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CLERK, U.S. DISTRICT COURT  
MAY 18 2004  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

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CLERK, U.S. DISTRICT COURT  
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CENTRAL DISTRICT OF CALIFORNIA  
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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

VERISIGN, INC.,  
Plaintiff,  
v.  
INTERNET CORP. FOR  
ASSIGNED NAMES AND  
NUMBERS,  
Defendant.

CASE NO. CV 04-1292 AHM (CTx)

**ORDER DISMISSING  
COMPLAINT WITHOUT  
PREJUDICE**

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

On February 26, 2004, VeriSign filed a complaint against Defendant Internet Corp. for Assigned Names and Numbers ("ICANN") alleging causes of action for: (1) violation of Section 1 of the Sherman Act, (2) injunctive relief for breach of contract, (3) damages for breach of contract, (4) interference with contractual relations, (5) specific performance of contract and injunctive relief, (6) damages for breach of contract, and (7) declaratory judgment. Subject matter jurisdiction is premised on federal questions arising under the Sherman Act and the Declaratory Judgment Act. Compl. ¶ 8. Now ICANN has moved to dismiss claims one through six of Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and also has moved to strike the second through sixth claims as strategic lawsuits against public participation, pursuant to Cal. Civ. Proc. Code Section

1 425.15.

2 The Court GRANTS ICANN's motion to dismiss the antitrust claim  
3 without prejudice. At this stage, the Court elects not to rule on the motion to  
4 dismiss the remaining state law claims because if VeriSign fails to state an  
5 antitrust claim in any First Amended Complaint ("FAC") or chooses not to file a  
6 FAC, the Court will decline to exercise supplemental jurisdiction. The Court also  
7 defers any ruling on the Special Motion to Strike until VeriSign's ability to state a  
8 viable federal claim has been conclusively resolved.

### 9 FACTUAL ALLEGATIONS

10 ICANN is a non-profit corporation that was organized in 1998 "in response  
11 to a plan by the [Department of Commerce] to introduce competition into the  
12 field of domain name registration, among other objectives." Compl. ¶ 18. The  
13 Internet is comprised of numerous top level domains ("TLDs") – some are  
14 generic TLDs ("gTLDs") like .com, .net, .gov, and .biz, while others are country  
15 code TLDs ("ccTLDs") such as .uk and .ca.<sup>1</sup> *Id.* ¶ 12. Each TLD has a "registry"  
16 or operator, a single entity responsible for keeping the records and a directory of  
17 all the domain names registered within that TLD. *Id.* ¶ 15. A person seeking to  
18 register a domain name within any given TLD must do so through a "registrar"  
19 for that TLD. *Id.* ¶ 16. There are approximately 250 TLDs throughout the world  
20 that compete with each other, through their respective registries, to attract  
21 registrars and registrants. *Id.* ¶¶ 12, 32.

22 One of ICANN's functions is to enter into registry agreements that  
23 authorize an entity to act as the registry for a particular gTLD. *Id.* ¶ 20. The  
24 Complaint describes how ICANN functions:

25 ICANN is governed by and acts through an international

26  
27 <sup>1</sup> ICANN does not claim to have any power to regulate ccTLDs. *Id.* ¶ 78.  
28 Nonetheless, 10 of the approximately 240 ccTLDs have entered into registry  
*Id.* ¶ 81. "ccTLDs" compete with other TLD registries.  
*Id.* ¶ 20.

1 Board of Directors that is elected by members of various  
2 constituencies within the Internet community. Among  
3 the members of these groups are operators of gTLDs that  
4 compete with each other and with VeriSign; domain  
5 name registrars that are present or potential competitors  
6 of each other and of VeriSign for certain services;  
7 foreign governments and foreign registries that have  
8 ccTLDs that compete with the gTLD registries operated  
9 by VeriSign; and others. ICANN also operates in  
10 cooperation with various industry boards that are  
11 comprised of existing or potential competitors of  
12 VeriSign. ICANN frequently carries out its activities,  
13 including the conduct alleged herein, through the  
14 collective action of these constituent groups.

