NO. 04-56761

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VERISIGN, INC.,

Plaintiff-Appellant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES & NUMBERS,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
No. CV 04-1292 AHM
Honorable Howard A. Matz

OPENING BRIEF OF APPELLANT VERISIGN, INC.

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CORPORATE DISCLOSURE STATEMENT
(Fed. R. App. P. 26.1)

Pursuant to Fed. R. App. P. 26.1, the undersigned, counsel of record for Appellant VERISIGN, INC. ("VeriSign"), certify that, to the best of their knowledge, VeriSign, a nongovernmental corporate party, has no parent corporation. Nor does any publicly held corporation own 10% or more of VeriSign's stock.

Dated: December 17, 2004.

Respectfully submitted,

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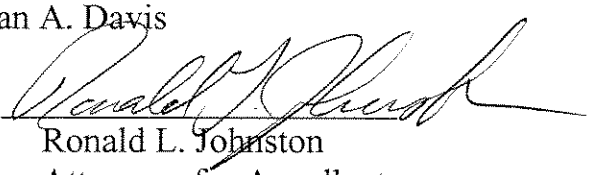
By: 
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES AND RULES

OTHER AUTHORITIES

I. STATEMENT OF JURISDICTION

Plaintiff-appellant VeriSign, Inc. ("VeriSign") filed suit in the United States District Court for the Central District of California ("District Court") alleging that defendant-appellee Internet Corporation for Assigned Names and Numbers ("ICANN") violated Section 1 of the Sherman Act, 15 U.S.C. §1, breached its contract with VeriSign, and interfered with VeriSign's contractual relations. The district court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1337, and 15 U.S.C. §§15 and 26; and the principles of supplemental jurisdiction, 28 U.S.C. §1367. On September 22, 2004, the district court entered final judgment. Plaintiff filed a timely notice of appeal on September 24, 2004. This Court has jurisdiction to hear appeals from the district court's final judgment. 28 U.S.C. §1291.

II. STATEMENT OF ISSUES

1. Are the allegations of the complaint that the challenged restraints of trade were the result of (i) conspiracies in the form of agreements between ICANN and named competitors of VeriSign, and (ii) capture of the decision-making processes of ICANN by these competitors, sufficient under Fed. R. Civ. P. 8(a) to allege the element of a "contract, combination . . . or conspiracy" required under Section 1 of the Sherman Act?

2. Did the district court commit error by engaging in "fact finding" in granting the motion to dismiss the complaint, including by drawing adverse inferences against plaintiff, ignoring express allegations of the complaint, and weighing the probative value of factual allegations in the complaint against extrinsic evidence improperly included in the motion to dismiss?

III. STANDARD OF REVIEW

The standard for appellate review of the district court's judgment granting a motion to dismiss is *de novo* review. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004). The Court must construe the complaint in the light most favorable to the plaintiff to determine if it has stated a claim under Rule 8(a). *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003).

IV. STATEMENT OF THE CASE

A. Procedural History

On February 26, 2004, VeriSign filed a complaint alleging ICANN had violated federal antitrust and California state laws and breached the contract existing between ICANN and VeriSign. The operative First Amended Complaint ("FAC") was filed on June 14, 2004 and contained detailed and specific allegations to support the same claims that were alleged

in the original complaint. ICANN filed a motion to dismiss on July 6, 2004. The district court dismissed VeriSign's FAC with prejudice on August 26, 2004. Judgment was entered thereon on September 22, 2004.

B. Statement Of The Facts[1]

1. The Parties

ICANN is a private corporation established in 1998 to assist in the transition of the Internet domain name system from one of a single Internet domain name registrar to one with multiple companies acting as domain name registrars. (ER104/¶2.)[2] ICANN's defined role, which is set forth in the November 1998 Memorandum of Understanding ("MOU") between ICANN and the Department of Commerce ("DOC"), is to encourage technical coordination among various constituent groups with respect to the Internet's domain name system. (ER104/¶2; 108/¶18.) The MOU establishes the promotion of competition in the domain name system as one of its central principles, and it explicitly prohibits ICANN from acting arbitrarily or unjustifiably to injure any person or entity. (ER108/¶18.)

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[1] This Statement of Facts is taken from the factual allegations of the FAC, which this Court should accept as true and construe in the light most favorable to plaintiff. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

[2] A citation to the format "ER104/¶2" refers to paragraph 2 on page 104 of Appellant's Excerpts of Record.

ICANN is not an agency of, nor was it established by, the U.S. government. ICANN has no statutory authority or regulatory power. Its only authority is through contracts into which it has entered. (ER108/¶¶17-18.)

Plaintiff VeriSign (or its predecessor) has served as the registry for second-level domain names registered in the ".com" and ".net" global top-level domains ("TLDs") (e.g., msn.com or google.com) since 1993. (ER104/¶3; 107-08/¶16.) As the "registry," VeriSign maintains the definitive directory that associates registered domain names with their associated IP numbers so that domain names can be used on the Internet.[3] (ER107/¶14.) In 2001, VeriSign and ICANN entered into the current .com Registry Agreement. (ER109/¶21.) Pursuant to that Registry Agreement, VeriSign is to provide defined Registry Services to ICANN-accredited registrars in a manner meeting performance and functional specifications attached to the agreement, and ICANN is to recognize VeriSign as the sole operator of the .com registry. (ER109-10/¶¶22-23.)

[3] A "registrar," in contrast, is a company that registers and manages domain names on behalf of individuals wishing to register domain names (i.e., "registrants"). (ER107/¶15.) VeriSign does not act as a domain name registrar for the .com and .net TLDs.

The Registry Agreement expressly requires ICANN to "(i) exercise its responsibilities in an open and transparent manner," (ii) "not unreasonably restrain competition," and (iii) "not apply standards, policies, procedures and practices arbitrarily, unjustifiably or inequitably and not single out [VeriSign] for disparate treatment unless justified by substantial and reasonable cause." (ER111/¶27.) Nothing in the Registry Agreement authorizes ICANN to do any of the following: (i) prohibit, regulate, or restrict VeriSign's provision of services that are not defined Registry Services governed by the agreement; (ii) regulate or fix the prices at which VeriSign may offer such services; or (iii) regulate, restrict, or prohibit the marketing methods or promotions VeriSign uses to promote its services. (ER112/¶30.)

2. ICANN's "Bottom-Up" Form of Decision-Making

ICANN's decision-making is based on a unique form of "bottom-up" policy development. ICANN has determined to carry out its activities (as relevant hereto) through Supporting Organizations, which, under ICANN's Bylaws, have primary responsibility for ICANN policy development. (ER108/¶17; 131/¶86; 133/¶91.) For example, the Domain Name Supporting Organization ("DNSO") has the primary responsibility for developing policy relating to domain names. (ER133/¶91; 134/¶95.) The

Supporting Organizations are comprised, in turn, of Constituency Groups. The Constituency Groups consist of operators of other registries and registrars that are existing or potential competitors of VeriSign. (ER108/¶17; 130-31/¶¶85-86; 133-34/¶¶91-92.) As the district court observed, "ICANN is an unusual organization"; it is "not like a typical association" because it has various constituencies, comprised of competitors, that "have commercial interests that sometimes are at odds or in conflict with the interests of other constituents." (ER255.)

The Supporting Organizations and Constituency Groups of ICANN that engaged in the restraints of trade alleged in the FAC were substantially controlled by existing and potential competitors of VeriSign and others sharing similar economic interests with VeriSign's competitors. (ER108/¶17; 130-31/¶¶84-85.) ICANN has expressly admitted (as quoted in the FAC) in other proceedings that this bottom-up policy making process is subject to control or "capture" by small groups of competitive interests. (ER131/¶86.) According to ICANN, an important reason that its processes are subject to capture is that competitors may have strong interests directly affected by particular actions of ICANN, while other members of ICANN's Constituency Groups generally are part time volunteers, are not directly affected by such actions, and/or lack the time or resources fully to participate

in ICANN's processes, therefore not attending meetings or voting on issues presented to the Constituency Groups. (ER130-31/¶¶85-86.) The result, according to ICANN, is that a small number of highly motivated competitors may control the actions and decisions of ICANN's Supporting Organizations and thus its Board. (*Id.*)

ICANN's Bylaws not only provide that the DNSO has primary responsibility for developing and recommending policies pertaining to domain names, but, at times relevant to the actions alleged in the FAC, the Bylaws explicitly provided that the Board was *bound to accept the DNSO's recommendations* (except for a few narrowly defined exceptions not applicable here). (ER134/¶95.) These recommendations in connection with the decisions alleged in the FAC were binding on the Board notwithstanding that the DNSO was controlled by competitors of VeriSign. (*Id.*) Indeed, the President of ICANN specifically admitted in his February 2002 Annual Report – while the concerted action alleged in the FAC was ongoing – that the Board's dependence on the decisions of the Supporting Organizations freed those groups from having to support or justify their decisions within the ICANN process. (*Id.*) The President of ICANN further explicitly stated that this process for ICANN decision-making has allowed competitors to use ICANN's processes for anti-competitive purposes. (*Id.*)

The Registrar Constituency of ICANN, including co-conspirators named in the FAC, also has provided the single largest source of ICANN's funding. (ER134/¶93.) The President of ICANN specifically identified this as a problem in his February 2002 Report, observing that ICANN has been seriously underfunded and its dependence on registrars for a significant portion of its funding has left ICANN "overly vulnerable" to their dictates. (*Id.*) ICANN's President specifically acknowledged that "deficiencies" in ICANN's decision-making were caused by ICANN's budget being dependent on the "consent of those subject to its policy control." (*Id.*) Indeed, to serve their own interests, co-conspirators named in the FAC have offered to fund expenses of ICANN in defense of the claims made by VeriSign in this action. (*Id.*)

3. ICANN's Decision-Making Has Been Subject to Capture by Competitors

As admitted by ICANN's President in his 2002 Annual Report:

> The current ICANN concept is based on the notion of "bottom-up" policy development, with the Supporting Organizations responsible for the development of policy and *the Board theoretically just the implementing device* for those policies. In hindsight, the notion of truly "bottom-up" consensus decision-making simply *has not proven workable, partly because the process is too exposed to capture by special interests* and partly

> because ICANN relies entirely on volunteers to do all the work. (ER131/¶86.)

