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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VERISIGN, INC., a Delaware corporation, Plaintiff, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation, Defendant.	Case No. CV 04-1292 AHM (CTx) **PLAINTIFF VERISIGN, INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE FIRST THROUGH SIXTH CLAIMS FOR RELIEF IN THE AMENDED COMPLAINT PURSUANT TO RULE 12(b)(6)** Date: August 23, 2004 Time: 10:00 a.m. Courtroom: 14 – Spring Street Bldg. Hon. A. Howard Matz

Plaintiff VERISIGN, INC. ("VeriSign") respectfully submits this memorandum in opposition to the Motion by Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") to Dismiss the First through Sixth Claims for Relief in the First Amended Complaint (the "Complaint" or "FAC").

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I. PRELIMINARY STATEMENT

This Court's May 18, 2004 Order (the "Order") dismissed with leave to amend the Sherman Act claim on the following two grounds: "VeriSign has not sufficiently alleged a Section 1 conspiracy"; and "VeriSign has not alleged anything more than injury to its own business and, therefore, does not have antitrust standing." (Order at 10:1, 13:3-4.) In response to the Order, VeriSign amended the First Claim for Relief by adding 28 pages of specific allegations pleading the conspiracy and antitrust injury in extensive detail.[1] Rather than address these supplemental allegations, however, ICANN merely recycles the same arguments it made before directed to the original complaint. Accordingly, ICANN literally and repeatedly ignores specific factual allegations of structural and conduct-driven capture of ICANN's decision-making processes, injury to competition, and antitrust injury to VeriSign from the market foreclosure alleged in the FAC. Contrary to ICANN's motion, the First Claim for Relief sets forth facts that, if proven, establish a clear violation of Section 1 of the Sherman Act.

II. PLAINTIFF HAS PROPERLY PLED A SECTION 1 CLAIM

A. The Nature Of The Conspiracy To Restrain Trade

The FAC alleges that ICANN has conspired with named third-party competitors and potential competitors of VeriSign to restrain trade in relevant markets for several innovative services VeriSign sought to introduce.[2] With respect to each service, VeriSign has alleged that named competitors have captured and controlled ICANN's decision-making process in order to block or materially interfere with the service, and

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[1] The additional allegations are contained in Paragraphs 17, 31, and 85 through 182 of the FAC.

[2] The motion to dismiss must be denied if the First Claim for Relief alleges an actionable conspiracy to restrain trade in a relevant market with respect to *any one* of these services. A complaint may not be dismissed unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 4 (9th Cir. 1963) (internal quotation marks and citation omitted). A claim advancing multiple theories of recovery is sufficient if it shows the plaintiff would be "entitled to *any* relief which the court can grant." *Air Line Pilots Ass'n, Int'l v. Transam. Airlines, Inc.*, 817 F.2d 510, 516 (9th Cir. 1987) (internal quotation marks omitted).

that, in fact, the conspirators have accomplished their unlawful objectives. The anticompetitive effect of the unlawful conduct, as alleged in the Complaint, has been to deny consumers unique and beneficial new services, resulting in higher prices for inferior products and reduced output in the relevant markets. VeriSign has been harmed by the conspiracy, and has standing to bring this claim, because its services have been directly foreclosed by the illegal acts.

The Complaint specifically pleads the *conspiracy or capture* of the relevant ICANN decision-making process for each service. The FAC alleges not only control of ICANN, but specifically why and how capture occurred in this case (¶¶ 84-105, 128-39, 157-68), including, among other facts, as a result of: ICANN's unique bottom-up policy development process by constituency groups of competitors (¶ 86); the manner in which constituency groups operated to achieve capture (¶¶ 90-105, 128-39, 157-68); the requirement of ICANN's Bylaws that the constituency groups' policy decisions be followed by the Board of Directors of ICANN (¶¶ 86, 95, 102); and ICANN's dependence on VeriSign's competitors for its funding (¶ 93). The FAC further alleges specific admissions by ICANN's President that the policy development process at ICANN was subject to capture for precisely the reasons stated above and that competitors working through ICANN used its processes to "hamstring their competitors." (¶¶ 86, 90, 95.) The FAC similarly quotes competitor co-conspirators admitting both their domination of relevant ICANN decision-making processes and how they used the process "quagmire," which was "subject to capture," to steal control over the decision-making process at ICANN. (¶¶ 94, 97.) Finally, the FAC specifically names the co-conspirators and identifies specific acts by *both* ICANN and the co-conspirators in the formation of the conspiracy and in furtherance of its goals to restrain competition, including violating ICANN's own Bylaws and using false statements to block innovative services. (¶¶ 90, 96-105, 128-39, 157-68.)