15 *Id.* ¶ 18. In 2001, VeriSign and ICANN entered into a registry agreement  
16 authorizing VeriSign to act as the sole registry for the .com gTLD. *Id.* ¶¶ 22-23  
17 Under the agreement, VeriSign must provide certain “registry services” to  
18 accredited registrars in accordance with ICANN’s specifications. *Id.* ¶ 24.

19 The core of this dispute is that ICANN allegedly has taken actions to: (1)  
20 prohibit or otherwise restrict VeriSign from offering services valuable to Internet  
21 users,<sup>2</sup> (2) impose improper conditions on the offering of such services by  
22 VeriSign, (3) regulate and set the prices at which such services may be offered,  
23 and/or (4) delay the introduction of new services. *Id.* ¶ 1. Because ICANN has  
24 allegedly blocked, delayed, and restricted the “value-added” services VeriSign  
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27 <sup>2</sup> In particular, the services to which VeriSign refers are Site Finder (described  
28 at ¶¶ 33-34 of the Complaint), Wait Listing Service (¶¶ 40-42), ConsoliDate (¶¶ 48-  
50), Internationalized Domain Names (¶¶ 56-60), and the Incentive Marketing  
Program (¶ 66).

1 has sought to offer its customers, VeriSign is “at a competitive disadvantage”  
2 since other TLD registries have been able to introduce similar services without  
3 restriction or delay. *Id.* ¶¶ 77-78. VeriSign claims that ICANN’s various actions  
4 have breached their 2001 registry agreement, *Id.* ¶¶ 92-104, 111-126; interfered  
5 with a contract VeriSign had with an unidentified third party, *Id.* ¶¶ 105-110; and  
6 violated the antitrust laws, *Id.* ¶¶ 83-91.

### 7 APPLICABLE LEGAL STANDARD

8 On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of  
9 Civil Procedure for failure to state a claim, the allegations of the complaint must  
10 be accepted as true and are to be construed in the light most favorable to the  
11 nonmoving party. *Wylar Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d  
12 658, 661 (9th Cir. 1998). A Rule 12(b)(6) motion tests the legal sufficiency of  
13 the claims asserted in the complaint. Thus, if the complaint states a claim under  
14 any legal theory, even if the plaintiff erroneously relies on a different legal theory,  
15 the complaint should not be dismissed. *Haddock v. Bd. of Dental Examiners*, 777  
16 F.2d 462, 464 (9th Cir. 1985). On the other hand, dismissal is proper where “it  
17 appears beyond doubt that the plaintiff can prove no set of facts in support of his  
18 claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46  
19 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989)  
20 (employing *Conley v. Gibson* standard). Where a motion to dismiss is granted, a  
21 district court should provide leave to amend unless it is clear that the complaint  
22 could not be saved by any amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th  
23 Cir. 1996).

24 “Generally, a district court may not consider any material beyond the  
25 pleadings in ruling on a Rule 12(b)(6) motion. . . . However, material which is  
26 properly submitted as part of the complaint may be considered” on a motion to  
27 dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555  
28 n.19 (9th Cir.1990) (citations omitted). Similarly, “documents whose contents are

1 alleged in a complaint and whose authenticity no party questions, but which are  
2 not physically attached to the pleading, may be considered in ruling on a Rule  
3 12(b)(6) motion to dismiss” without converting the motion to dismiss into a  
4 motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.  
5 1994) (citing *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n.3 (1st Cir.  
6 1991)). If the documents are not physically attached to the complaint, they may  
7 be considered if their “authenticity ... is not contested” and “the plaintiff’s  
8 complaint necessarily relies” on them. *Parrino v. FHP, Inc.*, 146 F.3d 699,  
9 705-06 (9th Cir. 1998). “The court will not accept as true allegations that are  
10 contradicted by facts that can be judicially noticed or by other allegations or  
11 exhibits attached to or incorporated in the pleading.” 5A Wright & Miller, *Fed.*  
12 *Prac. and Pro.* § 1363 (2d. ed. 1990).

