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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)

NOTICE OF MOTION AND 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; MEMORANDUM OF POINTS AND AUTHORITIES

[Concurrently filed with Request for Judicial Notice]

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

PLEASE TAKE NOTICE that, on May 17, 2004, at 10:00 a.m. or as soon thereafter as counsel may be heard at the courtroom of the Honorable A. Howard Matz, United States District Judge, located at 312 North Spring Street, Los Angeles, California, defendant Internet Corporation for Assigned Names and Numbers ("ICANN") will and hereby does move this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing plaintiff VeriSign, Inc.'s ("VeriSign") first claim for relief for violation of section 1 of the Sherman Act, second claim for relief for injunctive relief for breach of contract, third claim for relief for damages for breach of contract, fourth claim for relief for interference with contractual relations, fifth claim for relief for specific performance of contract and injunctive relief, and sixth claim for relief for damages for breach of contract. None of these claims for relief states a claim upon which relief may be granted.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on March 24, 2004. Counsel were unable to reach any agreements that would obviate the need for the motion.

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

Dated: April 5, 2004

JONES DAY

By: _____
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This is a dispute about the interpretation of a contract, which VeriSign's seventh claim for relief appropriately seeks to resolve (at least in part). The first six claims, by contrast, seek to impose liability upon ICANN merely because ICANN reads the parties' contract differently than VeriSign does. Disagreeing with VeriSign is neither an antitrust violation nor a breach of contract, and thus none of the first six claims has merit.

First, none of the first six claims is ripe because they all rest on the assumption that ICANN's interpretation of the contract is wrong. Because that is the issue presented by the seventh claim, and because if ICANN is right none of the first six claims has any merit, these claims should all be dismissed and be addressed only when and if VeriSign's interpretation of the contract is authoritatively established to be correct.

Second, all of the claims rest on the assertion by ICANN of: (a) its interpretation of the contract, and (b) its stated intention to utilize the dispute resolution mechanism of the contract if VeriSign did not accept that interpretation. As a matter of law, such actions cannot violate the antitrust laws or amount to a breach of contract. VeriSign has always been free either to seek a judicial resolution of those disagreements, as the contract provided it could do, or to act in accordance with its own contract interpretation. VeriSign's voluntary actions to respond (on some but not all occasions) to ICANN's contract interpretation, as if it were correct, does not form the basis for any claims against ICANN.

Third, there are significant problems with many of the individual claims. For example, the first claim, for violation of the antitrust laws, does not sufficiently allege *any* of the necessary elements of an antitrust conspiracy. VeriSign has not (in its one conclusory paragraph (¶ 85)) sufficiently alleged that there is an antitrust conspiracy, that there has been any injury to competition, that it has antitrust

standing, or that it has sustained antitrust injury. The notion that ICANN is scheming to injure VeriSign is particularly ironic in view of the fact that ICANN has been successfully defending lawsuits brought *in this Court*[1] in order to *protect* VeriSign's ability to offer one of the services — the so-called "Wait Listing Service" or "WLS" — that VeriSign now alleges ICANN is conspiring to *prevent*. Compl. ¶¶ 40-47.

The first six claims should be dismissed.

BACKGROUND REGARDING ICANN

ICANN is a not-for-profit corporation organized under California law. Compl. ¶ 6. ICANN's mission "is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. (The Bylaws are attached as Exhibit B to ICANN's RJN.) In November 1998, the United States Department of Commerce ("DOC") and ICANN entered into a Memorandum of Understanding ("MOU"). Compl. ¶ 19. (The MOU is attached as Exhibit C to ICANN's RJN.) In the MOU, the DOC and ICANN agreed to "jointly design, develop and test the mechanisms, methods, and procedures that should be in place and the steps necessary to transition management responsibility for DNS [domain name system] functions now performed by, or on behalf of, the U.S. Government to a private-sector not-for-profit entity." MOU, § II.B. The MOU provides that the DOC will maintain oversight responsibility of the technical management of the domain name system until further agreements are arranged for the private sector to undertake that management. The DOC and ICANN have amended and extended the MOU several times; however, during the continuing

[1] *See* Judge Walter's order, dated November 10, 2003, denying plaintiffs' motion for preliminary injunction in the litigation styled *Dotster, Inc. et al. v. ICANN*, Case No. CV 03-5045 JFW (MANx), attached as Exhibit A to ICANN's concurrently filed request for judicial notice ("RJN"). The *Dotster* plaintiffs brought a motion for preliminary injunction seeking to stop ICANN from permitting VeriSign to proceed with WLS; ICANN vigorously opposed the motion, and, in a detailed opinion, Judge Walter denied it.

transition the DOC retains ultimate authority over the management of the domain name system. (The most recent amendment is attached as Exhibit D to ICANN's RJN; *see especially* Section V.B.11.)

ICANN's Board of Directors consists of fifteen directors. RJN, Ex. B, Art. VI. ICANN also has a staff, an Ombudsman, a Nominating Committee for directors, three Supporting Organizations that make recommendations to the Board on specific topics, and four Advisory Committees. *Id.*, Arts. V, VII-XI. Pursuant to its Bylaws, the directors are selected as follows: (a) eight directors selected by the Nominating Committee; (b) two directors selected by the Address Supporting Organization; (c) two directors selected by the Country-Code Names Supporting Organization; (d) two directors selected by the Generic Names Supporting Organization; and (e) the president ex officio (who also votes). RJN, Ex. B, Art. VI, §§ 1-2. ICANN does not have any "members." *Id.*, Art. XVII.

