(s) and caused such envelope to be hand delivered via messenger to the offices
14 of the addressee(s) as follows:

15 LAURENCE HUTT, ESQ.
16 ARNOLD & PORTER
17 777 S. Figueroa, 44th Fl.,
18 Los Angeles, CA 90017

19 I am "readily familiar" with the firm's practice of collection and processing
20 correspondence for mailing. Under that practice it would be deposited with the U.S. postal
21 service on that same day with postage thereon fully prepaid at Los Angeles, California in the
22 ordinary course of business. I am aware that on motion of the party served, service is presumed
23 invalid if postal cancellation date or postage meter date is more than one day after date of deposit
24 of mailing in affidavit.

25 _____ (STATE) I declare under penalty of perjury under the laws of the State of California that
26 the foregoing is true and correct.

27 X (FEDERAL) I declare that I am employed in the office of a member of the bar of this
28 Court at whose direction this service was made. I declare under penalty of perjury under the laws
of the United States of America that the foregoing is true and correct.

Executed on July 6, 2004, at Los Angeles, California.

25 _____
26 Elba Alonso de Ortega
27 Type or Print Name

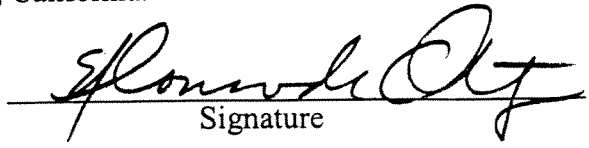
25 
26 Signature

EXHIBIT B

COPY

1 Jeffrey A. LeVee (State Bar No. 125863)
2 Courtney M. Schaberg (State Bar No. 193728)
3 Christina Coates (State Bar No. 206602)
4 Sean W. Jaquez (State Bar No. 223132)

5 JONES DAY
6 555 West Fifth Street, Suite 4600
7 Los Angeles, CA 90013-1025
8 Telephone: (213) 489-3939
9 Facsimile: (213) 243-2539

10 Joe Sims (admitted *pro hac vice*)
11 JONES DAY
12 51 Louisiana Avenue, N.W.
13 Washington, D.C. 20001-2113
14 Telephone: (202) 879-3939
15 Facsimile: (202) 626-1700

16 Attorneys for Defendant
17 INTERNET CORPORATION FOR
18 ASSIGNED NAMES AND NUMBERS

19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA

21 VERISIGN, INC., a Delaware
22 corporation,

23 Plaintiff,

24 v.

25 INTERNET CORPORATION FOR
26 ASSIGNED NAMES AND NUMBERS,
27 a California corporation,

28 Defendant.

Case No. CV-04-1292 AHM (CTx)

**DEFENDANT INTERNET
CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS' RENEWED
SPECIAL MOTION TO STRIKE
VERISIGN'S SECOND, THIRD,
FOURTH, FIFTH, AND SIXTH
CLAIMS AS STRATEGIC
LAWSUITS AGAINST PUBLIC
PARTICIPATION (CAL. CIV.
PROC. CODE § 425.16);
MEMORANDUM OF POINTS
AND AUTHORITIES**

Date: August 23, 2004
Time: 10:00 a.m.
Place: Courtroom of the
Honorable A. Howard Matz

2004 JUL -6 PM 3:56
U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES

FILED

1 PLEASE TAKE NOTICE that Defendant Internet Corporation for Assigned
2 Names and Numbers' ("ICANN") Renewed Special Motion to Strike VeriSign's
3 Second, Third, Fourth, Fifth, and Sixth causes of action will be heard on August 23,
4 2004, at 10:00 a.m. or as soon thereafter as counsel may be heard at the courtroom
5 of the Honorable A. Howard Matz, United States District Judge, located at 312
6 North Spring Street, Los Angeles, California.

7 ICANN moves this Court for an order, pursuant to California Code of Civil
8 Procedure section 425.16, striking VeriSign's second, third, fourth, fifth, and sixth
9 claims for relief. This motion is based on the grounds that these claims, which arise
10 from a letter that ICANN sent to VeriSign and other ICANN statements about
11 VeriSign's operation of the ".com registry" of the Internet, impinge on ICANN's
12 rights of petition and free speech under the United States and California
13 Constitutions and are therefore subject to a special motion to strike. Pursuant to
14 California Code of Civil Procedure section 425.16(c), ICANN also seeks recovery
15 of its attorneys' fees in connection with this motion and the prior Special Motion to
16 Strike that ICANN filed on April 20, 2004 (and which the Court deferred pending
17 VeriSign's repleading of its antitrust claim).

18 This motion is made following the conference of counsel pursuant to Local
19 Rule 7-3, which took place on June 25, 2004. Counsel were unable to reach any
20 agreements that would obviate the need for the motion.

21 This motion is based upon this Notice of Motion and Motion, the
22 Memorandum of Points and Authorities filed herewith, the pleadings and
23 declarations that ICANN filed on April 20, 2004 and May 10, 2004, in conjunction
24 with its original Special Motion to Strike, the pleadings that ICANN filed on
25 April 5, 2004 and May 3, 2004, in conjunction with its original Motion to Dismiss

26 //

27 //

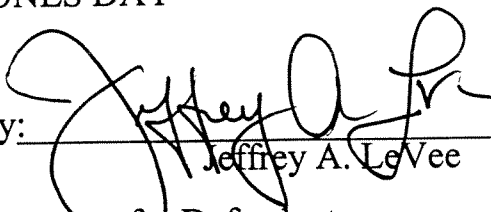
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1 VeriSign's claims pursuant to Federal Rule of Civil Procedure 12(b)(6), ICANN's
2 motion to dismiss VeriSign's First Amended Complaint (filed July 6, 2004), the
3 papers and records on file in this action, and upon all other matters and argument
4 that may appropriately be presented to the Court at or before the hearing.

