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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; DOES 1-50,

Defendants.

Case No. CV 04-1292 AHM (CTx)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT ICANN'S MOTION TO DISMISS PLAINTIFF'S FIRST, SECOND, THIRD, FOURTH, FIFTH, AND SIXTH CLAIMS FOR RELIEF PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

[Concurrently filed with Reply Memorandum in Support of Request for Judicial Notice and Supplemental Request for Judicial Notice]

Date: May 17, 2004
Time: 10:00 a.m.
Honorable A. Howard Matz

INTRODUCTION

A plaintiff may not amend its complaint via an opposition to a motion to dismiss. Yet the complaint described in VeriSign's opposition to ICANN's motion to dismiss is *not* the complaint on file with the Court. VeriSign's true "complaint" seems to be that VeriSign is unhappy with the relationship between it and ICANN under the parties' agreement because ICANN has been "too slow" or "too regulatory" or "too willing to disagree" with VeriSign. But VeriSign's unhappiness does not translate into viable claims for relief -- certainly not in this Court -- and so VeriSign is a plaintiff searching for a claim beyond the one claim -- declaratory relief -- that is appropriate.

In an effort to salvage an antitrust claim, VeriSign's opposition repeatedly refers to allegations that simply are not in its complaint. For example:

- VeriSign argues that it has alleged that ICANN's competitors exercised control over ICANN, but there are *no* such allegations in the complaint.
- VeriSign argues that these unnamed competitors consist of a "finite group," but the complaint alleges *multiple* groups of conspirators, as well as the undefined phrase "*and others*."
- VeriSign argues that the "conspiracy" -- the terms of which are not defined -- has had an anticompetitive effect because it has resulted in a decrease in efficiency, increase in prices, and unavailability of products, but the complaint contains no such allegations and, instead, alleges that products similar to VeriSign's *are* available to consumers.

VeriSign's arguments on its contract and tort claims also attempt to re-write the complaint (not to mention the parties' contract). For example, VeriSign argues that ICANN's October 3 letter somehow constitutes a "breach" because it "forced" VeriSign to remove the wildcard from the .com registry or risk ICANN wrongfully terminating the Registry Agreement; however, the contract (which VeriSign concedes is properly before the Court via judicial notice) is explicit that ICANN

cannot terminate unless a judge or arbitrator first determines that VeriSign has breached and VeriSign then fails timely to cure.[1] Likewise, the contract makes clear that none of ICANN's other alleged "breaches" -- express or implied -- could constitute an actual breach of the agreement. And there can be no doubt that the October 3 letter -- repeatedly characterized in the complaint as the "Suspension Ultimatum" but barely a footnote in VeriSign's brief -- is a communication protected by the litigation privilege.

ARGUMENT

I. VERISIGN HAS NOT ALLEGED AN ANTITRUST CLAIM.

VeriSign's opposition argues that its barebones antitrust allegations are sufficient under the federal "notice pleading" standard. Opp. 5:26-7:3. VeriSign knows that its argument is wrong.[2] *See Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 528, n.17 (1983) ("a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").[3]

A section 1 plaintiff must allege *facts* sufficient to establish each element of its claim. Mot. 9:11-28, n.4; *see Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987); *see also Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d

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[1] ICANN cannot terminate the Registry Agreement for a breach unless: (i) there is a litigation or arbitration of a dispute; (ii) a judgment or arbitration award is issued in ICANN's favor; (iii) ICANN demands that VeriSign comply; (iv) VeriSign does not comply within 90 days; and (v) ICANN gives notice of termination. *See* Request for Judicial Notice ("RJN"), Ex. E, II.16.

[2] In an antitrust suit filed recently against VeriSign in the Northern District of California (referred to herein as *Syncalot*), VeriSign argued that an antitrust plaintiff must provide supporting factual detail, and that the use of antitrust buzzwords is not sufficient to allege "how or why anticompetitive harm will result." *See* Exhibit G to ICANN's Supplemental Request for Judicial Notice ("Supp. RJN") (VeriSign's Motion to Dismiss Syncalot Complaint), 5:13-19.