One of ICANN's Advisory Committees is the Governmental Advisory Committee or "GAC." *Id.*, Art. X, § 2.1. The GAC consists of representatives of national governments and multinational governmental organizations. The GAC considers and provides advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements. *Id.*

ICANN's Board has the final authority to accept or reject a recommendation from its supporting organizations or advisory committees. The Bylaws prohibit Board members from voting on matters if ICANN's decision would directly affect his or her own economic interests or those belonging to affiliated firms. *Id.*, Art. VI, § 6.

One of ICANN's functions has been to enter into contracts with the operators of various Internet "registries", those companies that maintain the "zone" or "master" file for the "top level domains" of the Internet. Internet registries are, in some senses, similar to telephone books in that the registry operators maintain a list

(and a variety of other relevant information) about each of the persons who registers an Internet domain name in that registry. ICANN presently has contracts with a number of registry operators, including VeriSign, the operator of the ".com" and ".net" registries, stating the manner in which the registries will be operated. Compl. ¶¶ 15, 22. The most recent registry agreement between VeriSign and ICANN is the contract for .com, entered into in May 2001 (the "Registry Agreement"). *Id.* ¶ 22; Registry Agreement (the Registry Agreement is attached to ICANN's RJN as Ex. E).

SUMMARY OF VERISIGN'S ALLEGATIONS

VeriSign's claims arise out of its efforts to change the manner in which it operates the .com registry, allegedly "to enhance the value and attractiveness of second-level domain names registered in the .com gTLD." Compl. ¶ 32. VeriSign alleges that none of these changes involves a "Registry Service" within the meaning of the Registry Agreement, or otherwise relates to the Agreement's requirements. *Id.* ¶¶ 36, 43, 51, 59. ICANN disagrees.

Wildcard Allegations

When most users of the Internet type in an address that has not been registered in the registry, the users receive an "error" message or a "page cannot be displayed" message that states in effect that the Internet website does not exist. Compl. ¶ 34. (An example would be the response to typing in the address http://www.noantitrustclaim.com.) If, instead, a registry operator wants to redirect the Internet user to an Internet page established by the registry (with content supplied by the registry), the registry can insert what is known as a "wildcard" into the domain, which causes an Internet user who types in an address to be redirected to an Internet page established by the registry operator.

VeriSign alleges that, on or about September 15, 2003, VeriSign inserted its wildcard, which it called "Site Finder." *Id.* ¶¶ 33-34. VeriSign provided no notice to ICANN or to any users of the Internet that it would be adding the wildcard to the

.com registry. October 3 Letter (the October 3 Letter is attached as Exhibit F to ICANN's RJN). VeriSign then alleges that ICANN "wrongly" and "at the behest of others" demanded that VeriSign suspend its use of the wildcard. According to VeriSign, in the October 3 Letter, ICANN threatened that, unless the wildcard was suspended, ICANN would "initiate legal proceedings" against VeriSign. Compl. ¶ 37; RJN, Ex. F. VeriSign alleges that, as a result of the October 3 Letter, VeriSign was "forced to suspend" the wildcard. Compl. ¶ 38.[2]

WLS Allegations

Domain name subscriptions typically are for one or two years. At the end of that term, some domain name registrants elect not to renew their subscriptions, which causes those names to be deleted from the registry and permits others to register those names. VeriSign alleges that its WLS would allow a prospective domain name registrant to submit a request for an expired domain name on a first-come, first-serve basis through any of approximately 130 ICANN-accredited registrars (the entities that sell domain name subscriptions to consumers) for a domain name currently registered in the .com registry. *Id.* ¶ 41. If a domain name is thereafter deleted, the WLS subscription holder would become the registrant of the domain name. *Id.* ¶ 41.

VeriSign alleges that it would have been ready to offer WLS "in or before August 2002, and would have done so" had ICANN not acted wrongfully. *Id.* ¶ 45. VeriSign alleges that ICANN discussed WLS with VeriSign's competitors, including ICANN's registrar constituency, and then "announced that WLS is a Registry Service." *Id.* ¶ 44. It alleges that ICANN then wrongfully insisted that VeriSign comply with conditions that are not required by the Registry Agreement. *Id.* ¶¶ 44-46.[3]

[2] VeriSign's second, third, and fourth claims relate solely to its use of a wildcard in the .com domain. The remainder of its claims are directed to the wildcard as well as other topics.

[3] As noted above, several of ICANN's registrars have sued ICANN, demanding that ICANN not permit VeriSign to proceed with WLS. In the first of

ConsoliDate Allegations

VeriSign alleges that, in or about January 2003, it began offering ConsoliDate, which allowed .com registrants to add from 1 to 364 days to an existing domain name registration term in order to create a single anniversary date for their entire .com domain name registration portfolio. Compl. ¶¶ 48, 50. VeriSign concedes that, "ICANN provisionally supported the introduction of ConsoliDate," but alleges that ICANN has deprived VeriSign of revenues and deprived consumers of a beneficial new service. *Id.* ¶¶ 52, 55. ICANN has acted wrongfully, VeriSign alleges, by claiming that ConsoliDate is a Registry Service and conditioning permanent approval of ConsoliDate on VeriSign's entering into certain amendments to the Registry Agreement. *Id.* ¶¶ 52-54.

Internationalized Domain Name Allegations

VeriSign alleges that, in or about November 2000, it began an internationalized domain name ("IDN") service in a "third-level domain testbed environment." *Id.* ¶ 56. The IDN allows users of the Internet to use non-ASCII (non-English) character sets to register domain names in the .com registry. *Id.* ¶ 56. VeriSign alleges that it intended "to offer IDN on a permanent basis with respect to second-level domain names within the .com gTLD." *Id.* ¶ 56.