### 13 DISCUSSION

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

25  
26 <sup>3</sup> The parties jointly proceed in treating this case under the “rule of reason”  
27 standard rather than the “per se” rule reserved for presumptively illegal practices such  
28 as price-fixing, and the Court does the same. See *McGlinchy v. Shell Chem. Co.*, 845  
F.2d 802, 811 n.3 (9<sup>th</sup> Cir. 1988).

1 *Trade Regulation* § 164.01 (Matthew Bender 2002). “The pleader may not evade  
2 these requirements by merely alleging a bare legal conclusion; if the facts do not  
3 at least outline or adumbrate’ a violation of the Sherman Act, the plaintiffs will  
4 get nowhere merely by dressing them up in the language of antitrust.” *Rutman*  
5 *Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9<sup>th</sup> Cir. 1987).

6 Section 4 of the Clayton Act, pursuant to which VeriSign seeks to recover  
7 treble damages for the alleged Sherman Act violation, authorizes a private  
8 individual to bring suit under the antitrust laws if that individual has been  
9 “injured in his business or property by reason of anything forbidden in the  
10 antitrust laws.” 15 U.S.C. § 15. The Supreme Court has interpreted this language  
11 to mean that “Plaintiffs must prove antitrust injury, which is to say injury of the  
12 type the antitrust laws were intended to prevent and that flows from that which  
13 makes defendants’ acts unlawful. The injury should reflect the anticompetitive  
14 effect either of the violation or of anticompetitive acts made possible by the  
15 violation.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489  
16 (1977). These requirements are referred to as “antitrust standing.” *See, e.g., Pool*  
17 *Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9<sup>th</sup> Cir. 2001). There is no  
18 antitrust violation “[i]f the injury flows from aspects of the defendant’s conduct  
19 that are beneficial or neutral to competition...[A]n act is deemed  
20 *anticompetitive...only when it harms both allocative efficiency and raises the*  
21 *prices of goods above competitive levels or diminishes their quality.” Rebel Oil*  
22 *Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9<sup>th</sup> Cir. 1995), *cert. denied*,  
23 516 U.S. 987 (1995) (emphasis in original).

24 VeriSign alleges that “the collective and conspiratorial acts of ICANN and  
25 its members, including constituent groups within ICANN and members of those  
26 groups,” have “unreasonably restrained and restricted competition in the market  
27 for the operation of TLD registries and submarkets thereof, and have deprived  
28 consumers of the benefits of free and open competition...” Compl. ¶¶ 85-86. In a

1 recurring manner, VeriSign alleges that ICANN's conduct "has deprived  
2 consumers of a beneficial new service and VeriSign of revenues and profits it  
3 would generate..." Compl. ¶ 39; *see also* ¶¶ 47, 55, 65, 69, 72, 86. By making  
4 "the registration of domain names within the .com gTLD more desirable and  
5 attractive," these new services are alleged to be important to enable "VeriSign to  
6 compete more effectively with operators of competitive gTLD and ccTLD  
7 registries that are offering or intend to offer a similar service." *Id.* ¶ 69; *see also* ¶  
8 32. While VeriSign has been blocked, delayed, or restricted from offering these  
9 new services, other gTLD registries regulated by ICANN "have been allowed to  
10 offer and market similar, competitive services..." *Id.* ¶ 77; *see also* ¶¶ 35, 45, 65,  
11 68. In particular, VeriSign alleges that ICANN has facilitated ".museum," one of  
12 its gTLD competitors, in offering a service similar to VeriSign's Site Finder. *Id.*  
13 ¶ 35. In addition, ccTLD registries, which constitute some 240 out of 250 of all  
14 TLDs, are not regulated by ICANN and "are free to offer, and are offering, new  
15 and improved services to registrars and registrants..." *Id.* ¶¶ 12, 20, 78. VeriSign  
16 does not allege how the market for these services operates or the pricing structure  
17 for such services.

18 ICANN argues that VeriSign has not, and cannot, sufficiently plead  
19 antitrust standing or facts supporting *any* of the elements of a Section 1 claim.  
20 Def.'s Mot., pp. 8-17. VeriSign disagrees with each of these assertions. Pl.'s  
21 Opp'n, pp. 5-15.