[3] VeriSign's cites *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 870 (9th Cir. 1991) for its notation of Rule 8's "liberal requirements" but overlooks that court's analysis and reliance on the "specific examples" alleged in support of plaintiff's tying claim.

1016, 1033 (N.D. Cal. 2001). Thus, "[although there is no special pleading requirement in antitrust cases], it is no authority that in such cases the pleader is specially privileged to plead nothing but the statutory words."[4] *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1386-87 (10th Cir. 1980) (citation omitted) (lengthy allegations that nonetheless fail to provide grounds for antitrust claim insufficient); *see also Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.,* 300 F.3d 620, 633 (5th Cir. 2002). The essential elements of the claim must be "alleged in more than vague and conclusory terms." *Found. for Interior Design Educ. Research v. Savannah College of Art & Design*, 244 F.3d 521, 530 (6th Cir. 2001); *see Cal. Dump Truck Owners Ass'n, Inc. v. Associated Gen. Contractors of America*, 562 F.2d 607 (9th Cir. 1977) (section 1 claim dismissed where underlying contract did not violate antitrust laws and remaining allegations were broad and vague).

A. VeriSign Has Not Alleged That VeriSign's Competitors Control ICANN.

VeriSign argues that its complaint pleads an actionable conspiracy because it alleges that "ICANN conspires with and is controlled by VeriSign's competitors within ICANN." Opp. 11:3-5.[5] The problem with VeriSign's argument is that *these words are not in the complaint*. *See* Opp. 11:5, 11:17, 11:22, 12:17, n.8 (citing to ¶¶ 7, 18, 32, 38, 39, 44, 45, 47, 65, 68 and 81 of the complaint). Although VeriSign

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[4] VeriSign cites *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3 (9th Cir. 1963), *McLain v. Real Estate Bd.*, 444 U.S. 232, 246 (1980), and *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980) for the proposition that there are no special pleading requirements in antitrust cases, but the point of these cases is that pleading requirements in antitrust cases are no more and *no less* than in other cases. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106-07 (7th Cir. 1984) (stating that "[a] contrary view would be tantamount to providing antitrust litigation with an exemption from Rule 12(b)(6)"). VeriSign's citation to the slip opinion in *Agron, Inc. v. Lin*, 2004 WL 555377, at *5 (C.D. Cal. Mar. 16, 2004) is unavailing; VeriSign does not allege that it is unable to plead its claims because ICANN has the information that VeriSign needs.

[5] Because ICANN's Bylaws state that ICANN does not have any members (RJN, Ex. B, Art. XVII), VeriSign no longer uses the word "members" to describe those who are conspiring with ICANN (Compl. ¶¶ 18, 44, 45, 85 and 115).

refers frequently to paragraph 18 of the complaint, that paragraph simply does not allege *control* of ICANN's Board.

VeriSign then relies on cases that stand for the general proposition that some "entities, associations and organizations" can be liable under the antitrust laws (Opp. 9:23-25; 10:1-3), followed by cases where courts have found that the degree of control exercised by an organization's membership -- or an influential member -- was great enough to hold the organization liable under section 1 (Opp. 10:4-11:2). But these cases demonstrate that ICANN *cannot* be liable based on the allegations in the complaint.

For example, in *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 560-62 (1982), a vice president for one of the plaintiff's competitors was also the vice chairman of a subcommittee for ASME, the standard setting organization. The Supreme Court found that there was an illegal agreement between ASME and the competitor to deny approval to plaintiff's product because the executive of the association had agreed with plaintiff's competitor to subvert the association's decision-making process. The Court explained that "a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes. 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.

No activity of the type present in *Hydrolevel* is alleged anywhere in VeriSign's complaint, nor could it be. Mot. 11:25-28; 13:1-27. ICANN's Board is not made up of VeriSign's competitors.[6] Further, VeriSign does not (and could not)

[6] ICANN's Bylaws require its Board to have fifteen voting members who are selected from several different constituencies. The Board has final authority to accept or reject a recommendation from its supporting organizations and advisory committees. No Board member is permitted to vote on matters that could directly affect his or her own financial interests. RJN Ex. B, Arts. V-XI, XVII.

allege that VeriSign's competitors controlled ICANN *and* implemented some (as yet undefined) conspiracy to injure VeriSign.