VeriSign alleges that "[a]n appendix to the 2001 .com Registry Agreement purports to 'reserve' to ICANN all 'tagged domain names' with 'hyphens in the third and fourth characters.'" *Id.* ¶ 61. VeriSign alleges that it "therefore sought ICANN's authorization to use domain names with an 'xn--' prefix to enable the .com gTLD registry to provide IDN service, as other competing ccTLD registries that are not under contract with ICANN are already doing or have publicly announced they

(continued…)

those suits, the plaintiffs brought an unsuccessful motion for preliminary injunction seeking to block WLS. RJN, Ex. A. The second of those suits (Case No. CV 04-1368 ABC (CWx)) was filed on March 1, 2004.

intend to do." *Id.* ¶ 61. VeriSign alleges that IDN is not a "Registry Service," but that ICANN withheld its consent until VeriSign agreed to its "Guidelines for the Implementation of Internationalized Domain Names." *Id.* ¶¶ 59, 62.

Marketing Program Allegations

VeriSign alleges that, in or about November 2001, it launched an incentive promotion program through which participating registrars displayed a VeriSign advertisement for .com domain names on their websites in exchange for "placement fees" and "other consideration." *Id.* ¶ 66. VeriSign alleges that ICANN improperly "demanded that VeriSign cease the program on the ground that it had not been approved by ICANN," and that ICANN threatened to "declare VeriSign in formal breach of the 2001 .com Registry Agreement unless the program was suspended." *Id.* ¶ 67. VeriSign alleges that this has "deprived VeriSign of the ability to promote and market its services in the manner best designed to enhance its business." *Id.* ¶ 68.

LEGAL STANDARD

Although this Court must accept as true material factual allegations in the complaint, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Anderson v. Clow (In re Stac Elecs. Sec. Litig.)*, 89 F.3d 1399, 1403 (9th Cir. 1996) (internal quotation omitted). To withstand scrutiny under Rule 12(b)(6), the complaint "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (internal quotations omitted). In undertaking this analysis, the Court is not required to "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden St. Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). If the complaint fails on a motion to dismiss, it should be dismissed with prejudice if

amendment would be futile. *See Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990).

ARGUMENT

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

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1. To survive a Rule 12 motion, VeriSign must plead that: (1) there was a contract, combination or conspiracy; (2) the contract or conspiracy unreasonably restrained trade; and (3) the restraint affected commerce. *Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001).

Apart from a very narrow category of *per se* unlawful conduct, such as naked price fixing, section 1 claims are evaluated under the "rule of reason." *See, e.g.*, *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). As discussed below, VeriSign's claim that ICANN has conspired to injure VeriSign would be evaluated under the rule of reason. To succeed in a rule of reason case, a section 1 claimant must establish three elements: "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition." *See Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989); *Kingray*, *Inc. v. Nat'l Basketball Ass'n*, 188 F. Supp. 2d 1177, 1187, 1196-1197 (S.D. Cal. 2002) (dismissing complaint for failure to adequately allege conspiracy, intent to harm competition, and actual harm to competition). VeriSign has not alleged *any* of the requisite elements of a section 1 claim.

A. VeriSign Has Failed to Allege Any Facts that Support Its Section 1 Claim.

VeriSign's basic antitrust theory is really one of exclusion (*i.e.*, Sherman Act section 2) rather than collusion (Sherman Act section 1). The reason VeriSign strains to fit its theory into section 1 is that the law completely forecloses the section 2 theory it would like to assert. ICANN conducts no commercial business and does not compete with VeriSign, let alone possess monopoly power in the market of registry operations (a market ICANN is not permitted to participate in under its Bylaws). Therefore, VeriSign could never state a section 2 claim against ICANN. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927-928 (2nd Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

VeriSign is thus required to manufacture a "collusion" theory, but a section 1 plaintiff must allege *facts* sufficient to establish each element of its claim. *See Les Shockley Racing, Inc.*, 884 F.2d at 506, 508; *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987). Moreover, the essential elements "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).[4]

1. VeriSign's "Conspiracy" Allegations Are Insufficient.

Co-conspirators may be left unnamed in a section 1 complaint only under limited circumstances and only if a plaintiff describes the specific involvement of the unnamed claimed conspirators. Bare allegations that a defendant conspired with someone, somewhere, sometime, are not enough. *See, e.g.*, *Estate Constr.*

[4] It is not proper to assume that the defendants have violated the antitrust laws in ways that have not been alleged. *See Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). When the elements of an antitrust claim are lacking, the costs of antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *see also Found. for Interior Design Educ. Research*, 244 F.3d at 530 ("the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome.") (citation omitted.)

Co. v. Miller & Smith Holding Co., 14 F.3d 213, 221 (4th Cir. 1994) (some details of the conspiracy's time, place and alleged effect required); *Aquatherm Indus., Inc. v. Florida Power & Light Co.,* 971 F. Supp. 1419, 1429-39 (M.D. Fla. 1997) (conclusory conspiracy allegations insufficient; listing cases); *Newport Components, Inc. v. NEC Home Elecs. (U.S.A.), Inc.*, 671 F. Supp. 1525, 1546 (C.D. Cal. 1987) (plaintiff must allege facts constituting the conspiracy, the conspiracy's object, and its accomplishment).

For example, *Lombard's, Inc. v. Prince Mfg., Inc.* 753 F.2d 974 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986), affirmed the dismissal of a section 1 claim where the plaintiff identified unnamed co-conspirators only as the defendant's "dealers and others at this time unknown to Lombard's." *Id.* at 975. Similarly, in *Newport Components*, the court held inadequate allegations of a conspiracy with "'other entities and individuals,' including, but not limited to both foreign and domestic authorized distributors" of defendants. *Newport Components*, 671 F. Supp. at 1545-46.