The FAC particularly pleads both *antitrust injury* and *injury to competition* directly flowing from the conduct of the conspirators. The Complaint defines the

relevant markets and identifies the competitors and competitive products in those markets, including the co-conspirators and their products. (¶¶ 106, 108, 120, 140-41, 148-49, 157, 169-70, 173, 175-76.) The Complaint further specifically alleges how the restraints denied consumers the benefits of innovative services, which *ICANN* in fact has admitted are important new services for consumers (¶¶ 109-25, 142-53, 177-78), resulting in higher prices and restrictions in output in the relevant markets, thereby injuring competition (¶¶ 126-27, 154-56, 179-82). VeriSign's injury is a direct result of the foreclosure of its services from these markets and thus constitutes injury precisely of the type the antitrust laws were intended to prevent. (*Id.* ¶ 184.) VeriSign has pleaded a viable Section 1 claim.

B. The Legal Standard Of Pleading

An antitrust complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Rule 8(a)'s simplified pleading standard applies to all civil actions. . . ." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). "Further, [t]he Supreme Court has indicated that [courts] should be liberal in construing antitrust complaints." *Walker Distrib. Co.*, 323 F.2d at 3; *see also Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 870 (9th Cir. 1991). "[T]here are no special rules of pleading in antitrust cases." *Walker Distrib. Co.*, 323 F.2d at 3. Moreover, there is a "powerful presumption against rejecting pleadings for failure to state a claim," *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (internal quotation marks and citation omitted), and courts hesitate to dismiss antitrust cases, "where the proof is largely in the hands of the alleged conspirators." *Agron, Inc. v. Lin*, 2004 WL 555377, at *5 (C.D. Cal. Mar. 16, 2004) (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)).

C. VeriSign Properly Has Alleged Antitrust Standing

Ignoring the 28 pages of specific supplemental allegations in the FAC, ICANN repeats its earlier argument that Plaintiff has only alleged injury to itself, rather than

injury to competition. (Mot. at 5.) Based on this argument, ICANN contends that VeriSign fails to allege *antitrust injury, an element of antitrust standing*. (*Id.* at 5 n.3.) Contrary to ICANN's arguments, the FAC specifically pleads antitrust injury. In addition, the Complaint pleads with particularity *injury to competition, an element of a Section 1 violation*. Specific allegations establishing both antitrust injury and injury to competition are described below and set forth for the Court's convenience in the Appendix attached hereto.

To have standing under the antitrust laws, a plaintiff must allege *antitrust injury*, which means injury *to the plaintiff* "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, 97 S. Ct. 690, 50 L. Ed. 2d (1977). By contrast, *injury to competition* is an element of the antitrust violation itself and depends on adverse effects on or injury to competition in the market as a whole.[3]

The FAC alleges that ICANN conspired with VeriSign's competitors to stifle the introduction of significant new competition by VeriSign in each of the relevant markets. Such a conspiracy satisfies the *injury to competition* element required for a Section 1 violation because it deprives consumers of the benefits of competition provided by innovative new services.[4] At the same time, this conduct injured VeriSign

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[3] Injury to competition, either as proven in a rule of reason case or presumed in a *per se* case, thus focuses on competition in general (*i.e.*, consumer welfare). *See infra* note 4. Antitrust injury, by comparison, requires that the specific plaintiff prove that its injury flows from the violation or, stated differently, that the injury to the plaintiff reflects the reason why the challenged conduct is illegal. Antitrust injury, therefore, focuses not on the market but on the specific plaintiff and the source of its injury. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) ("The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws. . . ."). Although VeriSign opposes the motion to dismiss under the rule of reason analysis, certain collusive conduct alleged in the FAC may appropriately be judged under *per se* principles. (*E.g.*, FAC ¶¶ 90, 157.) VeriSign reserves its right to argue at a later stage of proceedings that this case is subject to the presumptions of *per se* illegality. *See generally Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 449 (9th Cir. 1979).

[4] *See e.g., Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 562, 565, 568, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982) (affirming Section 1 liability based upon actions of organization's subcommittee members stifling availability of innovative

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by depriving it of the profits it would have gained by being allowed to compete in the relevant markets. In short, VeriSign's injury stems from *exactly* the same roots as that which makes ICANN's conduct unlawful – the exclusion of VeriSign as a competitor in the relevant markets.

It is well established that where, as in this case, a competitor is directly foreclosed by the conduct that creates the injury to competition establishing the violation of the antitrust laws, antitrust injury and standing necessarily are satisfied. II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 348d (2d ed. 2000) ("The rival supplier harmed by an illegal foreclosure clearly has standing. . . ."); *Andrx Pharm., Inc. v. Biovail Corp., Int'l*, 256 F.3d 799, 813 (D.C. Cir. 2001) ("Biovail alleged that its exclusion from the market occurred not only by reason of the unlawful Agreement but also by reason of that which made the Agreement unlawful, that is, an illegal restraint of trade.").