In testimony before a Congressional committee, ICANN's President added: Members of ICANN's Supporting Organizations push ICANN "to perform *only* those policy functions that *hamstring their competitors*." (*Id.*)

Members of the DNSO specifically have acknowledged their control over ICANN policy development. One of the co-conspirators named in the FAC, who is a leading member of the Registrar Constituency of the DNSO, has publicly described the function of the Registrar Constituency within ICANN as follows: "[*W]e are ICANN* . . . Work doesn't need to get to the ["DNSO"] or the Board before ICANN officially gets involved." (ER134/¶94.)

The risks of precisely the type of collusive conduct alleged in the FAC were recognized by the DOC when it recommended the creation of a private corporation with supporting organizations, which became ICANN, to undertake the mission of technical coordination of the domain name system. More specifically, in reports leading to the establishment of ICANN, the DOC admonished: "The new corporation's processes should be fair, open and pro-competitive, protecting against *capture by a narrow group of stakeholders*"; the corporation "can face *antitrust liability* if it is dominated

by an economically interested entity, or if standards are set in secret by a few leading competitors." (ER131/¶87 (emphasis added).)

The DOC recommended that ICANN should abide by "rules and decision-making processes that are sound, transparent, *protect against capture* by a self-interested party and provide an open process for the presentation of petitions for consideration."[4] The DOC further recommended: "Applicable antitrust law will provide accountability to and protection for the international Internet community."[5] Nonetheless, as widely recognized[6] and alleged in the FAC, ICANN has failed to operate with transparency or accountability and has allowed special interests to capture and use its processes to advance their own competitive agendas.

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[4] *See* Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,750 (June 10, 1998) (emphasis added). The Registry Agreement between ICANN and VeriSign incorporates these principles as contractual obligations of ICANN. (ER055/§II.4.A-D.)

[5] *Id.* at 31,747.

[6] *See, e.g.*, Dan Hunter, *ICANN and the Concept of Democratic Deficit*, 36 Loy. L.A. L. Rev. 1149, 1153, 1177 (2003) (ICANN "ha[s] displayed all the worst features of regulatory capture."); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 Duke L.J. 187, 239-42 (2000) (ICANN's constituency structure has generated overrepresentation of some constituencies).

4. ICANN Has Combined with VeriSign's Competitors to Block Innovative New Internet Services by VeriSign

The FAC alleges ICANN unlawfully has combined with VeriSign's competitors, and others sharing similar economic interests with them, to restrain trade with respect to important new services that VeriSign has attempted to introduce. The FAC alleges two forms of concerted action:[7]

(1) The FAC specifically alleges the "Board of Directors of ICANN agreed with" co-conspirators, who are specifically named in the FAC, to undertake identified illegal acts (ER135/¶98); and

(2) The FAC further alleges "VeriSign's competitors have captured or controlled ICANN's decision-making processes with respect to each of these beneficial new services, using those processes improperly to 'regulate' VeriSign's business" (ER131-32/¶88).

[7] The district court considered only the second form of combination. Section IV.C., *infra*.

Each form of combination independently constitutes an actionable "contract, combination . . . or conspiracy" under Section 1 of the Sherman Act. Section VI.B., *infra*.[8]

a. Wait Listing Service ("WLS")

In or about December 2001, VeriSign announced a proposed new Wait Listing Service ("WLS"). (ER116/¶39.) Using WLS, a prospective domain name registrant could submit, through any participating registrar, a subscription on a first-come, first-served basis for a domain name currently registered in the .com TLD registry. (*Id.*/¶40.) In the event the domain name registration thereafter expired and the domain name was deleted from the registry, the subscriber would become the next registrant of the domain name. (*Id.*) Although it had no authority to regulate this proposed service, ICANN, in combination with VeriSign's competitors, asserted against VeriSign the power to: (i) prevent the offering of WLS, (ii) set the price at which it may be offered, (iii) establish the terms and conditions of the service, and (iv) restrict when WLS could be introduced. (ER116-17/¶43.)

[8] The conspiracies have caused injury to competition and harmed VeriSign. VeriSign has standing to bring this claim, because its services have been directly foreclosed or limited by the illegal acts. Section VI.C., *infra*.

As a result of this conduct, WLS has never been available to consumers. (ER118-19/¶46.)

The FAC specifically alleges that ICANN and the following identified competitors of VeriSign, among others, conspired to block WLS: GoDaddy Software, Inc.; Alice's Registry, Inc.; eNom Inc.; Dotster, Inc.; Pool.com, Inc.; and TuCows, Inc. (the "WLS co-conspirators"). (ER133/¶90.) As ICANN's President subsequently testified before a Congressional committee, these registrars and operators of related services had a "direct competitive interest" in WLS, in that "the availability of the WLS (with its guarantee of performance) to consumers would reduce the demand for their services (which were not able to offer a comparable guarantee), and thus they strongly opposed approval of the WLS." (*Id.*)

According to the FAC, "the Board of Directors of ICANN agreed with the WLS co-conspirators to assert control over WLS, substantially delay its implementation by VeriSign, and allow the ICANN process to be controlled by VeriSign's competitors." (ER135/¶98.) ICANN and its Board agreed with the WLS co-conspirators to block the introduction of WLS specifically "to avoid the adverse impact of the WLS on the competitive position of WLS co-conspirators." (*Id.*)

Pursuant to the conspiracy among ICANN and VeriSign's competitors, in March 2002, the Registrar Constituency of the DNSO, which was controlled by the WLS co-conspirators, issued a purported Position Paper asserting that ICANN should exercise control over WLS and limit or block its introduction. (ER135/¶96.) The Registrar Constituency undertook these actions for anti-competitive purposes and despite the fact that there was no proper basis for ICANN to assert control over WLS. (*Id.*)

The head of the Registrar Constituency has admitted the result of the Position Paper was to require the ICANN Board of Directors to deem WLS to be "policy related and thus subject to the current DNSO quagmire," which was "*subject to capture.*" (ER135/¶97 (emphasis added).) In fact, by causing the Registrar Constituency to issue the Position Paper, when no such formal statement of position was required, the WLS co-conspirators ensured they would keep within ICANN control of the process of review of WLS and could thereby "hamstring their competitor," VeriSign. (*Id.*) The WLS co-conspirators thus asserted control over and captured the DNSO proceedings with respect to WLS. (*Id.*) As alleged in the FAC, at all times relevant hereto, the Registrar Constituency and WLS co-conspirators controlled the DNSO. (ER135-36/¶¶98-99; 137/¶102.)

Based on the purported Position Paper, and pursuant to the conspiracy between ICANN and the WLS co-conspirators, the Board of Directors of ICANN purported to initiate an improper Consensus Review Process and referred the review of WLS to the DNSO. (ER135-36/¶98.) A Consensus Review Process is a special process (with a contractual basis in the Registry Agreement and the MOU) through which ICANN, under limited circumstances, can adopt policies concerning new services that otherwise are not within the scope of defined Registry Services. (ER136/¶99.) Contrary to ICANN's actions, however, and as ICANN later was forced to admit, the Consensus Review Process had no proper application to WLS. (*Id.*) Rather, ICANN used the initiation of a Consensus Review Process as a pretext to keep review of WLS in the hands of the DNSO, which ICANN knew was controlled by the WLS co-conspirators. (*Id.*)

In response to ICANN's actions delaying WLS through the Consensus Review Process and referring its consideration to a known group of VeriSign's competitors, VeriSign objected to ICANN on the grounds that ICANN had no basis or authority to conduct such a "process." ICANN turned a deaf ear to VeriSign's objections. (ER137/¶101.)

Although the Board of Directors of ICANN initially asserted control over WLS under the pretext of instituting a Consensus Review Process,

ICANN ultimately abandoned the improper Consensus Review Process after it had served its purpose. In its place, and in order to continue to block WLS, ICANN's Board of Directors then adopted the *contradictory* and *false* position that WLS is a "Registry Service" (as to which a Consensus Review Process would have no application), thus making WLS subject to the Registry Agreement. (ER138/¶104.) ICANN and the WLS co-conspirators have continued to assert this pretext as a basis to block the implementation of WLS by VeriSign. (*Id.*/¶¶104-05.)

As alleged more specifically in the FAC, in or about September 2002, pursuant to the conspiracy between ICANN and the WLS co-conspirators, the DNSO, which was controlled by the WLS co-conspirators, issued a report providing that WLS should only be permitted upon certain conditions that, in fact, rendered WLS impractical and prevented its introduction by VeriSign. (ER137-38/¶¶102-03.) Due to the requirements of the then existing ICANN Bylaws, and consistent with ICANN's practices, the Board of ICANN had to adopt and approve the DNSO's position. (ER137/¶102.) In furtherance of the conspiracy, and upon the false pretext that WLS was a Registry Service subject to its control, ICANN adopted the DNSO's position. (*Id.*)

ICANN has admitted that the conditions on the implementation of WLS were adopted by its Board of Directors as a consequence of and in deference to the position of the Registrar Constituency and DNSO, which ICANN knew were dominated by the WLS co-conspirators. (ER138/¶103.) In its resolution conditioning any offering of WLS by VeriSign, the Board of Directors of ICANN purported to exercise control over the proposed service on the ground that it constituted a Registry Service under the .com Registry Agreement – which was false and, indeed, contrary to the position of the Board in initially referring WLS to the DNSO as part of a purported Consensus Review Process. (*Id.*/¶104.)

