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INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VERISIGN, INC., a Delaware corporation,

Plaintiff,

v.

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

Defendant.

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

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

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

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

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

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

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

Dated: July 6, 2004

JONES DAY

By: _____
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

A. VeriSign Lacks Antitrust Standing.

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

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

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

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

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

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

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

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

(continued…)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued…)

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

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

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

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

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

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

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

VeriSign does allege that, pursuant to ICANN's Bylaws, the Board "was bound to accept the DNSO's recommendations," but this allegation is demonstrably false: the bylaws in effect at the time make clear that the Board had the final authority to accept or reject a recommendation from its supporting organizations and advisory committees. RJN Ex. L (Feb. 12, 2002 Bylaws) Art. VI § 2(b) ("The Supporting Organizations shall serve as advisory bodies to the Board."); *id.* at § 2(e) ("No recommendation of a Supporting Organization shall be adopted unless the votes in favor of adoption would be sufficient for adoption by the Board without taking account of either the Directors selected by the Supporting Organizations or their votes."); *id.* at § 2(g) ("Nothing in this Section 2 is intended to limit the powers of the Board or the Corporation . . . ."). Indeed, the most compelling evidence that the Board was not controlled by these groups is the fact that the Board *rejected* the recommendation of the DNSO that ICANN not permit WLS to

proceed, which was quickly followed by many of the alleged "co-conspirators" filing lawsuits against ICANN trying to stop WLS![5]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued…)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: July 6, 2004 JONES DAY

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