VeriSign's meager allegation of a conspiracy falls far short. VeriSign identifies ICANN's alleged co-conspirators only as "its members, including constituent groups within ICANN and the members of those groups." Compl. ¶ 85. This allegation is useless. ICANN *has* no members (RJN, Ex. B, Art. XVII), and VeriSign offers no explanation of what it means by that term. Presumably, it could include any person or entity in the global Internet community that has participated in the ICANN process. Compl. ¶ 18. But since participation in ICANN is open to any person or entity, the number of possible co-conspirators equals the population of the earth.

As to the alleged *conduct* of these unnamed co-conspirators, VeriSign again leaves ICANN and the Court guessing: VeriSign does not allege *any* conduct of *anyone* other than ICANN. Indeed, the only conduct alleged in furtherance of the conspiracy is alleged to have been undertaken by ICANN's Board. Compl. ¶¶ 18

("ICANN is governed by and acts through an international Board of Directors"); ¶ 85 (complaining about "[t]he acts of ICANN"). VeriSign's allegation that ICANN "frequently carries out its activities . . . through the collective action" of an unlisted and unlimited set of "others" is not sufficient to state an antitrust claim. *Id*. ¶ 18.

Moreover, VeriSign's pleading deficiencies are incurable. Leave to amend the complaint would be pointless for several reasons.

First, it is hornbook antitrust law that a company cannot conspire with itself. *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Columbia River People's Utility Dist. v. Portland Gen. Elec. Co.,* 217 F.3d 1187, 1190 n.4 (9th Cir. 2000). Yet, the gravamen of VeriSign's claim is that: (a) "ICANN's acts" have violated section 1; (b) ICANN acts "through its Board of Directors"; and (c) the conspiracy involved "ICANN and its members." Complaint ¶¶ 18, 85. These allegations concede that the alleged conspirators are subsumed within the formal decisionmaking structure of ICANN. *See Healthamerica Pennsylvania, Inc. v. Susquehanna Health Sys.*, 278 F. Supp. 2d 423, 435 (M.D. Penn. 2003) (non-profit with sole authority for management of defendant hospitals, including establishment of overall policy, acted as single entity "guided 'not by two separate corporate consciousnesses, but one'."). In short, VeriSign's Sherman Act allegations do not state a claim under *Copperweld*.

Second, since ICANN and VeriSign do not compete, VeriSign cannot allege a section 1 claim against ICANN. In *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery*, 185 F.3d 606 (6th Cir. 1999), the court held that an association cannot conspire with its members as a matter of law because the association "does not compete with its member[s], . . . therefore antitrust concerns are not raised." *Id*. at 620-21. Some courts have recognized a narrow exception to this rule where a standard-setting organization acts as a result of being "captured" by competitors of the plaintiff. But VeriSign makes no allegations supporting any "capture" theory, nor could it.

In determining whether activity by a standard-setting organization violates section 1, courts look to the structure of the organization and the decision-making process the organization utilizes.[5] Generally, courts inquire whether: (1) the organization is in competition with plaintiff; (2) the members of the organization have control over the organization so extensive that the organization is no longer operating as an independent body; and (3) the organization has a personal stake in the outcome of the litigation. None of these factors is present with respect to ICANN.

First, ICANN's Bylaws prohibit ICANN from competing against VeriSign. RJN, Ex. B at Art. II, § 2.[6] The fact that ICANN conducts no commercial activity of any kind and has no financial interest in the actions of VeriSign or any of its competitors strongly undermines any notion of an antitrust conspiracy. *See Allied Tube*, 486 U.S. at 510 n.13 (noting that standard-setting associations consisting of members without economic interest in suppressing competition enjoy greater leeway under the antitrust laws); *Moore v. Boating Industry Ass'ns.*, 819 F.2d 693, 703, 712 (7th Cir. 1987) (defendants did not compete with plaintiff, they had no incentive to exclude plaintiff's product). In *Bowers v. National Collegiate Athletic Association*, 9 F. Supp. 2d 460 (D.C. N.J. 1998), the court dismissed the section 1 claim on a Rule 12(b)(6) motion because "[t]he Sherman Act is aimed 'primarily at combinations having *commercial* objectives and is applied to a very limited extent to organizations . . . which normally have other objectives.'" *Id*. at 497 (quoting *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 214 (1959)).[7]

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[5] *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988); *Heary Bros. Lightning Prot. Co. v. Lightning Prot. Inst.*, 287 F. Supp. 2d 1038, 1049 (D. Az. 2003).

[6] *See Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1453 (9th Cir. 1983) (no Section 1 liability because none of the defendant Foundation officers was a veterinarian (as was the plaintiff)).

[7] Mere communications within trade associations and standard-setting organizations are not enough to establish antitrust liability. *Consolidated Metal Prods. v. American Petroleum Inst.*, 846 F.2d 284, 293-95 (5th Cir. 1988).

Second, VeriSign could not allege that ICANN's Board has been "captured" by its membership and is void of independent decision-making. This analysis would require a showing that the actions of some or all of those participating in the various ICANN processes should be vicariously imputed to ICANN, but there is no such allegation because the complaint concedes that the only entity qualified to take action on behalf of ICANN is its Board. Compl. ¶ 18.