In October 2002, VeriSign objected to the decision of ICANN by seeking reconsideration from ICANN's Board of Directors of the anticompetitive conditions the Board had placed on the offering of WLS. (*Id.*/¶105.) Pursuant to the conspiracy, the ICANN Board again delayed WLS, this time for a period of over seven months, by, among other things, deferring its response to VeriSign's request for reconsideration, thereby violating the Board's duty under its Bylaws to act within 90 days of the request. (*Id.*) When the ICANN Board finally acted in June 2003, it again improperly asserted control over WLS and imposed anticompetitive conditions upon its implementation. (*Id.*)

The actions resulting from the conspiracy among ICANN and VeriSign's competitors provided the co-conspirators with a several-year lead time to introduce competitive but inferior services without competition from VeriSign, blocked VeriSign's offering of WLS, and decreased the utility and attractiveness of WLS for consumers, even if it had been implemented. (*Id.*) As of this date, WLS remains blocked by ICANN. (*Id.*; 115/¶115.)

b. Site Finder

In September 2003, VeriSign introduced its Site Finder service. (ER113/¶32.) Site Finder provided an Internet user who made an error in typing a web address with a list of alternative web addresses that the user may have intended, instead of the unhelpful error message the Internet user otherwise would receive. (ER113/¶¶32-33.)

The FAC specifically alleges that, upon the introduction of Site Finder, ICANN, existing and potential competitors of VeriSign, and those sharing economic interests with VeriSign's competitors, entered into a conspiracy to close down the Site Finder service in restraint of trade. (ER144/¶128.) The co-conspirators named in the FAC include Afilias Limited; Alice's Registry, Inc.; Paul Vixie; certain registrars; and Steve Crocker (the "Site Finder co-conspirators"). (*Id.*)

Pursuant to the conspiracy between ICANN and the Site Finder co-conspirators, ICANN again falsely claimed that Site Finder was a Registry Service and threatened to interfere with VeriSign's continued operation of the .com registry in the event VeriSign did not close down the Site Finder service. (ER114/¶36; 144-45/¶129.) VeriSign had no choice but to capitulate to ICANN's threats and to suspend Site Finder to the detriment of VeriSign and millions of Internet users. (ER114-16/¶¶37-38.)

The Site Finder co-conspirators identified in the FAC are all members of ICANN's Security and Stability Advisory Committee ("SECSAC"), which reports directly to ICANN's Board. (ER145/¶¶130-31.) At all times relevant to the claims made in the FAC, the Site Finder co-conspirators captured and controlled the processes of SECSAC with respect to Site Finder. (*Id.*/¶130.)

SECSAC's website admits that SECSAC is composed of members whose interests "compet[e] with VeriSign" and that "conflicts of interest arise" in deliberations by SECSAC. (ER145/¶131.) Nonetheless, in connection with the conduct of SECSAC alleged in the FAC, no members of SECSAC who compete with VeriSign recused themselves from the SECSAC proceedings and decisions regarding Site Finder. (*Id.*/¶132.) Moreover, in violation of ICANN's Bylaws, during the course of the

SECSAC proceedings concerning Site Finder, the Site Finder co-conspirators, who dominated and controlled the proceedings, added to SECSAC outspoken opponents of the Site Finder service, including persons affiliated with Site Finder co-conspirators, specifically to secure and retain control of SECSAC, bias the proceedings against VeriSign, dictate the conclusions and contents of SECSAC reports concerning Site Finder, and compel ICANN to take action to terminate Site Finder. (*Id.*)

In furtherance of the conspiracy to block Site Finder, four days after VeriSign launched the new service, Steve Crocker, the Chairman of SECSAC and a co-conspirator, circulated a draft "report" recommending that the Site Finder service be terminated. (ER145-46/¶133.) This "report" contained no facts, evidence, or analysis; rather, it included a conclusion that Site Finder should be terminated and a place-holder for co-conspirator Paul Vixie and Suzanne Woolf, an outspoken critic of Site Finder who was improperly added to SECSAC, to add "factual information to support the opinions and recommendations." (*Id.*) As evidenced by the draft "report," as a result of its control by the co-conspirators, SECSAC prematurely concluded to shut down Site Finder, despite the absence of any evidence that Site Finder affected the security or stability of the domain name system; and

SECSAC issued a report indicating that co-conspirators were to manufacture evidence to support the conclusion that Site Finder should be blocked. (*Id.*)

Three days later, SECSAC issued its Report based on the above-referenced draft. (ER146/¶134.) Like the draft, this pretextual report lacked any support for its opinions and recommendations that Site Finder be terminated immediately. (*Id.*) The report admitted as much by acknowledging that SECSAC would meet the following month to determine support for its conclusions. (*Id.*/¶135.) Although a report with factual support was promised in November 2003, SECSAC had issued no such report by the time the FAC was filed on June 14, 2004. (*Id.*)

Pursuant to the conspiracy among ICANN and the Site Finder co-conspirators, and based on the pretextual SECSAC report, ICANN's President acted to force VeriSign to shut down the Site Finder service. (ER069-71.) ICANN's Board of Directors never adopted a resolution regarding Site Finder, nor did it rein in the improper conduct of ICANN's President or the Site Finder co-conspirators in forcing the service to be shut down. At all times relevant hereto, Steve Crocker, a co-conspirator and author of the SECSAC report, sat on the ICANN Board. (ER147/¶138.)

c. Internationalized Domain Names ("IDN")

In November 2000, VeriSign prepared to offer its IDN service, which allows Internet users to employ non-ASCII (i.e., non-English) character sets in domain names registered in the .com TLD registry. (ER121/¶55.) IDN would permit translation of a domain name in non-English characters to an ASCII format such that the translated domain name could be recognized by the registry. (*Id.*; 122/¶59.) ICANN, in conspiracy with identified co-conspirators, conditioned its approval (which ICANN insisted was necessary under the 2001 .com Registry Agreement) of VeriSign's IDN service on VeriSign's agreement to abide by certain costly and anticompetitive conditions, which delayed and limited VeriSign's introduction of IDN. (ER122/¶61; 123/¶63.)

The FAC specifically alleges that ICANN and existing and potential competitors of VeriSign combined to delay and limit the offering of IDN by VeriSign. (ER151-52/¶157.) Pursuant to this conspiracy, competitors of VeriSign captured and controlled the ICANN process concerned with IDNs, improperly delaying and conditioning VeriSign's offering of IDN services, and limiting the quantity and choice of IDN services available to consumers. (*Id.*) The FAC identifies the co-conspirators who combined with ICANN to restrain competition with respect to IDN services as including: the China

Internet Network Information Center ("CNNIC") and the Taiwan Network Information Center ("TWNIC"), who operate, respectively, the .cn and .tw ccTLDs[9] (the "IDN co-conspirators") in competition with VeriSign's operation of the .com gTLD. (*Id.*)

In December 2002, the Board of Directors of ICANN resolved that ICANN should form an IDN Registry Implementation Committee ("RIC") to "consider and exchange information on ways to resolve the issues associated with implementation of IDN capabilities in existing top level domains." (ER152/¶158.) In January 2003, as part of forming the RIC, the President of ICANN explained: "It is important to emphasize that the committee is not intended to set hard rules for registries, but rather to facilitate dialogue and information sharing so that IDNA project managers can educate and learn from each other and develop common solutions to common problems." (*Id.*)

On or about February 4, 2003, ICANN's RIC began work on formulating a set of guidelines for the deployment of IDNs into TLDs around the globe. (ER152/¶159.) VeriSign, as well as certain gTLDs and

[9] "ccTLDs" are domain names that end in a country code (e.g., .tw (Taiwan), .cn (China), .uk (United Kingdom)). (ER106/¶11.) By contrast, "gTLDs" are generic registries, such as .com, .gov, or .net. (*Id.*)

ccTLDs, including the IDN co-conspirators, became participants in this group. (*Id.*)

Prior to or upon the formation of the RIC, the IDN co-conspirators combined to pursue a common plan to delay or block VeriSign's introduction of IDN services to secure a head start for their own inferior competitive IDN services, and thereby to allow the IDN co-conspirators to be the first to enter the market for such services with respect to the languages spoken in their countries. (ER152-53/¶160.) Pursuant to this combination, the IDN co-conspirators determined to capture and control the IDN process at ICANN, including the process of the RIC, and to secure the agreement of ICANN to impose conditions delaying VeriSign's introduction of an IDN service. (*Id.*)

The FAC alleges that ICANN and the IDN co-conspirators combined to accomplish, and in fact accomplished, these unlawful objectives. (*Id.*) Moreover, a representative of co-conspirator CNNIC joined the ICANN Board of Directors and a consultant to CNNIC served as the IDN consultant to the Board. (ER153-54/¶163.)

At all times relevant to the conduct alleged in the FAC, ICANN acknowledged its responsibility under the Registry Agreement "to expressly authorize the registration of IDNA-compliant internationalized domain

names." (ER153/¶162.) Nonetheless, pursuant to the conspiracy between ICANN and the IDN co-conspirators, ICANN published a report proposing, in a reversal of its prior position, that the "guidelines" be "mandatory requirements" to which VeriSign would have to agree in order to offer its IDN service. (ER153/¶162.)

The Guidelines imposed numerous conditions, many of which put VeriSign at a competitive disadvantage vis-à-vis its registry competitors, for VeriSign to obtain ICANN's approval for its IDN services. (ER154-55/¶¶164-67.) For example, with respect to Chinese languages, VeriSign was required to develop variant tables by "work[ing] with local stakeholders who included the IDN co-conspirators and who were thus empowered by the Guidelines to delay and impede VeriSign's IDN efforts by their own conduct while they launched their competitive IDN services." (ER154/¶166.) The Guidelines also imposed on VeriSign "long-term, fixed obligations that would require the implementation of costly and burdensome procedures over and above compliance with the extensive technical standards for IDN . . . set by other groups." (ER155/¶167.)