5
6 Dated: July 6, 2004

JONES DAY

7
8 By:



Jeffrey A. LeVee

9 Attorneys for Defendant
10 INTERNET CORPORATION FOR
11 ASSIGNED NAMES AND NUMBERS
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MEMORANDUM OF POINTS AND AUTHORITIES
PRELIMINARY STATEMENT

Pursuant to this Court's Order Dismissing Complaint Without Prejudice (the "Order"), entered on May 18, 2004, defendant Internet Corporation for Assigned Names and Numbers ("ICANN") hereby renews its Special Motion to Strike VeriSign's Second, Third, Fourth, Fifth, and Sixth Claims as Strategic Lawsuits Against Public Participation. In the Order, the Court dismissed without prejudice VeriSign's antitrust claim, the only claim pursuant to which this Court had subject matter jurisdiction. As a result, the Court elected not to rule on ICANN's original Special Motion to Strike. As stated in the Court's Order, upon VeriSign's filing of an amended complaint, "regardless of whether VeriSign amends any or all of the second through sixth claims in any FAC, ICANN may incorporate into a renewed motion to strike the facts and arguments it relied on in the current set of motion papers regarding the original Complaint." Order, 14:1-4.

On June 14, 2004, VeriSign filed its first amended complaint. VeriSign's amendments to the allegations regarding its second through sixth claims do not necessitate any additional argument or facts not already presented in ICANN's original moving and reply papers and the declarations filed concurrently therewith. Accordingly, ICANN hereby renews its Special Motion to Strike and incorporates into its renewed motion all pleadings, arguments, facts, and evidence filed in conjunction with its original Special Motion to Strike, including:

- Defendant Internet Corporation for Assigned Names and Numbers' Special Motion to Strike VeriSign's Second, Third, Fourth, Fifth, and Sixth Claims as Strategic Lawsuits Against Public Participation, filed on April 20, 2004;
- Declaration of John O. Jeffrey In Support of Defendant Internet Corporation for Assigned Names and Numbers' Special Motion to Strike

VeriSign's Second, Third, Fourth, Fifth, and Sixth Claims as Strategic Lawsuits Against Public Participation, filed on April 20, 2004;

- Reply Memorandum In Support of Defendant Internet Corporation for Assigned Names and Numbers' Special Motion to Strike VeriSign's Second, Third, Fourth, Fifth, and Sixth Claims as Strategic Lawsuits Against Public Participation, filed on May 10, 2004; and
- Supplemental Declaration of John O. Jeffrey In Support of Defendant Internet Corporation for Assigned Names and Numbers' Reply on Special Motion to Strike VeriSign's Second, Third, Fourth, Fifth, and Sixth Claims as Strategic Lawsuits Against Public Participation, filed on May 10, 2004.

ICANN also incorporates by reference its motion to dismiss the first six claims for relief of VeriSign's First Amended Complaint, filed on this date.

BRIEF SUMMARY OF ARGUMENT

Pursuant to a May 2001 contract between VeriSign and ICANN, VeriSign operates the "Internet registry" for the ".com" zone of the Internet. ICANN and VeriSign disagree about several aspects of VeriSign's rights and obligations under that contract. These disagreements have resulted in ICANN advising VeriSign from time to time that certain VeriSign activities in its operation of the .com registry violate the contract. In the past, VeriSign has alternately responded by proceeding in conformity with ICANN's stated positions or by asserting its disagreement with ICANN's positions and ignoring them. Until the filing of this litigation (and, in particular, the seventh claim for relief), VeriSign never invoked the contractually agreed dispute-resolution mechanism.

VeriSign's First Amended Complaint ("FAC"), like its original complaint, goes well beyond seeking judicial resolution of the contract interpretation dispute. VeriSign's FAC includes five contract and tort claims that seek to impose monetary and injunctive liability on ICANN merely for articulating ICANN's positions.

1 Specifically, VeriSign's second, third, and fourth claims for relief are based entirely
2 on ICANN's October 3, 2003 letter that "threatened" to "initiate legal proceedings"
3 with respect to VeriSign's conduct and alleged breach of the parties' contract.
4 VeriSign's fifth and sixth claims are also based on that "threatening letter," as well
5 as other instances in which ICANN made statements about inconsistencies between
6 VeriSign's operation of the .com registry of the Internet and the parties' contract.
7 Thus, these five claims seek to impose liability on ICANN simply for adopting and
8 stating contractual positions with which VeriSign disagrees. And VeriSign's breach
9 of contract and tort claims are legally unsupportable for multiple reasons.

10 California's anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16) was enacted
11 to combat lawsuits that arise from free-speech and petitioning activities. The
12 statute establishes a procedure—followed by federal as well as state courts in
13 California—for prompt review and disposal of state law claims arising from acts "in
14 furtherance of the person's right of petition or free speech under the United States or
15 California Constitution in connection with a public issue." Because VeriSign's
16 second, third, fourth, fifth, and sixth claims arise from ICANN's free-speech and
17 petitioning activities in stating its contractual positions and indicating that it would
18 seek judicial redress if necessary, those claims should be stricken under the anti-
19 SLAPP statute.

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CONCLUSION

For the foregoing reasons, ICANN requests that the Court grant ICANN's Renewed Special Motion to Strike VeriSign's second, third, fourth, fifth, and sixth claims for relief and order VeriSign to pay ICANN's costs and attorneys' fees.