In *Pennsylvania Dental Ass'n. v. Medical Service Ass'n. of Pennsylvania*, 745 F.2d 248 (3rd Cir. 1984), the court found that there was no structural conspiracy because there was no control by member dentists over an organizational board. Defendant's bylaws provided for management by a board of directors, consisting of at least half lay people and up to half professionals. At the time of the appeal, only two of the thirty-two board members were in competition with the plaintiffs. *Id*. at 253, 258. The court found that, while either the board or management could refer certain matters to its standing committees, the "board of directors has ultimate responsibility for Blue Shield's business decisions," and the dentists did not control the defendant association. *Id*. at 258. "[W]e conclude that these committees were advisory only, that they were constituted and utilized as a resource to the board, that they participated in no activities anathematic to antitrust precepts, and rendered advice only when particularly solicited by the board." *Id*. "To give advice when asked by the decisionmaker is not equivalent to being the decisionmaker itself." *Id*. at 259.

As noted above, ICANN's Board has fifteen voting members who are selected from several different constituencies. The Board has the final authority to accept or reject a recommendation from its supporting organizations and advisory committees, and no Board member is permitted to vote on matters that could directly affect his or her own financial interests. Thus, any assertion that ICANN's Board has been "captured" by some portion of those who offer advice to the Board and also are VeriSign's competitors would be ludicrous.[8]

[8] While not relevant for purposes of this motion, the facts also would show that nearly all of the members of the ICANN Board are not associated with

Moreover, when the government encourages private standard-setting — or takes the analogous step as was done here — this factor also weighs against assuming a conspiracy. *See Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154, 158 (D. Or. 1966) ("A Commercial Standard must reflect a state of mind in the affected industry. The Department of Commerce will not publish one which is not accepted as satisfactory by the producers and users."), *aff'd*, 399 F.2d 155, 156 (9th Cir. 1968); *Nat'l Ass'n of Review Appraisers & Mortgage Underwriters v. Appraisal Found.*, 64 F.3d 1130, 1134 (8th Cir. 1995) (plaintiffs' contention that the Foundation should not have membership standards was "clearly not what Congress intended when it vested the Foundation with the authority to establish standards" after the savings and loan crisis).

2. VeriSign's Allegations of Anticompetitive Effect Are Insufficient.

Allegations of "impact upon *competitive conditions* in the relevant market" are "absolutely essential" to stating a section 1 claim. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812-813 (9th Cir. 1988) (emphasis added); *Tanaka*, 252 F.3d at 1064 (same). Thus, a section 1 claimant may not merely recite the bare legal conclusion that competition has been unreasonably restrained. *See Les Shockley Racing, Inc.*, 884 F.2d at 507. While VeriSign's complaint is replete with allegations that it has been "singled out" by arbitrary and discriminatory acts against it (*see, e.g.,* Compl. ¶¶ 70, 115), these allegations do not support an injury to competition; by definition, they assert injury only to VeriSign. *See Rutman Wine Co.*, 829 F.2d at 736 ("if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiff will get nowhere merely by dressing them up in the language of antitrust.") (citation omitted.) "The elimination of a single competitor,

(continued…)

VeriSign's competitors (however defined) and would have no financial incentive to injure VeriSign.

without more, does not prove anticompetitive effect." *McGlinchy*, 845 F.2d at 812-813.

VeriSign's own allegations are inconsistent with any allegation of harm "to competition." For example, VeriSign alleges in paragraph 39 that "ICANN's improper conduct has deprived consumers of a beneficial new service and VeriSign of revenues and profits it would generate from and in connection with" VeriSign's wildcard. Yet, just four paragraphs earlier, VeriSign alleges that "[o]ther gTLD and ccTLD registries that compete with the .com gTLD . . . are currently offering services similar to" VeriSign's wildcard. Compl. ¶ 35; *see also* ¶ 69 (prior to October 3 Letter, wildcard "enabled VeriSign to compete more effectively with operators of competitive gTLD and ccTLD registries that are offering or intend to offer a similar service"). Even taking these allegations at face value, the elimination of a single potential competitor does not equate to the "effect on competition" that is required to allege a violation of section 1. *McGlinchy*, 845 F.2d at 812-813; *see Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 952 (9th Cir. 1998) (no injury to competition from temporary decline in the number of competitors).

3. VeriSign Has Not Alleged Antitrust Standing Or Antitrust Injury.

Private antitrust plaintiffs must establish "antitrust standing." *Associated Gen. Contractors of Cal., Inc.*, 459 U.S. at 529-35. The most important element of antitrust standing is the requirement that a plaintiff demonstrate "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). "To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

VeriSign has not alleged facts sufficient to show that anticompetitive consequences flowed from ICANN's alleged conduct, or that ICANN's alleged conduct is the kind of conduct that the antitrust laws are intended to prevent. Indeed**,** all VeriSign has alleged is that *it* has been "prevented from competing" because ICANN has misinterpreted the contract.

Numerous dismissals of antitrust claims have been premised on similar, self-centered allegations. For example, in *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 812 (9th Cir. 1988), the plaintiff alleged that it was driven from the market by its various competitors in violation of section 1 of the Sherman Act. The Ninth Circuit affirmed the dismissal of the plaintiff's complaint for failure to allege antitrust injury because it "is injury to the market or to competition in general, not merely injury to individuals or individual firms that is significant," and plaintiff's own allegations showed that its rivals were thriving. *Id*. at 812-13; *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).