In *Hahn*, the court held that plaintiff needed to have sufficient evidence to demonstrate that the organization was controlled by plaintiff's competitors. The Ninth Circuit explained: "Read together, *Maricopa County, Barry, Royal Drug, Virginia Academy* and *Pennsylvania Dental* stand for the broad proposition that health care plans may reimburse members and nonmembers differently, both in price and manner, so long as physicians (or the relevant group of competitive providers) do not control the health care plan." *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1028-29 (9th Cir. 1988).[7] The court found that, because plaintiffs had shown that physicians formed a majority of the board and had "alleged that physicians who practice in any of [the] 20 specialties perform procedures that podiatrists perform," "[a] trier of fact could reasonably conclude that the physician board members . . . shared similar economic interests with those board members and OPS physicians who did compete directly, and that therefore the OPS board as a whole may have acted in the anticompetitive interests of those member physicians who compete with podiatrists for the provision of foot care." *Id.* at 1029-30.

The point of these cases is that a standard setting association that has a structure that permits competitors to control decision-making so as to injure another competitor could, in certain situations, violate section 1. But VeriSign has not alleged such facts, and the structure of ICANN would not permit antitrust liability to VeriSign even if the necessary facts could be alleged (which they cannot).

[7] In *Virginia Academy*, the board of directors of the defendant-plans were dominated by physicians. Thus, the court found that the control exerted by the physician members was sufficient to state a section 1 claim. *Virginia Academy of Clinical Psychologists v. Blue Shield,* 624 F.2d 476, 480-81 (4th Cir. 1980). However, the court did not find that the Neuropsychiatric Society of Virginia ("NSV") and the Blue Shield Plan colluded in violation of section 1 because "[p]laintiffs failed to show that NSV had some control over Blue Shield's decision-making, or that Blue Shield agreed to abide by the decision of NSV in formulating its policy. *Id.* at 483.

The trade association cases that ICANN cited in its motion reconfirm the point, despite VeriSign's suggestion to the contrary. Opp. 11:26-12:4. These cases establish that, in order for ICANN to be susceptible to antitrust liability, VeriSign must show that ICANN competes with it, or that ICANN is controlled by its membership, or that the ICANN's "membership" has an economic stake in suppressing competition. VeriSign *says* in its opposition that it "alleges that ICANN's co-conspirators *have* an economic interest in suppressing competition from VeriSign," and that "the co-conspirators are pursuing interests independent from ICANN's," but these allegations are not in the complaint paragraphs that VeriSign cites. Compl. ¶¶ 18, 38, 44, 45, 47, 65.

B. VeriSign's Allegations Of Unnamed Conspirators From Multiple Groups "And Others" Do Not Refer To A "Finite" Group.

VeriSign argues "that a claim of conspiracy with unnamed conspirators meets the notice pleadings standard when it sets forth a 'finite' group that can be identified through discovery." Opp. 7:4-6. This is *not* the law. The mere pleading of unnamed conspirators from a "finite group," without additional supporting facts, is *not* sufficient. *See* Mot. 9:19-11:4; *Garshman v. Universal Res. Holding, Inc.*, 641 F. Supp. 1359, 1370-71 (D.N.J. 1986) (dismissing section 1 claim for failure to allege sufficient conspiracy facts), *aff'd*, 824 F.2d 223 (3rd Cir. 1987); *Five Smiths, Inc. v. Nat'l Football League Players Ass'n*, 788 F. Supp. 1042, 1048 (D. Minn. 1992) (general allegations of conspiracy are inadequate); *Deep South Pepsi-Cola Bottling Co. v. PepsiCo, Inc.*, 1989-1 Trade Cases ¶ 68,560 (S.D.N.Y. 1989) (alleged conspiracy with unnamed "others" insufficient).[8]

[8] VeriSign's cases do not hold otherwise. *See Star Tobacco, Inc. v. Darilek, Jr.*, 298 F. Supp. 2d 436 (E.D. Tex. 2003) (antitrust claim dismissed because plaintiff failed to name conspirators or include additional facts); *see also William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1052-53 (9th Cir. 1982)(vertical conspiracy theory based on identified horizontal conspirators); *Bodine Produce, Inc. v. United Farm Workers Org. Comm.*, 494 F.2d 541, 556-561 (9th Cir. 1974) (allegations of complaint provided detail regarding alleged conspiracy); *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 681 (6th Cir. 1988) (multiple named and unnamed banks specifically alleged to have agreed to fix prices at noncompetitive levels); *Eye Encounter, Inc. v. Contour Art, Ltd.*, 81