Two weeks after the report was published, the ICANN Board adopted the guidelines and authorized ICANN's President to implement them. (ER153/¶163.) Subsequently, ICANN published *IDN Registry*

Implementation Committee (RIC) Guidelines for the Deployment of IDNs and established the Guidelines as the *gating requirement* for approval under the 2001 .com Registry Agreement between VeriSign and ICANN. (ER154/¶164.)

In adopting the Guidelines, the Board of Directors merely rubber-stamped the actions of the RIC, which was controlled by the IDN co-conspirators. (ER153/¶163.) As a result of this anti-competitive conduct, VeriSign was unable to launch IDN until after April 2004. Furthermore, the actions of the IDN co-conspirators limited VeriSign's offering and, to this day, have prevented VeriSign from getting the formal approval to launch a service that the co-conspirators received. (ER154/¶165; 155/¶¶167-68; 157/¶178.)

C. The District Court's Ruling

On May 18, 2004, the district court dismissed VeriSign's original complaint without prejudice on the following two grounds: "VeriSign has not sufficiently alleged a Section 1 conspiracy"; and "VeriSign has not alleged anything more than injury to its own business and, therefore, does not have antitrust standing." (ER094:1; 097:3-4.) The district court concluded that VeriSign's allegations fell "far short of the mark" because there was no allegation "that the Board of ICANN has actually conspired

with any of VeriSign's competitors," and VeriSign did not sufficiently allege that "competitors control or influence ICANN." (ER093:21-25.) The district court further suggested at oral argument that VeriSign allege who the conspirators were and in what way they misused ICANN's processes to restrain VeriSign's services. (ER078:16-20.)

In response to the district court's decision, VeriSign amended its antitrust claim by adding 28 pages of specific allegations naming the co-conspirators; alleging in greater detail agreements between ICANN's Board of Directors and the co-conspirators; specifically describing the ICANN decision-making processes for each service that were captured by the co-conspirators in order to perpetrate their anti-competitive acts; and setting forth in detail how each process was captured by the co-conspirators with the cooperation and agreement of ICANN. The additional allegations are contained in Paragraphs 17, 31, and 85 through 182 of the FAC. (ER108; 112; 130-58.)

On August 26, 2004, the district court granted ICANN's motion to dismiss with prejudice VeriSign's amended antitrust claim and declined to exercise supplemental jurisdiction over the remaining state law claims.

(ER268.) The district court held that VeriSign failed sufficiently to allege the element of a conspiracy. (ER267.)[10]

The district court considered the sufficiency of the allegations of an illegal conspiracy only against the following standard: "in order to sufficiently plead a conspiracy, [VeriSign] must allege that ICANN's decision-making process was controlled by economic competitors who have conspired to injure VeriSign." (ER260:24-26.) Contrary to allegations on the face of the FAC, the district court held that the FAC was deficient because it merely alleged that "certain named competitors have conspired to control *advisory groups* that report to ICANN's ultimate decision-maker, the Board of Directors." (*Id.*:27-28.)

In an apparent attempt to rationalize this improperly narrow reading of the FAC, the district court ignored allegations pled by VeriSign, drew unjustified inferences from allegations against VeriSign, and weighed the probative value of facts alleged in the complaint against extraneous evidence cited by ICANN in its motion to dismiss the FAC. (ER260-67.) More specifically, the district court ignored both (i) explicit allegations of agreements between ICANN, including its Board of Directors, and the co-

[10] The district court chose not to "analyze whether VeriSign ha[d] pled facts establishing 'antitrust injury' and standing." (*Id.*)

conspirators to accomplish their illegal ends, and (ii) specific and clear allegations of control of ICANN's Board of Directors and officers by the co-conspirators (Section VI.B., *infra*).

Furthermore, the district court improperly drew adverse inferences against VeriSign or otherwise weighed the facts on numerous important issues. For example, the district court concluded that VeriSign "makes too much" of admissions by ICANN that it was captured by competitors seeking to control its decisions (ER263:21); that ICANN's policy-development process was not "inherently conspiratorial" (ER262:8-9); that VeriSign's allegations concerning policy development responsibilities under ICANN's Bylaws – and apparently allegations that ICANN in fact acted consistent with those allegations (ER131/¶86; 134-35/¶95; 135-36/¶98; 137-38/¶¶102-03) – were incorrect (ER262:15-263:9); and that ICANN's funding from the co-conspirators' contributions was insufficient to influence ICANN's actions. (ER263:10-20.)[11] Indeed, at oral argument, the district court incorrectly observed that the admissions of capture by ICANN's

[11] The district court also improperly considered each allegation separately, rather than reading them together, and ultimately rejected each as factually inconsequential or wrong. (*See generally* ER260-64.) *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 990-91 (9th Cir. 2000) ("The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.").

President were "relatively ancient," having been made "six or seven months" prior to the restraints in question, and that the district court was "told" (with no attribution of source) they were taken out of context and have "nothing whatsoever to do with VeriSign." (ER232:2/5/7; 233:11.)

The district court concluded as follows:

> To summarize, VeriSign has not alleged, and cannot allege, that the co-conspirators comprised a majority of the ICANN Board of Directors. It has not alleged and, given that the bylaws provide otherwise, it cannot allege that the "supporting organizations" within ICANN's structure that do include competitors of VeriSign dominated the Board. (ER267.)

Taken literally, the district court's conclusion would confer broad immunity from the antitrust laws to ICANN and similar organizations except where a group of competitor co-conspirators comprise a majority of the organization's board. Here, the district court concluded that the FAC could not plead a conspiracy involving ICANN because (1) the alleged competitor co-conspirators did not comprise a majority of the Board and (2) ICANN's Bylaws, which the district court mistakenly interpreted to give to the Board the authority for the decisions at issue, precluded allegations of capture or control of the Board by groups of competitors within ICANN.

V. SUMMARY OF ARGUMENT

The FAC pleads violations of Section 1 of the Sherman Act based on specific, detailed factual allegations of concerted action between ICANN

and VeriSign's competitors to restrain trade by blocking the introduction of three innovative new services by VeriSign.[12] In the case of each service, the FAC sufficiently pleads concerted action in the form of (i) an agreement between ICANN and identified competitor co-conspirators to block the service, and (ii) capture or control of ICANN's decision-making for that service by identified competitor co-conspirators. It is well established that the FAC is sufficient if it adequately pleads a violation based on any theory, including either of these bases for concerted action with respect to any of the services blocked by the conspirators. Here, the FAC adequately pleads concerted action with respect to each service.

Nonetheless, the district court improperly dismissed the FAC by ignoring clear and specific allegations of agreements between ICANN and the co-conspirators; by applying an improper legal standard for capture as a basis for concerted action; and by making findings on disputed questions of fact in this case, including improperly drawing adverse inferences from the allegations against VeriSign and weighing the probative value of allegations in the FAC against extrinsic evidence cited by ICANN in its motion to

[12] The FAC pleads concerted action separately with respect to each service, including 6 pages of detailed allegations with respect to WLS, and 4 pages each with respect to Site Finder and IDN. (ER133-39; 144-47; 151-55.)

dismiss the FAC. The judgment should be reversed based on each of these errors.

First, because it assessed the adequacy of the FAC only on the basis of whether "ICANN's decision-making process was controlled by economic competitors who have conspired to injure VeriSign" (*supra* at 28), the district court ignored specific and independently sufficient allegations of concerted action based on actual agreements between ICANN and the competitor co-conspirators to restrain trade. Section VI.B.1., *infra*. Such allegations of conspiracy are made with respect to each of the services and are sufficient to satisfy the element of concerted action necessary for a Section 1 violation, whether or not capture was adequately plead (which it was).

Second, the district improperly held that capture depends on allegations "that the co-conspirators comprised a majority of the ICANN Board of Directors," since, according to the district court, the Bylaws made the Board the final decision-maker within ICANN's structure and thus precluded allegations of capture or control by the Supporting Organizations within ICANN. As alleged in the FAC, that holding is contrary to the intent of the U.S. Government when it recommended permitting a private corporation to perform the coordination function ultimately undertaken by

ICANN. It also is contrary to authority from the U.S. Supreme Court and this Court that trade groups and industry self-regulatory bodies are subject to liability under the antitrust laws when they combine with commercial competitors, whether or not the competitors comprise a majority of the group's board. Finally, the district court's decision is contrary to explicit allegations in the FAC that ICANN's Bylaws provide that the Supporting Organizations decide matters of policy and, more fundamentally, that ICANN thinks they do and conducts business in that way, allowing its Supporting Organizations to decide policy matters, as admitted by the President of ICANN.

Third, the district court made "findings of fact" inconsistent with the allegations of the FAC. Contrary to the factual weighing performed by the district court (*supra* at 28-30), the FAC specifically pleads agreements between ICANN and its co-conspirators, and the control by the co-conspirators of the relevant ICANN decision-making process, with respect to each new service proposed by VeriSign and blocked by ICANN. The FAC specifically *names* the co-conspirators and identifies particular acts by *both* ICANN and the co-conspirators (i) in the formation of the conspiracy and (ii) in furtherance of its goals to restrain competition. (ER133/¶90; 135-39/¶¶96-105; 144-47/¶¶128-39; 151-55/¶¶157-68.)

The FAC further alleges why and how capture occurred (ER130-39/¶¶84-105; 144-47/¶¶128-39; 151-55/¶¶157-68), including: ICANN's unique bottom-up policy development process, which enabled control of the decision-making processes by constituency groups controlled by VeriSign's competitors (ER131/¶86); the specific actions taken by the competitor co-conspirators and constituency groups to achieve capture of ICANN (ER 133-39/¶¶90-105; 144-47/¶¶128-39; 151-55/¶¶157-68); the requirement of ICANN's Bylaws that the policy decisions of the relevant constituency groups be followed by the Board of Directors of ICANN (ER 131/¶86; 134/¶95; 137/¶102); and ICANN's dependence on VeriSign's competitors for its funding (ER134/¶93).