VeriSign also has failed to allege facts sufficient to show that whatever injuries VeriSign has incurred proximately flow from any acts of ICANN that are even arguably anticompetitive. Even if VeriSign has been injured — an allegation ICANN disputes — VeriSign still would have to show that its injuries were the result of ICANN's anticompetitive acts. This is the concept of "antitrust injury" as opposed to some other form of injury. *See Heary Bros. Lightning Protection Co., Inc.*, 287 F. Supp. 2d at 1050 (citing *Brunswick* , 429 U.S. at 489 (1977) and stating Ninth Circuit requires but-for causation). But VeriSign has alleged only that its injuries have flowed from its own *voluntary acquiescence* to ICANN's interpretation of the Registry Agreement. Until the filing of this complaint, VeriSign has never sought to utilize the dispute resolution provisions of the contract in order to establish that ICANN's expressed views on these subjects were wrong. Instead, VeriSign made entirely voluntary decisions sometimes to defer to ICANN's

contractual interpretation and other times to act in spite of ICANN's views. Thus, any injury that VeriSign might have suffered was caused entirely by VeriSign's own conduct. *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 11-12 (1st Cir. 1999) (affirming dismissal of plaintiff's complaint for lack of antitrust injury where plaintiff's injuries flowed from a contract termination, not defendants' anticompetitive acts); *SouthTrust Corp. v. Plus Sys.*, 913 F. Supp. 1517, 1522 (N.D. Ala. 1995) (plaintiff did not establish antitrust injury from a contract plaintiff voluntarily executed and abided by).

* * * * *

In summary, VeriSign has not adequately pled an antitrust claim against ICANN and could never do so, for all the reasons set forth above.

II. VERISIGN'S SECOND THROUGH SIXTH CLAIMS FOR RELIEF SHOULD BE DISMISSED.

VeriSign's second through sixth claims for relief are all premised on the allegation that ICANN's assertion of its interpretation of the parties' contract can somehow constitute a breach of contract or a tort. As a matter of law, it cannot. Moreover, VeriSign's allegations that its new services *are not even subject* to the Registry Agreement demonstrate the absurdity of its claim that ICANN has breached the agreement.

A. There Is No Violation By Merely Asserting A Contractual Position.

The common theme to VeriSign's allegations about ICANN's actions regarding VeriSign's new services is that, contrary to ICANN's interpretation, ICANN was "unauthorized to act" under the Registry Agreement. Compl. ¶ 31. As a matter of law, this cannot support a claim by VeriSign that ICANN has breached the contract or interfered with a separate VeriSign contract.

1. Asserting ICANN's Contract Interpretation Is Not A Breach.

VeriSign's second, third, fifth and sixth claims allege that ICANN breached the Registry Agreement. Compl. ¶¶ 94, 101, 115, 124. In order to establish a claim for breach of contract, VeriSign must allege facts demonstrating a breach of the contract. *Hentzel v. Singer Co.,* 138 Cal. App. 3d 290, 305 (1982). But the thrust of VeriSign's breach allegations is that ICANN was not authorized to hold a different view of the Registry Agreement from VeriSign, much less to threaten to enforce its interpretation of the agreement. Nothing in VeriSign's complaint alleges any action that could amount to a breach of the contract by ICANN.

VeriSign first claims that ICANN breached the parties' agreement by announcing that it would seek to enforce VeriSign's obligations under the parties' agreement unless VeriSign suspended the wildcard. Compl. ¶¶ 94, 101. Sending a letter complaining that the other party to a contract has breached its obligations, and threatening to utilize the dispute resolution provisions of the contract if necessary, cannot constitute a breach of the contract.[9] The October 3 Letter did not *force* VeriSign to suspend the wildcard; rather, VeriSign elected to suspend the service voluntarily (presumably because it recognized the strength of ICANN's position). A threat to do that which one has the legal right to do is not actionable by itself. *See Konecko v. Konecko*, 164 Cal. App. 2d 249 (1958).[10]

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[9] *See Bill's Coal Co. v. Bd. of Public Utilities*, 682 F.2d 883, 885 (10th Cir. 1982) (holding that the urging of a particular interpretation of a contract clause, even if in bad faith, "is neither a failure to perform contract obligations (breach) nor an indication those obligations will not be performed in the future (repudiation)."); *Kimel v. Missouri State Life Ins. Co.*, 71 F.2d 921, 923 (10th Cir. 1934) (holding that an offer to perform in accordance with the promisor's interpretation does not give rise to a breach: "'If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh . . . It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation.'") (citation omitted).

[10] Verisign's second claim for injunctive relief should also be dismissed on the independent ground that VeriSign's alleged injuries are not irreparable. In order to establish a claim for injunctive relief, a complaint must allege irreparable injury and inadequacy of legal remedies. *Stanley v. University of S. Cal.*, 13 F.3d 1313,

Further, for VeriSign to demonstrate that the alleged threat breached the implied covenant of good faith and fair dealing, VeriSign must allege that ICANN agreed in the Registry Agreement that ICANN would not make threats to enforce its contractual rights (or even assert that VeriSign had breached the agreement). *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349-50 (2000) ("The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive *the benefits of the agreement actually made* . . . It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (emphasis in original)). But the agreement does not contain such terms, and it would be shocking if it did. How else, after all, can *ICANN* receive its benefits under the agreement if it cannot seek to enforce it? *See Pulver v. Avco Financial Services*, 182 Cal. App. 3d 622, 636 (1986) (dismissing claim for breach of the implied covenant of good faith and fair dealing where plaintiff failed to demonstrate that the purpose behind the contract was to prevent defendant from threatening to take action or make statements).