Dated: July 6, 2004

JONES DAY

By: 

Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:**

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 555 West Fifth Street, Suite 4600, Los
5 Angeles, California 90013.

6 On July 6, 2004, I caused to be served the document described as:

7 **DEFENDANT ICANN'S RENEWED SPECIAL MOTION TO STRIKE VERISIGN'S**
8 **SECOND, THIRD, FOURTH, FIFTH, AND SIXTH CLAIMS AS STRATEGIC**
9 **LAWSUITS AGAINST PUBLIC PARTICIPATION (CCP § 425.16); MEMORANDUM**
10 **OF POINTS AND AUTHORITIES**

11 on the interested parties in this action.

12 _____ BY (U.S. MAIL) I placed _____ the original _____ a true copy thereof enclosed in sealed
13 envelope(s) to the addressee(s) as follows:

14 XX BY PERSONAL SERVICE. I placed _____ the original X true copies thereof enclosed
15 in sealed envelope(s) and caused such envelope to be hand delivered via messenger to the offices
16 of the addressee(s) as follows:

17 LAURENCE HUTT, ESQ.
18 ARNOLD & PORTER
19 777 S. Figueroa, 44th Fl.,
20 Los Angeles, CA 90017

21 I am "readily familiar" with the firm's practice of collection and processing
22 correspondence for mailing. Under that practice it would be deposited with the U.S. postal
23 service on that same day with postage thereon fully prepaid at Los Angeles, California in the
24 ordinary course of business. I am aware that on motion of the party served, service is presumed
25 invalid if postal cancellation date or postage meter date is more than one day after date of deposit
26 of mailing in affidavit.

27 _____ (STATE) I declare under penalty of perjury under the laws of the State of California that
28 the foregoing is true and correct.

_____ X (FEDERAL) I declare that I am employed in the office of a member of the bar of this
Court at whose direction this service was made. I declare under penalty of perjury under the laws
of the United States of America that the foregoing is true and correct.

Executed on July 6, 2004, at Los Angeles, California.

25 _____
26 Elba Alonso de Ortega
27 Type or Print Name

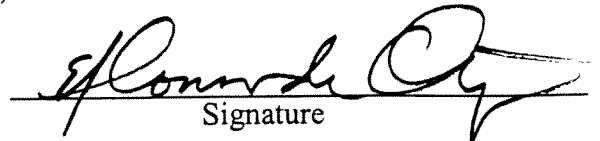
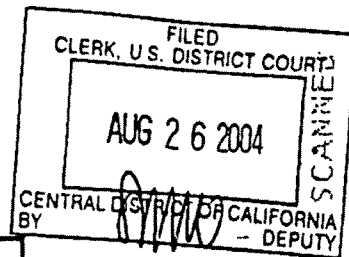
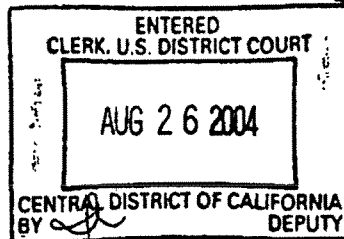
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Signature

EXHIBIT C



Priority
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JS-2/JS-3
Scan Only

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VERISIGN, INC.,

Plaintiff,

v.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS,

Defendant.

CASE NO. CV 04-1292 AHM (CTx)

**ORDER DISMISSING
ANTITRUST CLAIM WITH
PREJUDICE AND DECLINING
TO EXERCISE SUPPLEMENTAL
JURISDICTION OVER
REMAINING STATE LAW
CLAIMS**

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

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INTRODUCTION AND PROCEDURAL HISTORY

On February 26, 2004, VeriSign filed a complaint against Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") alleging causes of action for: (1) violation of Section 1 of the Sherman Act, (2) injunctive relief for breach of contract, (3) damages for breach of contract, (4) interference with contractual relations, (5) specific performance of contract and injunctive relief, (6) damages for breach of contract, and (7) declaratory judgment. Subject matter jurisdiction was premised on federal questions arising under the Sherman Act and the Declaratory Judgment Act. Compl. ¶ 8.

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1 On May 18, 2004, the Court granted ICANN's motion to dismiss the
2 Complaint. The Court held that VeriSign had failed to sufficiently allege an
3 antitrust conspiracy and an injury of the type the antitrust laws were designed to
4 protect. The Court stated that if VeriSign failed to plead a viable antitrust claim
5 in any First Amended Complaint ("FAC") or chose not to file an FAC, the Court
6 would dismiss the Sherman Act claim with prejudice and decline to exercise
7 supplemental jurisdiction over the state law claims. The Court also vacated
8 ICANN's special motion to strike the state law claims as strategic lawsuits
9 against public participation, pursuant to Cal. Civ. Proc. Code Section 425.15,
10 subject to renewal at a later date if VeriSign did file a FAC alleging a viable
11 federal claim.

12 On June 14, 2004, VeriSign filed a FAC, adding nearly 30 pages of
13 allegations to its Sherman Act claim, *see* ¶¶ 85-182. Now ICANN moves to
14 dismiss claims one through six of the FAC pursuant to Fed. R. Civ. P. 12(b)(6),
15 and also renews its motion to strike the second through sixth claims. The Court
16 GRANTS ICANN's motion to dismiss the antitrust claim, this time with
17 prejudice, and declines to exercise supplemental jurisdiction over the remaining
18 state law claims.