The FAC supports the foregoing allegations by specific admissions by ICANN's President and the competitor co-conspirators that the policy development process at ICANN was subject to capture for precisely the reasons alleged in the FAC, including that competitors working through ICANN used its processes to "hamstring their competitors." (ER131/¶86; 133/¶90; 134/¶¶94-95; 135/¶97.)

The FAC's extraordinarily detailed allegations of "a contract, combination . . . or conspiracy" to restrain trade go far beyond the pleading

standards of Rule 8(a) and sufficiently plead a violation of Section 1 of the Sherman Act.

VI. ARGUMENT

A. The FAC Must Plead Only A "Short And Plain Statement" Of VeriSign's Antitrust Claim

The Federal Rules of Civil Procedure provide that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The United States Supreme Court recently explained that "[s]uch a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002) (holding this "simplified pleading standard applies to all civil actions"). A court may not dismiss a complaint unless the movant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[13] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). As this Court has stated, there is a "powerful

[13] A claim advancing multiple theories of recovery, such as VeriSign's independent claims of unlawful combinations with respect to three separate services, is sufficient if it shows the plaintiff would be "entitled to *any* relief which the court can grant." *Air Line Pilots Ass'n, Int'l v. Transam. Airlines, Inc.*, 817 F.2d 510, 516 (9th Cir. 1987) (internal quotation marks and citation omitted).

presumption against rejecting pleadings for failure to state a claim." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

In *Swierkiewicz*, the Supreme Court rejected the notion that Rule 8(a)'s "simplified notice pleading standard" requires that the complaint allege facts setting forth a prima facie violation. 534 U.S. at 512-15. The Supreme Court explained that "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits." *Id.* at 515. "The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Id.* at 514. The "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 512. The Supreme Court noted that, while defendants may argue that notice pleading may burden the courts and encourage unsubstantiated lawsuits, "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 515 (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

There can be no doubt after *Swierkiewicz* that the "relevant standard" for determining whether a complaint satisfies the requirement of Rule 8(a) is

simply whether it gives defendant "fair notice of the basis for [plaintiff's] claims." *Id.* at 514. As demonstrated below, the FAC certainly satisfies this standard. Indeed, the FAC does far more. In pleading facts that, if true, establish each element of a Section 1 violation, the FAC satisfies even the most demanding pleading standards found in cases decided before *Swierkiewicz*.

B. The FAC Sufficiently Pleads A Conspiracy Under Section 1 Of The Sherman Act

The elements of a claim under Section 1 of the Sherman Act are: "1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991). The only element of a Section 1 claim that the district court ruled VeriSign failed to meet was the first element – whether the FAC adequately pleads a "contract, combination . . . or conspiracy."

A claim under Section 1 of the Sherman Act must plead concerted action because Section 1 does not proscribe anticompetitive activity by a single entity. Section 1 instead reaches only restraints of trade brought about by two or more entities acting in concert. In *Copperweld Corp. v.*

Independence Tube Corp., 467 U.S. 752, 767-68 (1984), the Supreme Court stated:

> The Sherman Act contains a basic distinction between concerted and independent action. . . . The conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization . . . .
>
> Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities. It does not reach conduct that is "wholly unilateral."

For this reason, and this reason alone, a Section 1 claim must allege that separate entities contracted, combined or conspired to bring about the allegedly anticompetitive result.

The FAC satisfies this requirement of concerted action by alleging two separate bases for finding that the restraints on competition alleged here were brought about by conspiratorial action. The FAC alleges that ICANN, a separate legal entity, conspired with identified competitors of VeriSign to bring about restraints in several identified markets. The FAC additionally satisfies this requirement by alleging that the actions of ICANN were brought about by a conspiracy of the same identified companies that captured ICANN's relevant decision making processes.

As discussed below, the FAC clearly gives ICANN "fair notice of the bases for" VeriSign's claims that the restraints on competition alleged were brought about by conspiracy and did not result simply from "wholly unilateral" conduct. Moreover, the FAC does not simply provide notice of alternative bases for the conspiracy claims; it provides extensive factual detail of the grounds on which each of them rests.

1. The FAC Alleges Conspiracies Between ICANN and Identified Competitors of VeriSign

The FAC alleges that ICANN agreed with identified competitors of VeriSign to undertake the anticompetitive acts that form the basis for the Section 1 claim. In support of these allegations of an actual agreement, the FAC alleges specific, improper actions by officers of ICANN and its Board of Directors that were part of the very formation of the conspiracy and the unlawful conduct that carried out its plans.[14] These allegations more than satisfy the Rule 8(a) requirements for pleading conspiracy.

[14] While much of the argument of the parties below centered on the allegations of capture or control, VeriSign also argued that ICANN conspired with VeriSign's competitors by forming an anticompetitive agreement. *E.g.*, Plaintiff VeriSign, Inc.'s Memorandum in Opposition to Defendant's Motion to Dismiss filed on July 28, 2004, p.16 ("The FAC alleges that ICANN and VeriSign's competitors 'joined and agreed' that ICANN would falsely assert control over Site Finder as a Registry Service").

Consistent with the simplified notice pleading requirements of Rule 8(a), courts of appeal have required only that a complaint's allegations of conspiracy be sufficient to put the defendant on notice of the alleged conspiracy. For example, in *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979), the Tenth Circuit reversed dismissal of an antitrust claim where plaintiff alleged only that "[p]laintiff is informed and believes, and upon information and belief alleges that defendants conspired to cancel (the agreement)." *Id.* at 1372. The district court had dismissed the claim because it did not "specify in any manner the facts with respect to [Defendant's] conduct which would make it part of the conspiracy or combination." *Id.* The Tenth Circuit held that the conspiracy allegation was sufficient because defendants had "fair notice" of the claims and it was not "beyond doubt the plaintiff would be unable to prove the claim of conspiracy." *Id.* The Tenth Circuit noted, "[w]hether the allegation is called conclusory, as it is, or factual, as it is also, is not determinative." *Id.*; *see also Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (explaining in §1983 case, "there is no requirement in federal suits of pleading the facts or the elements of a claim, with the exceptions (inapplicable to this case) listed in Rule 9. Hence it is enough in pleading a conspiracy merely to indicate the parties, general purpose, and approximate date, so that the

defendant has notice of what he is charged with."); *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n*, 891 F.2d 1473, 1481-82 (10th Cir. 1989) (similar); *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154, 1156 (8th Cir. 1988) (reversing dismissal of complaint where plaintiff had alleged "(albeit minimally) facts constituting the conspiracy, its object and accomplishment"); *In re Commercial Explosives Litig.*, 1996 WL 795270, at *2 (D. Utah Dec. 20, 1996) (refusing to dismiss antitrust claim with no detailed facts regarding defendant's conduct because it "fairly informs [defendant] that it is accused of engaging in a conspiracy to fix [prices]").

This Court, in *Walker Distribution Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963), similarly reversed the dismissal of defendant's antitrust counterclaim although the allegations were "sketchy and disconnected" and failed to name or describe the conspirators. *Id.* at 4. "[T]he existence of doubt as to a party's ability to prove his case" was irrelevant because "this is a pleading case, and nothing more." *Id.* at 4, 8.

VeriSign's factual allegations are far more detailed and specific in alleging and supporting its claim of concerted action than the complaints in any of these cases. The district court simply ignored the allegations in the FAC that ICANN had conspired with named competitors of VeriSign to

block the introduction of VeriSign's innovative services. In fact, only one *sentence* in the district court's opinion addresses (albeit inaccurately) VeriSign's allegations of ICANN's agreements with co-conspirators: "Moreover, there is no allegation (much less factual support for one) that the Board of ICANN actually conspired with any of VeriSign's competitors." (ER264:6-8.) To the contrary, the FAC is replete with allegations that ICANN and its Board "actually conspired" with the identified co-conspirators.[15]

WLS. The FAC explicitly alleges, for example, that "the *Board of Directors* of ICANN *agreed* with the WLS co-conspirators" improperly to assert control over WLS through the artifice of initiating a Consensus Review Process, thereby placing control over the introduction of WLS in the very hands of the WLS co-conspirators, despite the fact that WLS could not be a proper subject of a Consensus Review Process for reasons ICANN was later forced to admit.[16] (ER135-36/¶98.) The FAC (ER136/¶99) further

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[15] Courts should hesitate to dismiss antitrust cases "where the proof is largely in the hands of the alleged conspirators." *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976). This is precisely the case here. VeriSign should have had the opportunity for discovery in order to uncover the factual details of the conspiracy, such as meeting dates, locations, and the identity of additional co-conspirators.

[16] *See* ER133/¶90 ("ICANN and existing and potential competitors of VeriSign have conspired to use, and have in fact used, ICANN's processes

clearly states that, "[i]n fact, ICANN's actions in purporting to invoke the Consensus Review Process were part of a combination designed unreasonably to restrain competition," and specifically alleges how the conspiracy affected the Consensus Review Process: "As part of the conspiracy between ICANN and the WLS co-conspirators, the DNSO . . . adopted the position of the Registrar Constituency and Task Force." (ER137/¶102.)

The FAC alleges that, following its efforts to block WLS through the artifice of the abandoned Consensus Review Process, ICANN asserted control over, and blocked, the introduction of WLS by taking the *contradictory* and *false* position that WLS was in fact a Registry Service (to which a Consensus Review would have had no application). (ER136/¶99; 138/¶104.)

Ultimately, the FAC alleges, pursuant to the conspiracy, the Board of Directors of ICANN delayed and effectively blocked WLS by adopting an improper resolution imposing anticompetitive conditions on the offering of WLS, notwithstanding the fact that WLS was not a Registry Service and,

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(Footnote Cont'd From Previous Page)
improperly to regulate VeriSign's attempted introduction of the WLS . . . ."); 133-37/¶¶96-100; 137-39/¶¶102-03, 105.

therefore, that ICANN had no authority to act with respect to WLS or to impose such conditions. (ER136/¶99; 138-39/¶¶104-05; 142/¶117.) As part of this course of conduct, the Board violated its own Bylaws, violated the Registry Agreement between VeriSign and ICANN, and prevented the introduction of an innovative service. Section IV.B.4.a., *supra*.