VeriSign's remaining allegations of breach are premised mostly on ICANN's assertion that certain services VeriSign has offered or wishes to offer are subject to the Registry Agreement because they are "Registry Services." Compl. ¶¶ 72-76. VeriSign disagrees, and this disagreement can be resolved pursuant to the

(continued…)

1320 (9th Cir. 1994). An injury that was in part self-inflicted cannot be considered irreparable. *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3rd Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable"); *Ventura County Christian High Sch. v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1253 (C.D. Cal. 2002) (plaintiffs' "financial peril is due in part to their own failure to obtain a judicial determination of their rights and obligations at some earlier point in time. [Citation.] If the harm complained of is self-inflicted, it does not qualify as irreparable."). VeriSign's second claim for relief asserts that ICANN demanded that VeriSign suspend its wildcard. Compl. ¶ 94. After weighing the threat of suit by ICANN against the continued operation of the wildcard, VeriSign made a decision to suspend it. Compl. ¶ 95. Thus, any alleged injury was self-inflicted.

mechanisms set forth in the contract. But it is ludicrous to assert that the existence of a dispute over the meaning of terms of the contract creates a breach of the contract or the implied covenant of good faith and fair dealing. There is clearly no express provision in the contract that prevents ICANN from asserting its own view of the contract's terms, and ICANN has obviously not frustrated VeriSign's right to receive the benefit of the agreement actually made merely by making assertions.[11] VeriSign can (although it chose not to until the filing of this complaint) take advantage of the dispute resolution provisions of the contract to resolve that disagreement. This seems particularly obvious where VeriSign's stated position is that the Registry Agreement does not even apply to these services (see section II.B. below); in those circumstances, VeriSign is obviously free to ignore ICANN's assertions, assuming it is comfortable in the correctness of its views.[12]

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[11] VeriSign also states that the implied covenant of good faith and fair dealing has been breached because "it was understood and agreed between the parties that ICANN would not unreasonably withhold or delay consent to reasonable updates, upgrades, or other changes in the operation of or specifications for the registry." Compl. ¶ 30. But Paragraph II.35 of the Registry Agreement states that the contract and its appendices "constitutes the entire agreement of the parties hereto *pertaining to the operation of the Registry TLD* and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject." RJN, Ex. E (emphasis added). *See Guz v. Bechtel Nat'l, Inc.*, 100 Cal. 4th 317, 348-349 (2000) (stating that an express provision of a contract trumps an asserted implied understanding).

[12] VeriSign's request for attorneys' fees pursuant to the Registry Agreement is also misplaced. VeriSign alleges that the agreement "expressly requires ICANN to indemnify VeriSign against any and all damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising from VeriSign's compliance with an ICANN policy or specification established after the Effective Date of the agreement." Compl. ¶¶ 98, 103. In essence, VeriSign is claiming that, because the parties have a dispute concerning the meaning of "Registry Services," the indemnity provision means that ICANN should pay for VeriSign's attorneys' fees to litigate this dispute. But the Registry Agreement does not provide for attorneys' fees in the event the parties litigate a dispute. Absent explicit language to the contrary, a party to a contract may not invoke an indemnity provision when bringing an action under the contract itself. *Campbell v. Scripps Bank*, 78 Cal. App. 4th 1328, 1337 (2000) ("[T]he inclusion of attorney fees as an item of loss in a third party claim indemnity provision does not constitute a provision for the award of attorney fees in an action on contract."); *Myers Building Indus., Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 962 (1993) (contractual third-party indemnity clause does not provide for attorney fees incurred in actions to enforce the contract).

2. Asserting ICANN's Contract Interpretation Is Not A Tort.

VeriSign's fourth claim for intentional interference with contractual relations also arises directly (and solely) out of ICANN's assertion of its contract interpretation. Compl. ¶¶ 105-110. To state a claim for intentional interference with contractual relations, VeriSign must allege that: (1) there was a valid and existing contract between plaintiff and a third party; (2) defendant had knowledge of this contract; (3) defendant committed intentional acts that were designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) damages. *Scripps Clinic v. Sup. Ct.*, 108 Cal. App. 4th 917, 929 (2003). In support of this claim, VeriSign makes the bare assertion that, when ICANN sent VeriSign the October 3 Letter, ICANN "intended to disrupt [its] contractual relationship [with Provider]."[13]

Just as ICANN's mere assertion of its interpretation of the contract cannot constitute a breach of contract, nor can it be a tortious act.[14] *See Konecko*, 164 Cal. App. 2d 249 (a threat to do that which one has the legal right to do is not actionable by itself). It cannot be the case that ICANN's attempts to assert its rights under its contract with VeriSign can subject it to liability for interference with a separate contract VeriSign subsequently entered into with a different party.[15] *See Weststeyn Dairy 2 v. Eades Commodities Co.*, 280 F. Supp. 2d 1044, 1089 (E.D. Cal. 2003)

[13] VeriSign's intent allegation is contradicted by the October 3 Letter itself. According to VeriSign, ICANN sent a letter *to VeriSign* asserting that ICANN intended to enforce its rights under ICANN's contract *with VeriSign*. Compl. ¶ 37. VeriSign made a choice to suspend the wildcard, and now it apparently earns less money from its contract with Provider. Compl. ¶ 108. VeriSign elected not to protect its relationship with Provider. The absence of any *factual* allegations that ICANN intended to interfere with VeriSign's relationship with Provider constitutes an independent ground for dismissal of VeriSign's fourth claim.

[14] California law precludes the assertion of a tort claim that is based only on an alleged breach of contract. *See Khoury v. Maly's of California, Inc.*, 14 Cal. App. 4th 612 (1993) (affirming sustaining of demurrer on plaintiff's cause of action for intentional interference with business relations because the only real conduct alleged was breach of contract).