20 FACTUAL ALLEGATIONS

21 ICANN is a non-profit corporation that was organized in 1998 "in response
22 to a plan by the [Department of Commerce] to introduce competition into the
23 field of domain name registration, among other objectives." FAC ¶ 17. The
24 Internet is comprised of numerous top level domains ("TLDs"). Some are generic
25 TLDs ("gTLDs") like .com, .net, .gov, and .biz, while others are country
26 code TLDs ("ccTLDs") such as .uk and .ca.¹ *Id.* ¶ 11. Each TLD has a "registry"

27
28 ¹ ICANN does not claim to have any power to regulate ccTLDs. *Id.* ¶ 78.
Nonetheless, 11 of the approximately 240 ccTLDs have entered into registry

1 or operator, a single entity responsible for keeping the records and a directory of
2 all the domain names registered within that TLD. *Id.* ¶ 14. A person seeking to
3 register a domain name within any given TLD must do so through a “registrar”
4 for that TLD. *Id.* ¶ 15. There are approximately 250 TLDs throughout the world
5 that compete with each other, through their respective registries, to attract
6 registrars and registrants. *Id.* ¶¶ 11, 31.

7 One of ICANN’s functions is to enter into registry agreements that
8 authorize an entity to act as the registry for a particular gTLD. *Id.* ¶ 19. The
9 FAC describes how ICANN functions:

10 ICANN is governed by and acts through an international
11 Board of Directors that is elected by members of various
12 constituent groups and supporting organizations within
13 ICANN. As more specifically alleged below, among the
14 members of these groups are operators of gTLDs that
15 compete with each other and with VeriSign; domain
16 name registrars that are present or potential competitors
17 of each other and of VeriSign for certain services; and
18 foreign governments and foreign registries that have
19 ccTLDs that compete with the gTLD registries operated
20 by VeriSign. ICANN frequently carries out its activities,
21 including the conduct alleged herein, through the
22 collective action of its supporting organizations (which,
23 in turn, are comprised of various constituent groups). In
24 fact, in certain circumstances, ICANN was bound by its
25 By-Laws to follow the actions of its supporting
26 organizations.

19 *Id.* ¶ 17.

20 ICANN is an unusual organization. It is not like a typical association,
21 because it has numerous “constituencies” that explicitly acknowledge that they
22 have commercial interests that sometimes are at odds or in conflict with the
23 interests of other constituents. Indeed, one of ICANN’s rather formidable
24 challenges is to promote coherent policies that accommodate, or at least take into
25 account, the differing objectives of competing interests in the business of
26 “cyberspace.” ICANN is essentially comprised of a Board of Directors and three

27
28 agreements with ICANN. *Id.* ¶ 81. “ccTLDs” compete with other TLD registries.
Id. ¶ 19.

advisory bodies called "supporting organizations." Each of the supporting organizations has primary responsibility for developing and recommending policy in its area of expertise. Those areas are: (1) Domain Name Supporting ("DNSO"); (2) Address Supporting ("ASO"); and (3) Protocol Supporting ("PSO"). *Id.* ¶ 91; Def.'s Supplemental Req. for Judicial Notice, Exh. L (Bylaws), Art. VI, §§ 1(a), 2(b).²

In 2001, VeriSign and ICANN entered into a registry agreement authorizing VeriSign to act as the sole registry for the ".com" gTLD. FAC ¶¶ 21-22. Under the agreement, VeriSign must provide certain "registry services" to accredited registrars in accordance with ICANN's specifications. *Id.* ¶ 23. The core of this dispute is that ICANN allegedly has taken actions to: (1) prohibit or otherwise restrict VeriSign from offering services valuable to Internet users,³ (2) impose improper conditions on the offering of such services by VeriSign, (3) regulate and set the prices at which such services may be offered, and/or (4) delay the introduction of new services. *Id.* ¶ 1. Because ICANN has allegedly blocked, delayed, and restricted the "value-added" services VeriSign has sought to offer its customers, VeriSign is "at a competitive disadvantage" since other TLD registries have been able to introduce similar services without restriction or delay. *Id.* ¶¶ 77-78. VeriSign claims that ICANN's various actions have breached their 2001 registry agreement, *id.* ¶¶ 188-200, 207-222; interfered with a contract VeriSign had with an unidentified third party, *id.* ¶¶ 201-206; and violated the antitrust

² Over Plaintiff's objection, the Court takes judicial notice of Exhibit L, ICANN's bylaws. The bylaws are a proper subject of judicial notice because VeriSign references them in the FAC (e.g., ¶¶ 17, 86, 95, 102) and their authenticity is not disputed. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

³ In particular, the services to which VeriSign refers are Site Finder (described at ¶¶ 32-33 of the FAC), Wait Listing Service (¶¶ 39-40), ConsoliDate (¶¶ 47-49), Internationalized Domain Names (¶¶ 55-57), and the Incentive Marketing Program (¶ 65).

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laws, *id.* ¶¶ 83-187.

APPLICABLE LEGAL STANDARD

On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wylar Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. *Haddock v. Bd. of Dental Examiners*, 777 F.2d 462, 464 (9th Cir. 1985). On the other hand, dismissal is proper where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989) (employing *Conley v. Gibson* standard). Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch*, 14 F.3d at 454 (9th Cir. 1994) (*citing*

1 *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n.3 (1st Cir. 1991)). If
2 the documents are not physically attached to the complaint, they may be
3 considered if their “authenticity ... is not contested” and “the plaintiff’s complaint
4 necessarily relies” on them. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir.
5 1998). “The district court will not accept as true pleading allegations that are
6 contradicted by facts that can be judicially noticed or by other allegations or
7 exhibits attached to or incorporated in the pleading.” 5C Wright & Miller, *Fed.*
8 *Prac. and Pro.* § 1363 (3d. ed. 2004).