Moreover, VeriSign's complaint fails to meet VeriSign's own incorrect test. VeriSign alleges that ICANN has conspired with at least four different "groups" as well as an unlimited number of "others":

> ICANN is governed by and acts through an international Board of Directors that is elected by members of various ***constituencies within the Internet community***. Among the members of these groups are ***operators of gTLDs*** that compete with each other and with VeriSign; ***domain name registrars*** that are present or potential competitors of each other and of VeriSign for certain services; ***foreign governments and foreign registries*** that have ccTLDs that compete with gTLD registries operated by VeriSign; ***and others***. ICANN also operates in cooperation with ***various industry boards*** that are comprised of existing or potential competitors of VeriSign. ICANN frequently carries out its activities, including the conduct alleged herein, through the collective action of these constituent groups.

Compl. ¶ 18 (emphasis added). (VeriSign's quotation in its brief conspicuously omits the words "and others" and "various industry boards." Opp. 7:7-8:2.) VeriSign must do more to identify from among the several hundreds of entities included in the various groups it names, as well as the millions or billions in "the Internet community" the persons, entities, governments or "others" with whom ICANN allegedly conspired.[9]

(continued…)

F.R.D. 683, 686 (E.D.N.Y. 1979) (named and unnamed defendants specifically alleged to have agreed to discriminatory pricing and tying arrangement).

[9] VeriSign's allegations are much more vague than those in the cases it cites. *See*, *e.g.*, *Walker Distrib. Co.*, 323 F.2d at 7 (one finite group); *Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242, 244, 247 (S.D.N.Y. 1997) (same); *Hewlett-Packard Co. v. Arch Assocs. Corp.*, 908 F. Supp. 265, 268-70 (E.D. Pa. 1995) (same); *Daniel v. Am. Bd. Emergency Med.*, 802 F. Supp. 912, 925 (W.D.N.Y. 1992) (same).

C. VeriSign's Complaint Contains No Allegations of Anticompetitive Effect.

VeriSign argues that "[a]n anticompetitive effect occurs when conduct 'harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.'" Opp. 12:11-15 (citing *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995)). But VeriSign's complaint fails to meet this test because there are *no allegations* that the alleged conspiracy harmed allocative efficiency, raised the price of goods above competitive levels, or diminished their quality.

VeriSign argues that "numerous cases in this Circuit have found harm to competition where only one competitor is harmed or excluded from the market,[10] because consumers faced fewer product or service choices or higher prices from the remaining competitors -- precisely the allegations here." Opp. 12:15-13:28. But the complaint does *not* allege a reduction in choice or higher prices; the paragraphs to which VeriSign refers allege only that ICANN's conduct has "deprived consumers of a beneficial new service" *offered by VeriSign*. Compl. ¶¶ 39, 47, 55, 65. In view of VeriSign's acknowledgement that its competitors are offering "similar services" (Compl. ¶¶ 35, 45, 65), these allegations cannot be morphed into allegations of anticompetitive activity.

VeriSign next argues that harm to VeriSign should be sufficient to constitute harm to competition because "the relevant market is narrow and discrete and the market participants are few." Opp. 12:28-13:19, n.10. But this is *not* what the complaint says. VeriSign alleges in the complaint that the operation of TLD

[10] VeriSign argued in its *Syncalot* brief that a plaintiff cannot state an antitrust claim without alleging injury to competition, as opposed to a competitor. *See* Supp. RJN, Ex. G, 3:23-4:10. And the cases VeriSign cites in its opposition confirm the point: *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1032 (9th Cir. 1989)(differences between plaintiff's services and competitors' had impact on consumer prices); *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988)(same); *Indus. Bldg Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1342-43 (9th Cir. 1971)(elimination of independent distributor left no competition).

