

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
CLERK, U.S. DISTRICT COURT
AUG 26 2004
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature] - DEPUTY
SCANNED

ENTERED
CLERK, U.S. DISTRICT COURT
AUG 26 2004
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

Priority
Send
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

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

CASE NO. CV 04-1292 AHM (CTx)

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

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

INTRODUCTION AND PROCEDURAL HISTORY

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

82

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

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

20 FACTUAL ALLEGATIONS

21 ICANN is a non-profit corporation that was organized in 1998 "in response
22 to a plan by the [Department of Commerce] to introduce competition into the
23 field of domain name registration, among other objectives." FAC ¶ 17. The
24 Internet is comprised of numerous top level domains ("TLDs"). Some are generic
25 TLDs ("gTLDs") like .com, .net, .gov, and .biz, while others are country
26 code TLDs ("ccTLDs") such as .uk and .ca.¹ *Id.* ¶ 11. Each TLD has a "registry"
27

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

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

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

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

19 *Id.* ¶ 17.

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

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

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

7 In 2001, VeriSign and ICANN entered into a registry agreement
8 authorizing VeriSign to act as the sole registry for the “.com” gTLD. FAC ¶¶ 21-
9 22. Under the agreement, VeriSign must provide certain “registry services” to
10 accredited registrars in accordance with ICANN’s specifications. *Id.* ¶ 23. The
11 core of this dispute is that ICANN allegedly has taken actions to: (1) prohibit or
12 otherwise restrict VeriSign from offering services valuable to Internet users,³ (2)
13 impose improper conditions on the offering of such services by VeriSign, (3)
14 regulate and set the prices at which such services may be offered, and/or (4) delay
15 the introduction of new services. *Id.* ¶ 1. Because ICANN has allegedly blocked,
16 delayed, and restricted the “value-added” services VeriSign has sought to offer its
17 customers, VeriSign is “at a competitive disadvantage” since other TLD registries
18 have been able to introduce similar services without restriction or delay. *Id.* ¶¶
19 77-78. VeriSign claims that ICANN’s various actions have breached their 2001
20 registry agreement, *id.* ¶¶ 188-200, 207-222; interfered with a contract VeriSign
21 had with an unidentified third party, *id.* ¶¶ 201-206; and violated the antitrust

22
23 ² Over Plaintiff’s objection, the Court takes judicial notice of Exhibit L,
24 ICANN’s bylaws. The bylaws are a proper subject of judicial notice because
25 VeriSign references them in the FAC (*e.g.*, ¶¶ 17, 86, 95, 102) and their authenticity
is not disputed. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

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

1 laws, *id.* ¶¶ 83-187.

2
3 **APPLICABLE LEGAL STANDARD**

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

20 "Generally, a district court may not consider any material beyond the
21 pleadings in ruling on a Rule 12(b)(6) motion. . . . However, material which is
22 properly submitted as part of the complaint may be considered" on a motion to
23 dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555
24 n.19 (9th Cir.1990) (citations omitted). Similarly, "documents whose contents are
25 alleged in a complaint and whose authenticity no party questions, but which are
26 not physically attached to the pleading, may be considered in ruling on a Rule
27 12(b)(6) motion to dismiss" without converting the motion to dismiss into a
28 motion for summary judgment. *Branch*, 14 F.3d at 454 (9th Cir. 1994) (*citing*

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

10 DISCUSSION

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

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

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

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

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

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

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

19
20 **A. Conspiracy Allegations**

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

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

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

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

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

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

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

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

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

10 VeriSign's contentions are deficient. First, there is nothing inherently
11 conspiratorial about a "bottom-up" policy development process that considers or
12 even solicits input from advisory groups. *See Hahn v. Or. Physicians' Serv.*, 868
13 F.2d 1022, 1029 (9th Cir. 1989) (*en banc*); *Barry v. Blue Cross of Cal.*, 805 F.2d
14 866, 868-69 (9th Cir. 1986) (advisory committee's comments and suggestions did
15 not establish requisite control over Board's decisions). "Participation" is not
16 enough to give rise to antitrust liability; *control* is required.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9
10 **B. Antitrust Standing**

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

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

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

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

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

8 **CONCLUSION**

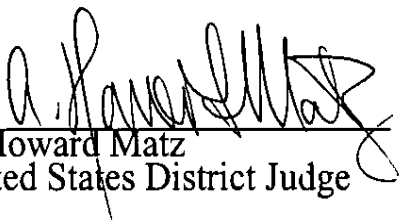
9 For the foregoing reasons, the Court hereby GRANTS Defendant's motion
10 to dismiss claim one of the FAC, with prejudice.⁸ The Court declines to exercise
11 supplemental jurisdiction and DISMISSES the second through seventh claims,
12 without prejudice to their being filed in state court. The Court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

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

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

18
19 IT IS SO ORDERED.

20
21 DATE: August 26, 2004


A. Howard Matz
United States District Judge

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

28 ⁸ Docket No. 70.

⁹ Docket No. 69.