The FAC quotes admissions by ICANN's officers that WLS was superior to any service offered by VeriSign's competitors and would have benefited consumers. (ER141-42/¶116.) Nonetheless, the FAC pleads, ICANN has admitted that the anticompetitive conditions were adopted by its Board as part of its agreement and common plan with the WLS co-conspirators.[17]

Accordingly, the FAC specifically pleads an *agreement* between ICANN and VeriSign's competitors unlawfully to block the introduction of WLS. (ER135/¶98.) The allegations of an agreement are augmented by allegations of specific, improper actions by ICANN as part of the formation of the conspiracy and the carrying out of its unlawful plans, including assertion of false and contradictory statements by ICANN and its Board,

[17] ER138/¶103 ("ICANN has admitted that the conditions on the implementation of WLS were adopted as a consequence of and in deference to the position of the Registrar Constituency, which was dominated by the WLS co-conspirators.").

violations by ICANN of its own Bylaws, specific anticompetitive acts undertaken by the Board itself, and conduct by ICANN and its Board purporting to regulate a service over which ICANN has no authority whatsoever. (ER133-39/¶¶90-105.)

Neither these allegations regarding WLS, nor the allegations in the following paragraphs of this section, were addressed by the district court in its Order.

Site Finder. Similar allegations are made with respect to Site Finder, including that the unlawful combination was based on a conspiracy and agreement between ICANN and named co-conspirators who were part of the SECSAC committee that created the pretextual report ICANN cited in blocking Site Finder. The FAC alleges that, "at or about the time Site Finder was introduced, the Site Finder co-conspirators joined and agreed with ICANN that ICANN would assert control over Site Finder as a purported Registry Service and would shut down the service." (ER144-45/¶129.) The FAC further alleges that, as part of the conspiracy, ICANN itself took action based on the false report that was prepared by SECSAC as a "subterfuge and pretext to attempt to justify the actions of ICANN" and through procedures that were "contrary to the Bylaws of ICANN." (ER145/¶132; 146/¶134; 147/¶¶136-37.) The FAC alleges that the false pretense for ICANN's

actions included a fundamental misrepresentation by ICANN that Site Finder was a Registry Service (ER144-45/¶129); that ICANN's Board of Directors never adopted a proper resolution authorizing any of the actions of its officers in connection with their shutting down Site Finder (ER147/¶138; 069-71); that ICANN acted without the open or transparent procedures that ICANN is required to follow (ER147/¶139); and that ICANN acted beyond its authority and without any jurisdiction in blocking VeriSign's new service (ER144-45/¶129). Again, the FAC includes allegations that specifically plead a conspiracy between ICANN and named competitors of VeriSign and that are reinforced by allegations of specific, independently improper acts by ICANN as part of the formation of the conspiracy and the perpetration of the anticompetitive plans of the conspiracy.

IDN. Finally, the FAC pleads an agreement between ICANN and named co-conspirators to restrain IDN services (ER151-52/¶157; 152-53; ¶160; 153-54/¶163.) In particular, it alleges that "ICANN and existing and potential competitors of VeriSign have combined and conspired to delay and limit the offering of internationalized domain names by VeriSign." (ER151-52/¶157; *see also* 153/¶160 ("the IDN co-conspirators determined . . . to secure the agreement of ICANN to impose conditions delaying VeriSign's introduction of an IDN service").) These allegations are coupled with

allegations of specific actions by ICANN supporting the formation and goals of the conspiracy, including: contradictory actions by the Board of Directors of ICANN to give the competitor co-conspirators actual control over VeriSign's introduction of IDN (ER 152/¶158; 153/¶162; 153-54/¶¶163-64; *compare* ER152/¶158; 153/¶62 *with* 154/¶166); and specific actions by ICANN in carrying out the plans of the conspiracy, including actions that limited the value of VeriSign's IDN service and that then delayed the service so that the co-conspirators could introduce their services in the market first (ER154-55/¶¶165-68).

The district court failed to consider these allegations of conspiracies between ICANN and VeriSign's named competitors. The district court's statement that "there is no allegation (much less factual support for one)" of an actual conspiracy (ER264:6-7) is contrary to the face of the pleading. The explicit and detailed allegations of the FAC provide more than mere "fair notice" of VeriSign's claim of conspiracy. They identify the alleged co-conspirators and actions taken by the co-conspirators, including ICANN and its Board, to form the conspiracy and carry out its plans. These allegations unquestionably satisfy the requirements of Rule 8(a) and *Swierkiewicz*.

2. The FAC Also Satisfies the Conspiracy Requirement By Pleading Capture of ICANN by VeriSign's Competitors

The FAC's detailed allegations that VeriSign's competitors captured and controlled the decision-making processes of ICANN with respect to the services at issue in this action provide an alternative basis to find that the FAC sufficiently alleges concerted action. The district court correctly acknowledged that capture or control of ICANN's decision-making processes by VeriSign's competitors could fulfill the requirement of concerted action. (ER260.) Indeed, the district court correctly described a legal standard for capture: "that ICANN's decision-making process was controlled by economic competitors who have conspired to injure VeriSign." (*Id.*)

Nonetheless, in dismissing VeriSign's antitrust claim, the district court erroneously limited the doctrine of capture to cases where a majority of the board of directors of the association are competitor co-conspirators. (ER267.) As explained more fully below, this arbitrary limitation on the scope of concerted action under Section 1 is contrary to prior holdings of the Supreme Court and this Court and improperly would immunize many associations, including ICANN, from liability under Section 1. *See Am.*

Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 571-73 (1982), *infra*; *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1029 (9th Cir. 1988), *infra*; *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1156 (9th Cir. 2001) (considering at summary judgment stage whether the Board rubber stamped sub-entity's recommendation); *Podiatrist Ass'n, Inc. v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 15 (1st Cir. 2003) (same). Under the standards set forth in these and other cases, the FAC sufficiently pleads capture as a theory of concerted action with respect to restraints involving each of the services at issue in this action.

a. Capture Does Not Require Control of a Majority of ICANN's Board of Directors, As the District Court Incorrectly Held; Capture Requires Only That the Conspirators Control or Greatly Influence ICANN's Pertinent Decision-Making Processes

It is well established that where an organization's pertinent decision making process is controlled or greatly influenced by conspiring competitors of the plaintiff, the organization may be held liable under Section 1 for its actions that restrain trade on the theory that those actions are not "unilateral" but, rather, the product of concerted action. This doctrine of capture applies

even when the act in restraint of trade was not directly caused by the board of directors of the organization and even where there is no allegation that a majority of the board is comprised of competitor co-conspirators.

In *Hydrolevel*, 456 U.S. at 572-73, the Supreme Court held that a standards organization could be liable under Section 1 where the plaintiff's competitors used the organization's actions to restrain trade, notwithstanding that there was no allegation that competitors comprised a majority of, or controlled, the board of directors. Defendant was a non-profit society of mechanical engineers with over 90,000 members. 456 U.S. at 559. Defendant had a full time staff and also was assisted by volunteers from industry and government. *Id.* Threatened with the introduction of a new boiler product by plaintiff, a competitor used a subcommittee of the association in which it participated to publish a letter questioning the safety of the new product. *Id.* at 560-61. The Supreme Court held the association could be liable under such circumstances for action by employees of its member companies using the organization "to harm their employers' competitors through manipulation of [the organization's] codes." *Id.* at 571. It did not matter to the Court that the decision-maker was not the board of directors of the association because "[w]hen [the board] cloaks its subcommittee officials with the authority of its reputation, ASME . . . gives

them the power to frustrate competition in the marketplace." *Id.* at 570-71.[18]

Similarly, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509-10 (1988), the Supreme Court found that the National Fire Protection Association could be liable under Section 1, where competitors used the association to foreclose introduction of a new competitive product. The association had over 31,000 members from industry, academia, labor, firefighters, government, and medicine. *Id.* at 495. Nonetheless, capture was found where a competitor packed the annual meeting with its supporters and won a vote excluding plaintiff's product from the association's code.[19] The Supreme Court, recognizing that "the restraint of trade on which liability was predicated was the Association's exclusion of respondent's product from the Code," found that such a restraint, although in some sense the association's unilateral act, was tantamount to an "agreement not to manufacture, distribute, or package certain types of products." *Id.* at 500. Because of this possibility that the acts of such an association can result

[18] The court explained: "Furthermore, a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity . . . . Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers." *Id.* at 571 (quoted in part at ER092:21-093:1).

[19] Although the decision reached at the annual meeting was appealed to the board of the association, the board denied the appeal on the independent ground that no rule of the association had been violated. 486 U.S. at 497.

from the agreement of competitor members, the Supreme Court noted that, "private standard setting associations have traditionally been objects of antitrust scrutiny." *Id.*

In *Hahn v. Oregon Physicians' Service*, 868 F.2d 1022 (9th Cir. 1988), this Court reversed the entry of summary judgment in favor of the defendant, where plaintiffs challenged a prepaid health care plan for alleged price fixing with respect to a certain class of services. The district court granted summary judgment based on reasoning similar to that used by the district court in this case – namely, that the majority of the health care plan's board did not compete economically with the plaintiffs. This Court reversed, holding that the proper inquiry was "whether practitioners sharing similar economic interests collectively exercise control of a plan" and that such issues presented questions of fact for trial. *Id.* at 1029-30.

Each of these cases is contrary to the district court's conclusion that there can be no sufficient allegation of capture unless the complaint alleges a majority of the board of directors is comprised of competitor co-conspirators.