#### 22 A. Conspiracy Allegations

23 ICANN summarizes the defects in the allegations concerning the first  
24 required element of a Section 1 violation as follows:

- 25 • VeriSign argues that it has alleged that ICANN's  
26 competitors exercised control over ICANN, but  
27 there are *no* such allegations in the complaint.
- 28 • VeriSign argues that these unnamed competitors

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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.

Def.’s Reply, 1:11-22 (emphasis in original).

Trade associations or industry groups that set standards or promulgate regulations, such as ICANN, can be held liable for Section 1 violations because “[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988). As the Supreme Court explained in *Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982):

Although, undoubtedly, most [officials] serve [the industry organization] without concern for the interests of their corporate employers, some may well view their positions...,at least in part, as an opportunity to benefit their employers. When the great influence of [the organization’s] reputation is placed at their disposal, the less altruistic of [the organization’s] agents have an opportunity to harm their employers’ competitors



1 through manipulation of [the organization's] codes.  
2 *Id.* at 571. The Ninth Circuit elaborated on the issue of organizational  
3 conspiracies in *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1029, holding  
4 that "the proper inquiry is whether [decisionmakers] sharing substantially similar  
5 economic interests collectively exercised control of [the organization] under  
6 whose auspices they have reached agreements which work to the detriments of  
7 competitors."

8 Thus, in order to sufficiently plead a conspiracy, VeriSign must allege that  
9 ICANN's decisionmaking process was controlled or greatly influenced by  
10 economic competitors who have agreed to injure VeriSign. Instead, VeriSign  
11 simply alleges that "ICANN is governed by and acts through an international  
12 Board of Directors that is elected by members of various constituencies within the  
13 Internet community...that compete with each other and with VeriSign" and that  
14 "ICANN also operates in cooperation with various industry boards that are  
15 comprised of existing or potential competitors." Compl. ¶ 18. VeriSign also  
16 claims that ICANN's decisions regarding the various services it seeks to offer  
17 were "made in conjunction with and at the behest of various constituent groups  
18 within ICANN and other businesses that compete with VeriSign," *Id.* ¶ 38, and  
19 this has benefitted "businesses who have combined and conspired with ICANN."  
20 *Id.* ¶ 47; *see also* 44-45, 65.

21 ICANN properly notes that VeriSign's factual allegations fall far short of  
22 the mark. There is not even an allegation (much less factual allegations  
23 supporting it) that the Board of ICANN has actually conspired with any of  
24 VeriSign's competitors. Nor are there sufficient allegations that competitors  
25 control or influence ICANN. VeriSign has not alleged how ICANN operates,  
26 makes decisions, and regulates Internet registries and registry services. For all  
27  
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1 these reasons, VeriSign has not sufficiently alleged a Section 1 conspiracy.<sup>4</sup> *Am.*  
2 *Soc'y of Mech. Eng'rs, supra.*

3 **B. Antitrust Standing**

4 ICANN argues that VeriSign does not have antitrust standing because even  
5 if it has been injured by being put at a competitive disadvantage, that injury is not  
6 one that the antitrust laws were designed to address. Def.'s Mot, 15:18-16:15.

7 ICANN relies on many key cases, including *McGlinchy, supra*, which held that a  
8 plaintiff's claim that its business had been injured did not amount to an antitrust  
9 injury because "the antitrust laws were enacted for the protection of *competition*,  
10 not *competitors*." *Id.* at 811-13 (internal citations omitted, emphasis in original).