10 DISCUSSION

12 **I. First Cause of Action: Antitrust Violation**

13 VeriSign’s antitrust claim is brought under Section 1 of the Sherman Act,
14 which states, in pertinent part, that “[e]very contract, combination in the form of
15 trust or otherwise, or conspiracy, in restraint of trade or commerce among the
16 several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1.
17 The elements required to allege a Section 1 violation are: “(1) an agreement or
18 conspiracy among two or more persons or distinct business entities; (2) by which
19 the persons or entities intend to harm or restrain competition; and (3) which
20 actually injures competition.” *Les Shockley Racing, Inc. v. Nat’l Hot Rod Ass’n*,
21 884 F.2d 504, 507 (9th Cir. 1989).⁴ Although Section 1 claims are not subject to a
22 heightened pleading standard, the plaintiff must plead facts to support each
23 element of the claim. Von Kalinowski, Sullivan & McGuirl, *Antitrust Law and*
24 *Trade Regulation* § 164.01 (Matthew Bender 2002). “The pleader may not evade
25

26
27 ⁴ The parties both treat this case under the “rule of reason” standard rather than
28 the “per se” rule reserved for presumptively illegal practices such as price-fixing, and
the Court does the same. See *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 n.3
(9th Cir. 1988).

1 these requirements by merely alleging a bare legal conclusion; if the facts 'do not
2 at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs^{STANDARD} will
3 get nowhere merely by dressing them up in the language of antitrust.'" *Rutman*
4 *Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987).

5 Section 4 of the Clayton Act, pursuant to which VeriSign seeks to recover
6 treble damages for the alleged Sherman Act violation, authorizes a private
7 individual to bring suit under the antitrust laws if that individual has been
8 "injured in his business or property by reason of anything forbidden in the
9 antitrust laws." 15 U.S.C. § 15. The Supreme Court has interpreted this language
10 to mean that "Plaintiffs must prove antitrust injury, which is to say injury of the
11 type the antitrust laws were intended to prevent and that flows from that which
12 makes defendants' acts unlawful. The injury should reflect the anticompetitive
13 effect either of the violation or of anticompetitive acts made possible by the
14 violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489
15 (1977). These requirements are referred to as "antitrust standing." *See, e.g., Pool*
16 *Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001). There is no
17 antitrust violation "[i]f the injury flows from aspects of the defendant's conduct
18 that are beneficial or neutral to competition...[A]n act is deemed
19 anticompetitive...only when it harms both allocative efficiency *and* raises the
20 prices of goods above competitive levels or diminishes their quality." *Rebel Oil*
21 *Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995), *cert. denied*,
22 516 U.S. 987 (1995) (emphasis in original).

23 VeriSign alleges that "[t]he conduct of ICANN in restricting and
24 purporting to 'regulate' non-Registry Services offered or proposed to be offered
25 by VeriSign, and in delaying the introduction and setting the prices or terms of
26 those services, represents the collective and conspiratorial acts of ICANN and
27 existing and potential competitors of VeriSign, including competitors who are
28 members of the constituent groups and supporting organizations of ICANN, in

1 the relevant markets and submarkets as defined below.” FAC ¶ 84. The specific
2 services to which VeriSign refers in its antitrust claim are the Wait Listing
3 Service (“WLS”), the Site Finder Service (“SFS”), and Internationalized Domain
4 Names (“IDN”). *Id.* ¶ 88. VeriSign alleges that ICANN’s conduct “has deprived
5 consumers of a beneficial new service and VeriSign of revenues and profits it
6 would generate...” *Id.* ¶ 38; *see also* ¶¶ 46, 54, 64, 67. By making “the
7 registration of domain names within the .com gTLD more desirable and
8 attractive,” these new services are alleged to be important to enable “VeriSign to
9 compete more effectively with operators of competitive gTLD and ccTLD
10 registries that are offering or intend to offer a similar service.” *Id.* ¶ 67; *see also* ¶
11 31. While VeriSign has been blocked, delayed, or restricted from offering these
12 new services, other gTLD registries regulated by ICANN “have been allowed to
13 offer and market similar, competitive services...” *Id.* ¶ 77; *see also* ¶¶ 34, 44, 64,
14 67. In particular, VeriSign alleges that ICANN has facilitated “.museum,” one of
15 its gTLD competitors, in offering a service similar to VeriSign’s Site Finder. *Id.*
16 ¶ 34. In addition, most ccTLD registries, which constitute some 240 out of 250
17 of all TLDs, are not regulated by ICANN and “are free to offer, and are offering,
18 new and improved services to registrars and registrants...” *Id.* ¶¶ 11, 19, 78.

19
20 **A. Conspiracy Allegations**

21 ICANN argues that VeriSign has not properly pled a conspiracy because it
22 has not alleged that its competitors controlled the relevant ICANN decision-
23 makers: the Board of Directors and ICANN’s President.

24 VeriSign recognizes that in order to sufficiently plead a conspiracy, it must
25 allege that ICANN’s decision-making process was controlled by economic
26 competitors who have conspired to injure VeriSign. But what VeriSign alleges is
27 different: that certain named competitors have conspired to control *advisory*
28 *groups* that report to ICANN’s ultimate decision-maker, the Board of Directors.

Paragraph 85 of the FAC alleges that “[t]he constituent groups and supporting organizations of ICANN...are substantially controlled by existing and potential competitors of VeriSign...” See, e.g., *id.* ¶¶ 92-102 (Domain Name Supporting Organization (“DNSO”) controlled by competitors and issued policy paper and report to Board regarding WLS), ¶¶ 130-135 (Security and Stability Advisory Committee (“SECSAC”) controlled by competitors and issued recommendation to Board regarding regulation of SFS); ¶¶ 158-161 (Registry Implementation Committee (“RIC”) controlled by competitors and proposed guidelines to Board for IDN).