[15] Indeed, if ICANN is correct in its interpretation, the terms of the Registry Agreement itself prevented VeriSign from enjoying the fruits of its subsequent contract, not ICANN's assertion of its contract rights.

("fact that [the defendant] knew [enforcing its right of foreclosure] would interfere with Plaintiffs' contracts 'may be regarded as 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.'" (citation omitted)); *see also* Restatement (Second) of Torts § 766 cmt. j ("If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.").

In addition, ICANN's assertion of its contract position in the October 3 Letter is a protected communication under California's litigation privilege. Under California law, a "'communication[] preparatory to or in anticipation of the bringing of an action or other official proceeding [is] within the protection of the litigation privilege of Civil Code section 47, subdivision (b).'" *eCash Technologies, Inc. v. Guagliardo*, 127 F. Supp. 2d 1069, 1082 (C.D. Cal. 2000) (quoting *Dove Audio, Inc. v. Rosenfeld*, 47 Cal. App. 4th 777, 784 (1996) (granting 12(b)(6) dismissing all state law tort claims based on privileged letter); *Aronson v. Kinsella*, 58 Cal. App. 4th 254 (1997) (confirming immunity of prelitigation statement made in connection with proposed litigation that is "contemplated in good faith and under serious consideration").

By VeriSign's own admission, ICANN's October 3 Letter to VeriSign is a communication protected by the litigation privilege. VeriSign alleges that in the Letter ICANN asserted the wildcard "was inconsistent with the 2001 .com Registry Agreement and threatened VeriSign that, unless Site Finder was suspended forthwith, ICANN would initiate legal proceedings against VeriSign." Compl.

¶ 37. Thus, the October 3 Letter was a "demand letter," and California law bars any tort claims based on it.[16]

B. VeriSign's Allegations that the New Services Are Not Even Subject to the Registry Agreement Defeats its Contract Claims.

VeriSign alleges that the new "services" it has sought to offer are not even the subject of the .com Registry Agreement. Compl. ¶ 73. Nevertheless, the basis for VeriSign's second, third, fifth, and sixth claims is that ICANN's conduct with respect to those proposed new services constitutes a *breach of the Registry Agreement*. Compl. ¶¶ 77-82. This makes no sense: if these services are not "subject to" the Registry Agreement, then ICANN cannot have breached the agreement by taking views concerning the services, since those views are irrelevant. Either VeriSign's actions that were challenged by ICANN are properly the subject of the .com Registry Agreement (which ICANN contends), or they are not (as VeriSign contends in paragraph 73). VeriSign's inconsistent pleading cannot survive a motion to dismiss. *Steiner v. Twentieth Century-Fox Film Corp.*, 140 F. Supp. 906, 908 (S.D. Cal. 1953), *rev'd on other grounds*, 232 F.2d 190 (9th Cir. 1956) (dismissing claim where inconsistent allegations are pled in the same claim); *Eichman v. Fotomat Corp.*, 880 F.2d 149, 164 (9th Cir. 1989) (party cannot claim a breach of contract for obligations not within the contract).

In a variation of this allegation, VeriSign makes a series of allegations that the new services it has sought to offer do not fall "within the meaning of 'Registry Services,'" and, apparently for that reason, are not subject to VeriSign's obligations under the contract. *See* Compl. ¶ 36, 43, 51, 59. While ICANN does not share this view, ICANN, unlike VeriSign, does not take the position that VeriSign's particular interpretation of the contract is a breach of that contract. But taking this allegation

[16] Indeed, had ICANN filed suit against VeriSign for breach of contract, that suit would have been protected activity under the *Noerr-Pennington* doctrine discussed below. The notion that a letter threatening to file suit — clearly a less aggressive act — could be a tort is absurd. *See Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1123, 1133-1134 (1990).

as true for the purposes of this motion, it logically follows that ICANN cannot breach the contract by asserting positions that are not relevant to the contract.[17] Notably, VeriSign has not, and cannot, allege that the Registry Agreement places any affirmative obligation upon ICANN *to avoid* directing actions to non-"Registry Services."

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

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1997) (*quoting Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985). The "basic rationale" of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

VeriSign's Sherman Act, contract, and tort claims (claims 1-6) are not ripe because they depend on future contingencies: all require a predicate finding that ICANN's asserted position on the underlying dispute with respect to VeriSign's proposed services is incorrect. If ICANN is right, ICANN's assertion of valid rights under the contract could in no way be anticompetitive or a breach of the contract.[18] Thus, the Court cannot decide claims 1-6 in the absence of a determination on the central dispute between the parties (*i.e.*, whether the contract applies to VeriSign's

[17] For example, if ICANN argued that the Registry Agreement gave ICANN the right to have input on the type of health plans that VeriSign offered to its employees, VeriSign presumably could and would ignore ICANN's views, since the offering of health plans to employees is not a "Registry Service or otherwise governed by the agreement."

[18] Indeed, ICANN's alleged "threat to initiate legal proceedings" under the Registry Agreement (Compl. ¶ 37) also is protected from a Sherman Act attack by the *Noerr-Pennington* doctrine. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *see also Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) (the litigator is not protected only when he strikes without warning: "If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.").

services). *See, e.g.*, *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1383 (D.C. Cir. 1998) (contract claim unripe because premised on unactualized possibility); *Johnson v. Greater Southeast Cmty. Hosp. Corp.*, 951 F.2d 1268, 1273 (D.C. Cir. 1991) (requiring actual termination of physician privileges for section 1 claim to be ripe).

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

CONCLUSION

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

Dated: April 5, 2004 JONES DAY

By: _____
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ASSIGNED NAMES AND NUMBERS

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