11 VeriSign, in turn, contends that its .com gTLD customers have not been able to  
12 purchase its "new innovative value-added services" and that some Ninth Circuit  
13 cases have found antitrust standing where only one competitor is harmed  
14 "because consumers faced fewer product or service choices...from the remaining  
15 competitors." Pl.'s Opp'n, 12:10-14:7. In *Hasbrouck v. Texaco, Inc.*, 842 F.2d  
16 1034, 1040 (9<sup>th</sup> Cir. 1988), *aff'd* 496 U.S. 543 (1990), the Ninth Circuit cautioned  
17 courts not to be too dismissive of an injury to one competitor:

18           The purpose of drawing a distinction between harm to  
19           competition and harm to competitors is to point out that  
20           not all acts that harm competitors harm competition.  
21           However, the converse is *not* true. Injury to competition  
22           necessarily entails injury to at least some competitors.  
23           Competition does not exist in a vacuum; it consists of  
24           rivalry among competitors. Clearly, injury to

25  
26           <sup>4</sup> ICANN argues that its bylaws, which outline how ICANN and its Board of  
27           Directors function, preclude VeriSign from ever being able to plead conspiracy. *See*  
28           Def.'s Request for Judicial Notice, Exh. B. The Court declines, at this stage, to  
          determine whether these documents would preclude VeriSign from alleging a  
          conspiracy against ICANN.

1 competitors may be probative of harm to competition,  
2 although the weight to be attached to such evidence  
3 depends on its nature and on the nature of the challenged  
4 conduct. The aphorism may not be invoked blindly in  
5 response to a showing that competitors have been  
6 harmed; otherwise it would often serve to shield  
7 unlawful conduct that adversely affects competition.

8 *Id.*; see also *USA Petroleum Co. v. Atl. Richfield Co.*, 859 F.2d 687, 696 (9<sup>th</sup> Cir.  
9 1988), *rev'd* 495 U.S. 328 (1990).

10 ICANN cites several Ninth Circuit cases dismissing Section 1 antitrust  
11 claims that fail to allege the requisite injury to competition in the relevant market.  
12 See, e.g., *Les Shockley Racing*, *supra* at 508 (removal of one competitor from  
13 market does not injure competition without allegation of unreasonable disruption  
14 in pricing, resource allocation, market entry, or output); *McGlinchy*, *supra* at 811-  
15 12 (injury to competitor is not injury to competition); *Rutman Wine Co.*, *supra* at  
16 734-35 (same).<sup>5</sup> Occasionally, of course, there are situations of “convergence of  
17 injury to a market competitor and injury to competition...when the relevant  
18 market is both narrow and discrete and the market participants are few.” *Les*  
19 *Shockley Racing, Inc.*, *supra*, at 508-09 (citation omitted). None of the cases  
20 VeriSign cites changes this analysis.

21 \_\_\_\_\_  
22 <sup>5</sup> For similar results at the summary judgment stage, see also *Pool Water*  
23 *Prods.*, *supra* at 1035-36 (neither decreased prices nor a competitor’s decreased  
24 market share are antitrust injuries harming competition); *Adaptive Power Solutions,*  
25 *LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 952 (9<sup>th</sup> Cir. 1998), *cert. denied*, 525  
26 U.S. 875 (1998) (in missile component market with only two or three competitors,  
27 forced exclusion of plaintiff resulting in temporary decline in number of competitors  
28 not a significant restraint of trade entitling antitrust injury); *McDaniel v. Appraisal*  
*Inst.*, 117 F.3d 421, 423 (9<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1022 (1998) (real estate  
appraiser who was not certified was at competitive disadvantage, but no harm to  
competition); *Rebel Oil Co., Inc.*, *supra* at 1444 (below-cost pricing by competitor  
who lacks market power is a “boon to consumers,” not an antitrust injury).

1 VeriSign relies on three cases where courts found that an antitrust claim  
2 was stated by one competitor: *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024,  
3 1032 (9<sup>th</sup> Cir. 1990), *aff'd* 500 U.S. 322 (1991); *Oltz v. St. Peter's Cmty. Hosp.*,  
4 861 F.2d 1440, 1448 (9<sup>th</sup> Cir. 1988); and *Industrial Bldg. Materials, Inc. v.*  
5 *Interchemical Corp.*, 437 F.2d 1336, 1342-43 (9<sup>th</sup> Cir. 1971). ICANN correctly  
6 notes that the plaintiffs in these three cases *did* sufficiently allege impacts on  
7 services, prices, or the number of entrants in the marketplace to allege an injury to  
8 competition. Def.'s Reply, p. 8 n.10.