Moreover, the FAC acknowledges that the final decision to regulate each of the VeriSign services at issue was made by either the Board or the President, not the advisory bodies. See, e.g., *id.* ¶¶ 98, 102 (Board adopted DNSO proposals to regulate WLS); ¶ 138 (Board “never adopted a lawful resolution regulating Site Finder”);⁵ ¶ 163 (Board adopted IDN guidelines proposed by RIC).

VeriSign’s theory seems to be that the advisory bodies were the *de facto* decision-makers because the Board essentially rubber-stamped all of their recommendations. VeriSign alleges that Board approval was a foregone conclusion because of:

- ICANN’s unique bottom-up policy development process by constituency groups of competitors (¶ 86);...
- ...the requirement of ICANN’s Bylaws that the constituency groups’ policy decisions be followed by the Board of Directors of ICANN (¶¶ 86, 95, 102);

⁵ ICANN’s President, rather than the Board, sent VeriSign a letter requiring it to close its Site Finder Service (“SFS”). FAC ¶ 36. The Court takes judicial notice of this October 3, 2003 letter, which VeriSign refers to as the “Suspension Ultimatum.” Def.’s Req. for Judicial Notice, Exh. F. The letter is a proper subject of judicial notice because it is referenced in the FAC and its authenticity is not disputed. *Branch, supra*. Since the Board never took action regarding SFS, the allegation that one of the SFS “co-conspirators” held a seat on the Board is irrelevant. *Id.* ¶ 138.

- ...ICANN's dependence on VeriSign's competitors for its funding (§ 93)...
- [and] specific admissions by ICANN's President that the policy development process at ICANN was subject to capture for precisely the reasons stated above and that competitors working through ICANN used its processes to "hamstring their competitors." (§§ 86, 90, 95).

Pl.'s Opp'n, 2:7-19.

VeriSign's contentions are deficient. First, there is nothing inherently conspiratorial about a "bottom-up" policy development process that considers or even solicits input from advisory groups. *See Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1029 (9th Cir. 1989) (*en banc*); *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 868-69 (9th Cir. 1986) (advisory committee's comments and suggestions did not establish requisite control over Board's decisions). "Participation" is not enough to give rise to antitrust liability; *control* is required.

Second, the Bylaws in effect at the time of these events, which the Court judicially notices, do *not* require the Board to accept the advisory bodies' policy recommendations. Rather, the Bylaws provide that:

the Board [of Directors] shall accept the recommendations of a Supporting Organization if the Board finds that the recommended policy (1) furthers the purposes of, and is in the best interest of, the Corporation; (2) is consistent with the Articles and Bylaws; (3) was arrived at through fair and open processes (including participation by representatives of other Supporting Organizations if requested); and (4) is not reasonably opposed by any other Supporting Organization. *No recommendation of a Supporting Organization shall be adopted unless the votes in favor of adoption would be sufficient for adoption by the Board without taking account of either the Directors selected by the Supporting Organization or their votes.*⁶

Exh. L, Art. VI, § 2(e) (emphasis added). If the Board rejects a policy

⁶ According to these Bylaws, each of the three Supporting Organizations selects three Directors. Exh. L, Art. 5, § 4.

1 recommendation, Section 2(f) provides the procedure for returning it to the
2 Supporting Organization for further consideration. If after reconsideration, the
3 Supporting Organization still does not provide an acceptable recommendation,
4 “the Board may initiate, amend or modify and then approve a specific policy
5 recommendation” if prompt action is necessary. *Id.* § 2(f). Article VI, Section 2
6 of the bylaws does not “require” the Board to approve the proposals and “[t]he
7 district court will not accept as true pleading allegations that are contradicted by
8 facts that can be judicially noticed...” 5C Wright & Miller, *Fed. Prac. and Pro.* §
9 1363 (3d. ed. 2004).

10 Third, VeriSign alleges in Paragraph 93 that ICANN “has been seriously
11 underfunded,” that members of the Registrar Constituency “have provided the
12 single largest source of ICANN’s funding,” and that “one or more of the WLS co-
13 conspirators have offered to fund expenses of ICANN in defense of the claims
14 made in this litigation.” VeriSign alleges that the “WLS co-conspirators” are part
15 of the Registrar Constituency, which provides the majority of ICANN funding.
16 FAC ¶ 93. There are approximately 175 registrars in the United States, *id.* ¶ 15,
17 yet only six are alleged to be “WLS co-conspirators.” *Id.* ¶ 90. Nowhere does
18 VeriSign allege that these six conspirators provide the majority of ICANN’s
19 funding. Nor has VeriSign alleged that ICANN accepted the alleged offer to
20 defray the cost of this litigation.