registries is the relevant product market (Compl. ¶ 84), with approximately 250 registries participating in the market (Compl. ¶ 12). VeriSign contradicts the allegations in its complaint by suggesting in its brief that the relevant market might be narrowed to each individual TLD or each TLD operator, instead of the operation of all 250 TLDs. Opp. 14:1-7, n.12. VeriSign cannot have it both ways: either the other registry operators are in competition with VeriSign (as alleged in the complaint) or they are not (as argued in the opposition). VeriSign must settle on a relevant market definition -- and allege an anticompetitive effect within it -- before it can state an antitrust claim. *See Tanaka v. Univ. of Southern California*, 252 F.3d 1059, 1064 (9th Cir. 2001).

D. VeriSign Does Not Sufficiently Allege Antitrust Injury.

VeriSign argues that "[t]he injury to VeriSign alleged in the complaint flows directly from the exclusionary conduct of ICANN and VeriSign's competitors." Opp. 14:9-11. Neither VeriSign's allegations nor the one-page argument in its opposition supports this conclusion.

VeriSign must allege that it has suffered an injury: (i) that is of the type the antitrust laws were intended to prevent; and (ii) that flows from that which makes defendants' acts unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see also* Mot. 15:18-17:8. In support of its argument that its complaint alleges antitrust injury, VeriSign cites six paragraphs from the complaint that allege that *VeriSign* has been "prevented from competing" while its competitors are able to offer services similar to those proposed by VeriSign. This does not amount to antitrust standing. *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); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 812-13 (9th Cir. 1988) (no antitrust injury because plaintiff's own allegations showed that its rivals were thriving).

Further, in view of the fact that the Registry Agreement does not permit ICANN to terminate the agreement until VeriSign has been found by a court or arbitrator to have breached the agreement and has then failed to cure, VeriSign's injury (if any) flowed from its own unilateral decision to comply with ICANN's October 3 letter rather than continue to breach and risk getting sued.[11]

II. NONE OF VERISIGN'S ARGUED CONTRACT BREACHES, EXPRESS OR IMPLIED, STATES A CLAIM.

VeriSign's opposition argues that its contract claims allege three theories of breach: express breach, breach of the implied covenant, and "repudiation." *None* of these theories can survive a motion to dismiss.[12]

A. No Express Breaches Are Alleged.

VeriSign's opposition lumps its four contract claims together and characterizes them as arising out of "years of ICANN's unwarranted demands, discrimination and harassment . . . ." Opp. 15:15-16. But VeriSign's second and third claims only relate to ICANN's sending of its October 3 letter. That letter, which related to VeriSign's unannounced implementation of the wildcard two weeks earlier, obviously does not involve "years" of activity. And VeriSign's opposition does not explain how ICANN breached an obligation by simply asserting that *VeriSign* breached the contract and threatening to enforce *VeriSign's* obligations.

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[11] VeriSign does not deny that its allegation that ICANN's "threat to initiate legal proceedings" under the Registry Agreement (Compl. ¶ 37) is protected from a Sherman Act attack by the *Noerr-Pennington* doctrine. *See* Mot. 24, n.18; *see also Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 2004 U.S. App. LEXIS 5428 at *22-30 (Fed. Cir. Mar. 23, 2004).

[12] VeriSign's opposition also misstates the express language of the third-party indemnity provision in the Registry Agreement. Opp. 18, n.16. In an effort to seek attorney's fees, VeriSign claims that the indemnity provision "on its face states that it was 'intended to operate between the contracting parties, [not] only as against nonparties.'" *Id.* (citation omitted). This language is *not* in the agreement, nor is there language remotely similar. *See* RJN, Ex. E, II.6. The provision actually in the agreement is a hornbook third-party indemnity provision. *Myers Bldg. Industries, Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 968-69 (1993).

As to the fifth and sixth claims, VeriSign argues that it has alleged that it was subject to years-long "disparate treatment," and that ICANN failed to act in an "open and transparent manner" with respect to VeriSign's ability to introduce new services. Opp. 17:3-16, 17:25-18:4. But VeriSign's position is that the Registry Agreement does not cover those "services," and thus allegations pertaining to VeriSign's "new services" cannot form the basis of breach of contract claims. *See*, *e.g.*, Mot. 23:5-24:5; *Eichman v. Fotomat Corp.*, 880 F.2d 149, 164 (9th Cir. 1989). Further, most of VeriSign's claims are based on mere statements of position by ICANN, and thus cannot support an argument of breach.