9 VeriSign alleges that ICANN's conduct "has deprived consumers of a  
10 beneficial new service and VeriSign of revenues and profits it would generate..."  
11 Compl. ¶ 39; *see also* ¶¶ 47, 55, 65, 69, 72, 86. These new services are important  
12 to enable "VeriSign to compete more effectively with operators of competitive  
13 gTLD and ccTLD registries that are offering or intend to offer a similar service"  
14 by making "the registration of domain names within the .com gTLD more  
15 desirable and attractive." *Id.* ¶ 69; *see also* ¶ 32. Thus, the crux of VeriSign's  
16 injury is that it is being placed at a "competitive disadvantage" *vis-a-vis* other  
17 TLDs since ICANN prevents, delays, or restricts VeriSign's ability to make new  
18 services its competitors offer from being made available to customers in the .com  
19 gTLD it operates. *Id.* ¶¶ 77-78.

20 VeriSign's very theory of damage depends on and arises out of the fact that  
21 it has vigorous competitors who will be able to compete more vigorously.  
22 Moreover, this is not a case in which the marketplace is small and the participants  
23 are few. To the contrary, VeriSign defines the relevant market as the operation of  
24 TLD registries worldwide, both gTLD and ccTLD. Compl. ¶ 84. There are  
25 approximately 250 TLDs throughout the world and numerous registries operating  
26 those TLDs and competing to attract domain name registrations, most of which  
27 are ccTLDs unregulated by ICANN. *Id.* ¶¶ 12, 20, 32. By VeriSign's own  
28 account, many of its competitors already offer (or plan to offer) similar or

1 competitive services. *Id.* ¶¶ 77-78. Its Complaint seems to be based on the  
2 unstated assumption that ICANN has a duty to help it compete more effectively.  
3 VeriSign has not alleged anything more than injury to its own business and  
4 therefore, does not have antitrust standing.

5 The Court DISMISSES the first cause of action for violation of Section 1  
6 of the Sherman Act without prejudice. ICANN states that VeriSign “has not  
7 adequately pled an antitrust claim against ICANN and could never do so,”  
8 suggesting that leave to amend would be futile. Def.’s Mot., 17:10-11. Although  
9 VeriSign has not requested leave to amend, it is entitled to attempt to cure the  
10 defects. If VeriSign can do so with a good faith basis and consistent with the  
11 obligations of Fed. R. Civ. P. 11, it may have until June 7, 2004 to file a FAC. If  
12 VeriSign does not timely amend and cure all defects, the antitrust claim will be  
13 dismissed with prejudice and the Court will decline to exercise supplemental  
14 jurisdiction.

### 15 CONCLUSION

16 For the foregoing reasons, the Court hereby GRANTS Defendant’s motion  
17 to dismiss claim one of the Complaint, without prejudice.<sup>6</sup> The Court declines to  
18 rule on the remainder of the motion to dismiss, which addresses the state law  
19 claims two through six. If, in any FAC, VeriSign sufficiently states an antitrust  
20 claim, but does not change any of the allegations pertaining to claims two through  
21 six, the parties shall incorporate into their respective motion papers the precise  
22 language and arguments they made in their respective current motion papers.

23 As to the Special Motion to Strike, in order to provide for docketing clarity,  
24 the Court ORDERS that it be withdrawn from the active calendar, without  
25 prejudice to it being renewed.<sup>7</sup> If the Court eventually rules on a dismissal  
26 motion directed at counts two through six, it will also rule on the motion

27  
28 <sup>6</sup> Docket No. 16.

<sup>7</sup> Docket No. 19.


1 to strike. In that event, regardless of whether VeriSign amends any or all of the  
2 second through sixth claims in any FAC, ICANN may incorporate into a renewed  
3 motion to strike the facts and arguments it relied on in the current set of motion  
4 papers regarding the original Complaint.

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

7 This Order is not intended for publication.

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10 IT IS SO ORDERED.

11  
12 DATE: May 18, 2004



A. Howard Matz

United States District Judge

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