21 Fourth, VeriSign makes too much of the fact that the President of ICANN
22 stated in his February 2002 report that ICANN’s consensus decision-making
23 process was “too exposed to capture by special interests” and that the supporting
24 organizations pushed ICANN “to perform only those policy functions that
25 hamstring their competitors.” *Id.* ¶ 86; *see also* ¶ 95. That statement did not refer
26 to any of the particular competitors or registry services at issue in this lawsuit. In
27 addition, it was made several months before VeriSign was prepared to offer WLS,
28 in August 2002 (*id.* ¶ 44), well before VeriSign received the Suspension

1 Ultimatum regarding SFS, in October 2003 (*id.* ¶ 36), and before the Board
2 enacted IDN regulations harming VeriSign, in June 2003 (*id.* ¶ 164). However
3 applicable the President's concerns still may have been at those later times; what
4 is most deficient about these allegations is that the President's statements were
5 about lower-level processes. *Nowhere does the FAC allege that he admitted that*
6 *the Board itself had been captured.* Moreover, there is no allegation (much less
7 factual support for one) that the Board of ICANN actually conspired with any of
8 VeriSign's competitors. VeriSign does not allege any specific facts to support its
9 theory that the Board complied with the conspirators' alleged attempt to
10 "hamstring" VeriSign – no allegations regarding how much time the Board spent
11 deliberating, how many meetings the Board held or how many objections or
12 comments the Board considered. That the Board ultimately may have adopted an
13 advisory group's policy recommendation, or that it was common practice for the
14 Board to do so, does not mean that the Board merely "rubber stamped" the
15 proposals and allowed itself to be controlled by VeriSign's competitors. *See*
16 *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1156-57 (9th Cir.
17 2001) ("As the Eleventh Circuit has noted, simply because the 'board is likely to
18 follow the recommendations of the medical staff does not establish, or even
19 reasonably suggest, the existence of a conspiracy.' . . . Even though the Board has
20 never disagreed with [the competitors'] recommendation . . . the Board did not
21 merely 'rubber stamp' [the competitor's] recommendation.") (citation deleted;
22 emphasis added).

23 In an attempt to overcome the foregoing defects in the FAC's factual
24 allegations, VeriSign cites language from several cases that are either
25 distinguishable or inapposite. The case VeriSign relies on most is *Am. Soc'y of*
26 *Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). There, plaintiff was one
27 of more than 90,000 members of defendant, a non-profit membership corporation
28 that promulgated codes for engineering and manufacturing standards. Defendant

1 sent a letter to a competitor of plaintiff. The letter was on the association's
2 stationery and was signed by one of its employees. It basically declared
3 plaintiff's product to be unsafe. The competitor then used the letter to dissuade
4 third parties from buying plaintiff's product. The association's subcommittee that
5 approved the letter had as its vice-chairman someone who just happened to be the
6 vice-president of the competitor; indeed, that person orchestrated the preparation
7 and mailing of the letter by the association. Plaintiff's Sherman Act Section 1
8 case against the association-defendant went to trial. Plaintiff requested that the
9 jury be instructed that defendant could be liable for its agents' conduct if they
10 acted within the scope of their apparent authority. The court rejected plaintiff's
11 request. Nevertheless, the jury returned a verdict for plaintiff and on appeal, the
12 Supreme Court held that plaintiff's proffered instruction was sound.

13 VeriSign cites *Hydrolevel* for the propositions that "an organization could
14 be liable for conspiring with plaintiff's competitor, notwithstanding that the
15 organization itself did not compete with plaintiff" and that "[i]t did not matter that
16 the decision-maker was not the Board of the association..." Pl.'s Opp'n, 13:10-
17 25. *Hydrolevel* is really about the appropriate instruction for the derivative
18 liability of an employer for antitrust violations committed by its employees.
19 Moreover, *Hydrolevel* is distinguishable on its facts. First, unlike what is alleged
20 here, the defendant-association's subcommittee was clearly "captured" by the
21 plaintiff's competitor whose vice-president manipulated the association into
22 approving and circulating the terribly injurious attack on plaintiff's product.
23 Second, it is not correct that *Hydrolevel* holds that Board action is irrelevant.
24 Indeed, if the association had not expressly delegated final decision-making
25 authority to the subcommittee, the letter would not have been issued. In short, the
26 association's conduct was a *sine qua non* to the case and the Supreme Court's
27 opinion. Third, *Hydrolevel* went to trial; standards for pleading a conspiracy
28 claim were not at issue.

1 In *Hahn, supra*, the district court granted summary judgment to defendant,
2 an association of physicians. The issue on appeal was whether those members of
3 the association's board who were physicians and who did not compete directly
4 with the podiatrist-plaintiffs nevertheless "shared similar economic interests with
5 [other] board members and . . . physicians who did compete directly," so as to
6 permit the trier of fact to conclude that the "board as a whole may have acted in
7 the anticompetitive interests of . . . [the] member physicians. . . ." *Hahn*, 868 F.2d
8 at 1030. To answer that question the Ninth Circuit articulated this test: "[T]he
9 proper inquiry is whether [decision-makers] sharing substantially similar
10 economic interests collectively exercised control of [the organization] under
11 whose auspices they have reached agreements which work to the detriment of
12 competitors." *Id.* at 1029. The court found that plaintiff had adduced enough
13 such evidence. I apply the *Hahn* test here, yet reach the opposite conclusion,
14 because *Hahn* is factually distinguishable in a critical respect. In *Hahn*, the
15 plaintiff adduced evidence which established that physicians, many of whom
16 competed with podiatrists, "formed a majority of the [defendant's] board." *Id.* at
17 1029. There is no such allegation here. See *Podiatrist Ass'n v. La Cruz Azul De*
18 *Puerto Rico, Inc.*, 332 F.3d 6, 14 (1st Cir. 2003) (upholding summary judgment
19 for defendant in a Sherman Act Section 1 case where plaintiffs could not establish
20 that their competitors controlled the defendant's board and noting "The corporate
21 bylaws make manifest that board action requires a majority vote and the . . .
22 [competitors, who held eight out of nineteen seats on the board] simply do not
23 constitute a majority.")

24 Finally, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492
25 (1988), the trade association involved in the underlying facts was not a party and
26 the opinion does not even deal with the elements of a Sherman Act Section 1
27 claim; the issue and the holding concern the scope of the *Noerr* doctrine. *Allied*
28 *Tube* has no bearing here.