VeriSign argues that ICANN did not have adequate appeal procedures in place because ICANN had no "functioning method of independent review." Opp. 17:25-18:4. However, the Registry Agreement does not require the existence of independent review; the agreement requires ICANN to "ensure, through its reconsideration and independent review policies . . . adequate appeal procedures . . . ." (RJN, Ex. E, II.4.D) and explicitly contemplates that independent review procedures may *not* be in effect. *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 of contract. *Overland Plumbing, Inc. v. Transamerica Ins. Co.*, 119 Cal. App. 3d 476, 481 (1981).[13]

B. VeriSign Has Not Alleged A Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

VeriSign argues that the "Complaint unambiguously alleges that ICANN has acted unfairly and arbitrarily toward VeriSign in specific areas where the contract

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[13] VeriSign also argues that ICANN has an obligation to take reasonable steps to enter into agreements similar to the Registry Agreement with other registries competing with VeriSign, but the face of the agreement (which includes an integration clause) shows that ICANN has no such obligation. Rather, the agreement conditions *VeriSign's termination* under Section II.18.B on a Department of Commerce judgment that termination is appropriate. *See* RJN Ex. E, II.18.B.

invests ICANN with discretion that it is bound to exercise in good faith." Opp. 18:17-19:2. But the implied covenant *does not apply* to discretionary acts expressly granted to a party under an agreement. *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 808 (1995) ("courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would . . . result in an unenforceable, illusory agreement").

VeriSign also claims that it feared ICANN would terminate the Registry Agreement, which in turn "forced" VeriSign to suspend its services. Opp. 21, n.20. But fear of one party asserting its rights is not grounds for breach of the implied covenant. *Third Story Music*, 41 Cal. App. 4th at 809 ("The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably. It is not enough to say that without the proposed implied covenant, the contract would be improvident or unwise or would operate unjustly. Parties have the right to make such agreements."); *see also* Mot. 18:10-20:12.

C. VeriSign's Complaint Does Not State A Claim for Repudiation.

VeriSign's 42-page complaint uses the word "repudiate" twice (page 29 and page 34). In both instances, all that is alleged is a repudiation of the claimed *limits on VeriSign's obligations*. But to state a claim for express repudiation of the contract, VeriSign must allege a repudiation of *ICANN's* obligations.[14] *See Salot v. Wershow*, 157 Cal. App. 2d 352, 357 (1958) (repudiation is a clear, unequivocal refusal *to perform*). VeriSign must also allege that "the refusal to perform [was] of the *whole* contract . . . and [was] distinct, unequivocal and absolute." *Id.* (emphasis

[14] VeriSign has not alleged that ICANN rendered its performance of the Registry Agreement impossible, so there is no implied repudiation. *Taylor v. Johnston*, 15 Cal. 3d 130, 137 (1975) ("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.").

added) (quoting *Atkinson v. District Bond Co.*, 5 Cal. App. 2d 738, 743 (1935); *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). VeriSign's complaint contains no such allegations.

VeriSign then argues that, by threatening to declare VeriSign in breach, ICANN breached the agreement by "effectively" conditioning performance of a contractual duty -- the duty to recognize VeriSign as the sole operator for the Registry -- on VeriSign's surrendering to ICANN's demands. Opp. 22:3-12. But VeriSign would have to allege that ICANN *expressly* conditioned its performance, not *argue* that the possible outcome of its threat was *effectively* to condition performance. *Salot*, 157 Cal. App. 2d at 357; *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."). VeriSign has made no such allegations because there are no facts that could support any such allegations.[15]

III. THE LITIGATION PRIVILEGE BARS VERISIGN'S TORT CLAIM.[16]

A pre-litigation demand letter is within the protection of the litigation privilege. *See* Mot. 22:11-23:2; *Rubin v. Green*, 4 Cal. 4th 1187, 1194 (1993) (demurrer properly sustained); *Knoell v. Petrovich*, 76 Cal. App. 4th 164 (2000) (same); *Larmour v. Campanale*, 96 Cal. App. 3d 566 (1979) (same). In *Knoell*, the court of appeal affirmed dismissal of plaintiff's tort claims because, on the face of