The district court's attempt to distinguish *Hydrolevel* ignores important allegations of the FAC and otherwise is misplaced. The district court stated that "unlike what is alleged here, the defendant-association's

subcommittee was clearly 'captured' by the plaintiff's competitor whose vice-president manipulated the association into approving and circulating the terribly injurious attack on plaintiff's product." (ER265:19-22.) The FAC, however, clearly alleges that the DNSO and Registrar Constituency *were* captured by the co-conspirators and that the restraints effected by the sub-entities were tremendously injurious, costing VeriSign millions of dollars.

The district court also attempts to distinguish *Hydrolevel* by stating that "if the association [in *Hydrolevel*] had not expressly delegated final decision-making authority to the subcommittee, the letter would not have been issued." (*Id.*:24-25.) The FAC specifically alleges, however, that ICANN's Board and Bylaws established and effectively delegated the decision-making processes that were followed in this case, which resulted in the conduct alleged in the FAC. Furthermore, the alleged actors in this case included, not just the DNSO and Registrar Constituency, but the Board of Directors of ICANN and its President. (ER134/¶95; 135-36/¶98; 137/¶102; 138/¶104; 147/¶138; 153-54/¶163; 069-71.) Thus, there is no distinction between *Hydrolevel* and this case with respect to the authority to undertake the acts alleged in the complaint.

Accordingly, there is no support in the law for limiting a finding of concerted action or capture involving an association or similar organization

to cases in which competitor co-conspirators are alleged to comprise a majority of the board of directors of the association. Indeed, the cases firmly establish that the law is to the contrary.

b. The FAC Alleges Capture of ICANN's Pertinent Decision-Making Processes

The FAC specifically and sufficiently pleads that the relevant decision-making process of ICANN with respect to each of the services at issue was "controlled or greatly influenced" by identified competitor co-conspirators.

WLS. VeriSign alleges the WLS co-conspirators captured and controlled ICANN's Board (ER135/¶98; 137-38/¶103), as well as its policy making body, the DNSO (ER133-34/¶92; 135/¶96). As described in detail in an earlier Section of this brief (IV.B.4.a.), the FAC specifically alleges how the decision-making process at ICANN was captured; the circumstances that made such capture possible with respect to WLS; how the ICANN Board of Directors and DNSO were used to further the conduct of the co-conspirators in blocking WLS; and admissions by ICANN of capture in this case and its effects on VeriSign and consumers. (ER133-34/¶92; 134-36/¶¶95-98; 136/¶100; 137-38/¶¶102-03.)

Contrary to statements by the district court, the FAC specifically pleads capture of the Board of Directors of ICANN[20] (*e.g.*, ER135-36/¶98; 137-38/¶¶102-03). Additionally, in support of these allegations, the FAC alleges with particularity contributions of the Board to the formation of the co-conspirators' plan and its implementation; the requirement of the Bylaws that the Board adopt the policies of the constituencies controlled by competitors; admissions of the President that the Bylaws required such control and that the practices of the Board were consistent with such control; and actions of the Board in violation of ICANN's own Bylaws in support of the conspiracy. (ER131/¶86; 134/¶93; 134-35/¶¶95-96; 135-36/¶98; 136-37/¶100; 137/¶102; 138-39/¶¶104-05.)

Site Finder. The FAC alleges that ICANN and VeriSign's competitors "joined and agreed" that ICANN would falsely assert control over Site Finder as a Registry Service. (ER144-45/¶129.) The co-conspirators "captured and controlled the processes of SECSAC [Security and Stability Advisory Committee] with respect to Site Finder."

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[20] The district court stated: "VeriSign . . . must allege that ICANN's decision-making process was controlled. . . . But what VeriSign alleges is different: that certain named competitors have conspired to control *advisory groups* that report to ICANN's ultimate decision-maker, the Board of Directors." (ER260:24-28.) As explained in the text, the so-called "advisory groups" are decision-makers on policy matters under ICANN's Bylaws. In addition, the FAC expressly alleges the Board was captured.

(ER145/¶130.) The co-conspirators, who controlled and were members of SECSAC, in turn, captured and controlled the actions of the President of ICANN, who made the decision requiring VeriSign to shut down Site Finder. (ER146¶¶133-34; 147/¶¶136-37; 069-71.)

Pursuant to the conspiracy, SECSAC wrote a sham report, lacking any factual support, and submitted it to ICANN urging that Site Finder be terminated. (ER145-46/¶¶133-34.) "ICANN purported to assert 'authority' over Site Finder and took action based on the SECSAC Report, and without proper independent review or consideration, to force VeriSign to shut down the service." (ER147/¶136.) ICANN's Board never adopted a lawful resolution regarding Site Finder and failed to adopt required independent review procedures to give VeriSign an avenue to challenge ICANN's action. (*Id.*/¶¶138-39.) ICANN supported the objects and conduct of the co-conspirators by adding members to SECSAC in violation of its own Bylaws and by forcing VeriSign to shutdown Site Finder. (ER145/¶132.)

IDN. The FAC specifically alleges that the co-conspirators captured ICANN's decision-making with respect to IDN, including controlling the Registry Implementation Committee (RIC) and the Board of Directors of ICANN. (ER151-52/¶157; 152-53/¶160; 153-54/¶¶162-63.) The FAC further alleges that the recommendation of the RIC that operated to restrain

trade in IDN services was rubber stamped by the Board of Directors of ICANN (ER152-53/¶160; 153-54/¶163); and that the key consultant to the Board with respect to IDN, whose recommendation ICANN followed, was an agent of the co-conspirators (ER153-54/¶163). Finally, the FAC alleges that ICANN delegated to the co-conspirators power over VeriSign's introduction of IDN (ER153-54/¶163) and delayed approval of *VeriSign's* implementation of IDN far beyond the time it authorized the co-conspirators to proceed with their implementation of IDN (ER155/¶168).

With respect to WLS, Site Finder and IDN, the FAC sufficiently and in great detail alleges capture of ICANN and its decision-making, including ICANN's Board of Directors. At bottom, in dismissing the FAC, the district court simply ignored, or disagreed with, these factual allegations.

c. The District Court Improperly Ignored, Argued With and Weighed the Probative Value of Factual Allegations of Capture

Attempting to justify its conclusion that the FAC did not adequately plead capture of ICANN, the district court ignored or disputed specific factual allegations in the FAC, construed allegations in a light most favorable to the *defendant* and against the pleader, and weighed the probative value of alleged facts, all of which are improper on a motion to

dismiss. *See Zimmerman*, 255 F.3d at 737 (on motion to dismiss, court must "accept[] as true all well-pled allegations of fact in the complaint and construe[] them in the light most favorable to the plaintiffs").

Admissions by ICANN of Capture

The district court inappropriately weighed the probative value of admissions by ICANN's President, for example, that the bottom-up decision-making process of ICANN had proven unworkable, was subject to capture by groups of competitors, and in fact had been used by groups of competitors against other competitors. (ER131/¶86, quoted in Section IV.B.3., *supra*.)

The district court dismissed these statements by treating them individually, in isolation from other allegations in the FAC, and by drawing inferences adverse to VeriSign. Thus, the district court argued there was "nothing inherently conspiratorial" about the "bottom-up" process that considers input from advisory groups of competitors. (ER262:8-10.) The district court likewise argued that the President in his statement "did not refer to any of the particular competitors or registry services at issue in this lawsuit," and drew an inference against the relevance of the statement on the factual basis that the statement was made "several months" prior to VeriSign being prepared to introduce WLS. (ER263:25-27.)

The impropriety and danger of drawing such inferences against the plaintiff on the basis of the pleadings is underscored by the fact that, here, the statement by ICANN's President was made at a time most relevant to VeriSign's claims – approximately two to three months *after* VeriSign informed ICANN of the details of its proposed WLS and, indeed, *while* the conspiracy to block the service was alleged to be *ongoing*. (ER116/¶39.) Similarly, the President's admission that groups of competitors used ICANN's bottom-up decision-making process to hamper their competitors was made just *two weeks* prior to the Registrar Constituency's assertion in its Position Paper that ICANN should exercise control over WLS and limit or block its introduction by VeriSign – i.e., at a time the Position Paper that would preempt the policy making process and place it in the hands of VeriSign's competitors obviously was being prepared. (ER135-36/¶¶96-98.)

Inexplicably, the district court also interpreted admissions by ICANN to refer only to "lower-level processes" (ER264:5), and, at oral argument, the district court even indicated that it was "told [these statements] are taken out of context" and that they had "nothing whatsoever to do with VeriSign." (ER232:5-7.)[21]

[21] It is unclear who exactly "told" the District Court that the statements were taken out of context because the allegations of the FAC show that these

Finally, contrary to the district court's factual determinations, one clear inference that should be drawn from the President's admissions of capture, especially when coupled with other admissions of Board action with respect to WLS cited in the FAC, is that capture or control of ICANN's decision-making would continue to occur until the circumstances that permitted capture changed. Such a change in circumstances certainly was not alleged in the FAC and should not have been made-up by the district court, especially not in assessing a motion to dismiss.

Such "fact-making" by the district court obviously is improper upon a motion to dismiss.

Bylaws and Related Practices of ICANN

The district court also, in substance, made "findings of fact" when it took judicial notice of ICANN's Bylaws, agreed with the interpretation of ICANN's Bylaws argued by ICANN in its motion to dismiss, and then assumed that ICANN acted only in accordance with that interpretation of its Bylaws. These findings are contrary to specific allegations in the FAC, including admissions by ICANN quoted in the FAC, that ICANN's Bylaws

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statements were made in a relevant context. (ER116/¶39; 131/¶86; 135-36/¶¶96-98.)

require it to accept the policy positions of the DNSO and that ICANN acts according to that interpretation of its Bylaws. (ER262-63.)