1 To summarize, VeriSign has not alleged, and cannot allege, that the co-
2 conspirators comprised a majority of the ICANN Board of Directors. It has not
3 alleged and, given that the bylaws provide otherwise, it cannot allege that the
4 "supporting organizations" within ICANN's structure that do include competitors
5 of VeriSign dominated the Board. *See Barry, supra*. Nor has VeriSign pled with
6 requisite specificity facts that, even circumstantially, establish that ICANN's
7 Board was a "rubber stamp." *County of Tuolumne, supra*. For all these reasons,
8 VeriSign has not sufficiently alleged a Section 1 conspiracy.

9
10 **B. Antitrust Standing**

11 Given the foregoing conclusion, which requires dismissal of the antitrust
12 claim, I need not analyze whether VeriSign has pled facts establishing "antitrust
13 injury" and standing, and I choose not to.

14
15 **II. Second Through Seventh Causes of Action: Breach of Contract,**
16 **Interference With Contractual Relations, and Declaratory Judgment**

17 Because the Court dismisses Plaintiff's antitrust claim, the only cause of
18 action arising under federal law, the Court declines to exercise supplemental
19 jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3). Thus,
20 the breach of contract causes of action (claims 2, 3, 5, and 6), the interference
21 with contractual relations cause of action (claim 4), and the request for a
22 declaratory judgment (claim 7)⁷ are DISMISSED without prejudice to being filed

23
24 ⁷ VeriSign also asserts that the Court has subject matter jurisdiction pursuant
25 to 28 U.S.C. § 2201 (the Declaratory Judgment Act). FAC ¶ 7. The Declaratory
26 Judgment Act "merely creates a remedy in cases otherwise within federal
27 jurisdiction," and "is not an independent basis of federal question jurisdiction." *See*
28 *Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* §
2:132 (The Rutter Group 2004); *Franchise Tax Bd. v. Constr. Laborers Vacation*
Trust, 463 U.S. 1, 27-28 (1983). The test is whether the underlying claim that the
defendant has threatened to pursue in litigation and that plaintiff seeks to avoid

1 in state court. Judicial resources will not be wasted as the case is in its early
2 stages and the Court has not had occasion to address any of the state law claims.
3 Plaintiff will not be prejudiced since the statute of limitations is tolled during the
4 time the state law claims were pending in federal court and for an additional
5 period of at least 30 days. 28 U.S.C. § 1367(d); Schwarzer, Tashima &
6 Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* § 2:161 (The Rutter
7 Group 2004).

8 CONCLUSION

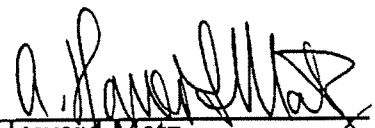
9 For the foregoing reasons, the Court hereby GRANTS Defendant's motion
10 to dismiss claim one of the FAC, with prejudice.⁸ The Court declines to exercise
11 supplemental jurisdiction and DISMISSES the second through seventh claims,
12 without prejudice to their being filed in state court. The Court VACATES
13 Defendant's renewed motion to strike claims two through six.⁹

14 In light of this ruling, the Court need not rule on the parties' various
15 remaining requests for judicial notice and related disputes.

16 Within seven calendar days of this Order, Defendant shall serve and lodge
17 a proposed judgment.

18
19 IT IS SO ORDERED.

20
21 DATE: August 26, 2004


A. Howard Matz
United States District Judge

22
23
24
25 through a declaratory judgment arises under federal law. *Id.* Here, it does not.
26 VeriSign merely seeks the Court's interpretation of certain key provisions of the
27 parties' 2001 registry agreement, presumably to avoid a breach of contract claim from
ICANN.

28 ⁸ Docket No. 70.

⁹ Docket No. 69.

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:**

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 555 West Fifth Street, Suite 4600, Los
Angeles, California 90013.

5 On January 10, 2005, I caused to be served the document described as:

6 **DECLARATION OF SEAN W. JAQUEZ SUBMITTED WITH REPLY TO VERISIGN'S**
7 **OPPOSITION TO ICANN'S MOTION TO STAY LITIGATION PENDING**
8 **ARBITRATION**

9 on the interested parties in this action.

10 **BY (U.S. MAIL).** I placed the original X a true copy thereof enclosed in sealed
envelope(s) to the addressee(s) as follows:

11 X **BY PERSONAL SERVICE.** I placed the original X true copies thereof enclosed in
12 sealed envelope(s) and caused such envelope to be hand delivered via messenger to the offices of
the addressee(s) as follows:

13 LAURENCE HUTT, ESQ.
14 ARNOLD & PORTER
15 777 S. Figueroa, 44th Fl.,
Los Angeles, CA 90017

16 I am "readily familiar" with the firm's practice of collection and processing
17 correspondence for mailing. Under that practice it would be deposited with the U.S. postal
18 service on that same day with postage thereon fully prepaid at Los Angeles, California in the
ordinary course of business. I am aware that on motion of the party served, service is presumed
19 invalid if postal cancellation date or postage meter date is more than one day after date of deposit
of mailing in affidavit.

20 (STATE) I declare under penalty of perjury under the laws of the State of California that
21 the foregoing is true and correct.

22 X (FEDERAL) I declare that I am employed in the office of a member of the bar of this
23 Court at whose direction this service was made. I declare under penalty of perjury under the laws
of the United States of America that the foregoing is true and correct.

24 Executed on January 10, 2005, at Los Angeles, California.

25 Elba Alonso de Ortega
26 Type or Print Name


Signature