[15] VeriSign does not respond to ICANN's arguments that VeriSign's claim for interference with contract must fail because: (i) ICANN's assertion of its contract interpretation cannot constitute a tort; and (ii) California law precludes the assertion of a tort claim that is based solely on a breach of contract. VeriSign's citation to *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 56 (1998), is consistent with ICANN's position that, if the October 3 letter constituted an interference with a subsequent third-party contract at all, the interference was "such a minor and incidental consequence and so far removed from defendant's objective that as against the plaintiff the interference may be found not to be improper.'" *See* Mot. 21:1-22:10.

[16] VeriSign asserts that the privilege only applies to tort claims (Opp. 23, n.23), but the Court may also dismiss all other claims based on the October 3 letter (i.e., claims 2 and 3). *See Laborde v. Aronson*, 92 Cal. App. 4th 459, 463-465 (2001); *Pollock v. Superior Court*, 229 Cal. App. 3d 26, 29-30 (1991).

the allegations and letters before it, the claims were barred by the litigation privilege. After reviewing a demand letter, another letter, and the pleadings, the court concluded that the action was barred and that the appellant "cannot plead around the litigation privilege." *Knoell*, 76 Cal. App. 4th at 171.

As in *Knoell*, the allegations of VeriSign's complaint, along with the text of the October 3 letter and the cure provisions in the Registry Agreement, demonstrate that the litigation privilege bars VeriSign's tort claim.[17] Not only does the letter speak for itself, but the letter is augmented by VeriSign's response, which was to remove the wildcard from the .com registry. *See* RJN Ex. C; Compl., ¶¶ 32-34, 94, 101, 107. There is no factual dispute to preclude application of the privilege to VeriSign's tort claim. *Kashian*, 98 Cal. App. 4th at 913 ("If there is no dispute as to the operative facts, the applicability of the litigation privilege is a question of law.").

IV. VERISIGN'S FIRST SIX CLAIMS ARE NOT RIPE.

VeriSign argues that its first six claims must be ripe because otherwise "no party could ever sue for breach of contract unless it had previously secured a judicial declaration of its rights under the contract." Opp. 24:15-25:5, n.26, 27. But unlike the typical breach of contract case, the contract terms underlying VeriSign's breach of contract clams are *not* the primary focus of its request for declaratory relief. VeriSign's opposition states that VeriSign's breach of contract claims are premised on ICANN's "breaches" of sections II.4.A, C, & D; II.18.B; App. C. at 4-5 of the Registry Agreement (Opp. 16:7-22:18), but the focus of VeriSign's claim for declaratory relief is provisions "I(9)," "I(1)" and "Exhibits C and D to the .com Agreement." Compl. ¶ 129.

[17] Contrary to VeriSign's argument, "application of the privilege does not depend on the publisher's 'motives, morals, ethics or intent.'" *See Kashian v. Harriman*, 98 Cal. App. 4th 892, 913 (2002) (quoting *Silberg v. Anderson*, 50 Cal. 3d 205, 220 (1990)).

The goal of the ripeness doctrine is to prevent the courts from prematurely "entangling themselves in abstract disagreements."[18] *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). If this (or some other) Court resolves VeriSign's seventh claim and determines that ICANN has complied with the contract, ICANN's proper assertion of rights will be established as a matter of law, and there will be no dispute left to adjudicate.

CONCLUSION

ICANN urges the Court to grant its motion to dismiss.

Dated: May 3, 2004 JONES DAY

By:_______________________________
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[18] VeriSign asserts that *Clinton v. Acequia, Inc.*, 94 F.3d 568 (9th Cir. 1996), stands for the proposition that a plaintiff who alleges it has suffered damages has stated ripe claims. In *Clinton*, the court found that Clinton's breach of contract claim did *not* present a live case or controversy because Acequia had over a year left to demonstrate compliance with the contract. *Id.*, 94 F.3d at 572-73. As in *Clinton*, compliance with the contract should be determined before any breach claims are litigated.

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