The FAC alleges that the Board of Directors of ICANN was required by ICANN's Bylaws to adopt the DNSO's position to limit or block WLS, notwithstanding that the DNSO was controlled by the co-conspirators. (ER108/¶17; 137/¶102.)[22] In support of this allegation, VeriSign specifically alleged that ICANN's Board of Directors and the DNSO conduct the affairs of ICANN consistent with this interpretation of ICANN's Bylaws, including by quoting in the FAC statements by ICANN's President and a co-conspirator (who is a leading member of the DNSO) that the Bylaws had this meaning and effect. VeriSign further alleged ICANN acted in accordance with this meaning of the Bylaws in adopting the Position Paper and in other respects in connection with WLS. (ER134-36/¶¶94-98.)

Nonetheless, ICANN asked the district court to take judicial notice of ICANN's February 12, 2002 Bylaws for the improper purpose of "proving" that ICANN's decision-making processes were contrary to VeriSign's

[22] The February 12, 2002 Bylaws provide (at Article IV ¶1(a)) that the powers of the corporation shall be exercised by its Board "[e]xcept as otherwise provided … including Section 2(b) …, which sets forth responsibilities of Supporting Organizations…." Section 2(b) provides that the Supporting Organizations shall have "primary responsibility for developing and recommending substantive policies." (ER191, 198.)

conspiracy allegations. In particular, ICANN offered its Bylaws in an effort to prove that it (1) "had the final authority to accept or reject a recommendation from its supporting organizations and advisory committees" (ER183:2-3), and (2) had "the ability to reject a recommendation of a supporting organization" (*id.*:11-12). ICANN thus offered its Bylaws not only to prove the contents of the Bylaws, but also that ICANN *in fact* operates in conformity with its interpretation of the Bylaws. Over VeriSign's objection, the district court judicially noticed the Bylaws and improperly adopted ICANN's interpretations of the Bylaws and of its practices, in granting the motion to dismiss. (ER256n.2; 262-63.)[23]

ICANN's Funding

The district court similarly made unwarranted factual inferences when it discounted the probative value of allegations of ICANN's reliance on funding from the co-conspirators. The FAC alleges that ICANN is susceptible to control because it "has been seriously underfunded" and the WLS co-conspirators and others sharing economic interests with them are

[23] The District Court took judicial notice of ICANN's February 12, 2002 Bylaws, but failed to explain why it did not consider the 16 July 2000 Bylaws which were in effect until February 11, 2002 or the 15 December 2002 Bylaws which added a provision granting the Names Council even more power to compel the Board of Directors to adopt policies. 15 December 2002 Bylaws at Annex A: 13.b. Both of these Bylaws were in

the single largest source of ICANN's funding. (ER134/¶93.) The FAC further quotes admissions by the President of ICANN that ICANN's dependence on registrars for a significant portion of its funding leaves ICANN "overly vulnerable" and causes "deficiencies" in ICANN's decision-making. (*Id.*) Nonetheless, the district court disregarded these factual allegations because it said, incorrectly, that "only six" registrars are alleged to be co-conspirators and VeriSign did not allege that those six registrars provide the "majority" of ICANN's funding. (ER263:17-19.)[24] Such weighing of evidence is plainly improper at the pleading stage. *See Zimmerman*, 255 F.3d at 737. The allegations of the FAC, instead, should have been construed in favor of the pleader. *Id.*

Taken together, as they should have been, VeriSign's allegations of capture of ICANN decision-making based on ICANN's structure, practices, Bylaws, reliance on funding from co-conspirators, and specific conduct with respect to the services at issue in the FAC, go far beyond what is necessary

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effect during periods relevant to the FAC. This further demonstrates the danger of "fact finding" at the motion to dismiss stage.

[24] In fact, the FAC clearly states that there are other co-conspirators than the six it named and, additionally, that many others shared the economic interests of the named co-conspirators. (ER133/¶90; *see also* 137/¶100.) The district court also apparently just assumed that the six named co-conspirators do not provide a majority of ICANN's funding and that a

adequately to plead concerted action. Whether VeriSign can ultimately prove capture is not the question on a motion to dismiss. *See Swierkiewicz*, 534 U.S. at 515. That, however, appears to be the standard applied by the district court.

C. The FAC Pleads an Injury to Competition

The district court found it unnecessary to determine the sufficiency of the allegations of injury to competition in the FAC. (ER267.) However, those allegations are sufficient and, furthermore, establish that VeriSign's injury is "antitrust injury" because it flows directly from the adverse effects on competition of ICANN's conduct.[25]

Injury to competition can be shown by proof of either (i) a relevant market and harm to competition in that market, or (ii) "actual detrimental effects, such as a reduction of output, [which] can obviate the need . . . .[for]

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"majority" of funding was necessary to control or greatly influence ICANN's decisions.

[25] Injury to competition, either as proven in a rule of reason case or presumed in a *per se* case, necessary for a violation of Sherman Act Section 1 focuses on competition in general (*i.e.*, consumer welfare). Antitrust injury necessary for standing under Clayton Act Section 4, 15 U.S.C. §15, by comparison, requires that the specific plaintiff prove that its injury flows from the violation or, stated differently, that the injury to the plaintiff reflects the reason why the challenged conduct is illegal. Antitrust injury, therefore, focuses not on the market but on the specific plaintiff and the source of its injury. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990) ("antitrust injury requirement is. . . .[to ensure] that the harm

elaborate market analysis." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *see also Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988) ("Given that the ability to raise price and to exclude competition are hallmarks of market power, the finding of actual harm to competition suffices under Sherman Act §1 even in the absence of extended market analysis."); *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989); *Sherman v. British Leland Motors, Ltd.*, 601 F.2d 429, 449 (9th Cir. 1979). The FAC pleads injury to competition in both forms for each of the services.

WLS. The FAC contains detailed allegations of injury to competition from the restraints ICANN and the WLS co-conspirators placed on WLS. (ER139-44/¶¶106-27.) For example, the FAC defines the relevant markets (ER139/¶106 (secondary domain name market), 142/¶120 (operation of TLD registries)), identifies the competitors and competitive products (ER139/¶108), and alleges how those markets operate (ER139/¶107; 140/¶¶109-11; 141-43/¶¶113-21). The FAC also specifically alleges actual anticompetitive effects, and thus injury to competition, from the foreclosure

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claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws. . . .").

of WLS. Among other allegations, the FAC avers with particularity the foreclosure from the market of superior services, resulting in artificially inflated prices, less efficient services and reduced output in the relevant markets. (ER141/¶¶112-14; 142/¶118; 143/¶123; 144/¶126.) In addition, the FAC specifically alleges the respects in which WLS had superior features to competitive products otherwise available and would have stimulated competition in the market as a whole had its introduction not been blocked by ICANN and its co-conspirators. (*Id.*) Finally, the FAC alleges admissions by ICANN of the unique and innovative qualities of WLS that would have caused "new competition" by a superior product (ER141-42/¶116).

Site Finder. The FAC contains independently sufficient allegations that ICANN and the Site Finder co-conspirators harmed competition in the market for the operation of TLD registries (ER150/¶148) and the market for the provision of web address directory assistance services (ER148-149/¶143). For example, the FAC alleges the relevant markets for Site Finder, relevant competitors and competitive products (ER148/¶141; 150/¶149), and how those markets operate (ER148-49/¶¶142-44; 150/¶¶149-50). Additionally, the FAC specifically alleges actual anticompetitive effects, and thus injury to competition, as a result of the foreclosure of a beneficial new service for

Internet users, holders of second-level domain names in the .com registry, as well as advertisers and sponsors of web links. (ER148-49/¶143; 149/¶¶145, 147; 150-151/¶¶151-52.) Among other anticompetitive effects of Site Finder's foreclosure from the market, the efficiency and beneficial features of Site Finder were lost for 32,000,000 holders of second-level domain names in the .com registry (whom Internet users may try to locate) and the 40,000,000 Internet consumers who used the service during the brief period it was running, before Site Finder was shut down by ICANN and its co-conspirators. (ER150/¶152.)

IDN. Finally, the FAC contains sufficient allegations that ICANN and the IDN co-conspirators harmed competition in the market for the operation of TLD registries (ER156/¶173) and in the IDN market (ER155/¶169). For example, the FAC alleges the relevant markets, competitors and products (ER151-52/¶157; 155/¶170; 156-57/¶¶175-76), and the manner in which those markets operate (ER155/¶170; 156/¶172; 156/¶¶174-75; 157/¶177). It further alleges anticompetitive effects, and thus injury to competition, as a direct result of the unlawful acts of the conspirators, including: the denial of a beneficial and more efficient new service to millions of Internet users; restrictions in output of services in relevant markets; and inflated prices for competitive services.

(ER156/¶¶172, 174; 157-58/¶¶177, 179.) Finally, the FAC alleges specific admissions by ICANN of the "importance of [IDN] . . . to enhance the accessibility of the domain-name system to all those using non-Roman alphabets." (ER155/¶171.)

VII. CONCLUSION

Based on the foregoing, plaintiff-appellant respectfully requests that the district court's judgment be reversed and that this case be remanded to the district court for further proceedings.

Dated: December 17, 2004.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant VeriSign, Inc. states that it is not aware of any related cases pending in this Court.

Dated: December 17, 2004.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Appellant's Opening Brief is proportionally spaced, has a typeface of 14 points or more and contains 13,716 words.

Dated: December 17, 2004.

Respectfully submitted,

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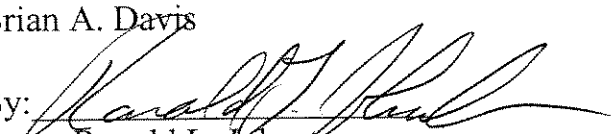
By: 
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STATE OF CALIFORNIA)
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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844.

On December 17, 2004, I served the foregoing document described as: **OPENING BRIEF OF APPELLANT VERISIGN, INC., EXCERPTS OF RECORDS (2 VOLS.), DECEMBER 17, 2004 LETTER TO CATHY CATTERSON, CLERK OF COURT**

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☐ **STATE** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Stacie L. James — Signature

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