In *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024 (9th Cir. 1990), the Ninth Circuit found that the plaintiff alleged injury to competition based on allegations of foreclosure of a single physician from the market:

> Assuming Pinhas's allegation that he provides his services at a rate cheaper than that of his competitors to be true, the preclusion of Pinhas from practicing could conceivably injure competition by allowing other similar doctors to charge higher prices for their services. Or Pinhas may show that his preclusion otherwise substantially reduced total competition in the market. We therefore conclude that Pinhas has adequately pleaded injury to competition. *Id.* at 1032.

Similarly, in *Angelico v. Lehigh Valley Hospital, Inc.*, 184 F.3d 268 (3d Cir.

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product to consumers). Injury to competition can be shown either by proof of (i) a relevant market and harm to competition in that market, or (ii) "actual detrimental effects, such as a reduction of output, [which] can obviate the need . . . [for] elaborate market analysis." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986); *see also Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir.1988) ("Given that the ability to raise price and to exclude competition are hallmarks of market power, the finding of actual harm to competition suffices under Sherman Act § 1 even in the absence of extended market analysis."); *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989); *Sherman*, 601 F.2d at 449.

1999), a doctor suing a hospital and competing surgeons for conspiring to eliminate him as a competitor was held to have adequately alleged antitrust injury. As the court said, "we conclude that the injury [plaintiff] suffered, *when shut out of competition for anticompetitive reasons*, is indeed among those the antitrust laws were designed to prevent." *Id.* at 274 (emphasis added); *see also Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1053, 1060 (9th Cir. 1999) (competitor had standing in case alleging agreement to eliminate discounts).

And, in finding antitrust injury from market foreclosure in *Nilavar v. Mercy Health Sys.*, 142 F. Supp. 2d 859, 874 (S.D. Ohio 2000), the court explained: "In short, Dr. Nilavar alleges that, as a result of Defendants' conduct, his ability to compete has been restrained, resulting in higher prices, lower quality services, and less choice for consumers and their physicians. These allegations constitute the kind of injuries that the antitrust laws were enacted to prevent."[5]

The same injury to the plaintiff and competition found in these cases is alleged in the FAC with respect to the foreclosure from the relevant markets of WLS, Site Finder and IDN.

1. Antitrust Injury and Injury to Competition Have Been Pled in the Relevant Markets for WLS: FAC ¶¶ 106–127

In addition to defining the relevant markets (¶ 106, secondary domain name market, ¶ 120, operation of TLD registries), competitors and competitive products

[5] As this Court previously recognized, injury to competition may result from foreclosure of a single competitor. (Order at 10-11 (citing *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir. 1988), *aff'd*, 496 U.S. 543, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)).) *See, e.g., Pinhas*, 894 F.2d at 1032, discussed in text; *Oltz*, 861 F.2d at 1448 (injury to competition from exclusion of plaintiff because consumers "were hindered from obtaining" plaintiff's services and market prices rose). ICANN's cases do not dispute this well-established proposition; rather, in each case ICANN cites the plaintiff alleged only injury to itself and failed to allege injury to competition in the market as a whole. *See Les Shockley*, 884 F.2d at 508-09 ("plaintiffs' complaint is disturbingly silent" about market effects); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812 (9th Cir. 1988) ("The elimination of a single competitor, *without more*, does not prove anticompetitive effect.") (emphasis added); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735-36 (9th Cir. 1987). By contrast, the FAC alleges in detail injury to competition and how competition has been harmed. *See* Appendix.

(¶ 108), and alleging how those markets operate (¶¶ 107, 109-11, 121-23), the FAC specifically alleges actual anticompetitive effects, and thus injury to competition, from the foreclosure of WLS. Among other allegations, the FAC alleges with particularity the foreclosure from the market of superior services, resulting in artificially inflated prices, less efficient services and reduced output in the relevant markets. (¶¶ 112-14, 118, 123, 126.) In addition, the FAC specifically alleges the respects in which WLS had superior features to competitive products otherwise available and would have stimulated competition in the market as a whole had its introduction not been blocked by ICANN and its co-conspirators. (*Id.*) Finally, the FAC alleges admissions by ICANN of the unique and innovative qualities of WLS that would have caused "new competition" by a superior product. (¶ 116.) *See* Appendix.

2. Antitrust Injury and Injury to Competition Have Been Pled in the Relevant Markets for Site Finder: FAC ¶¶ 140–156

The FAC alleges the relevant markets for Site Finder (¶ 140, provision of Web address directory services, ¶ 148, operation of TLD registries), relevant competitors and competitive products (¶¶ 141, 149), and how those markets operate (¶¶ 142-44, 149-50). Additionally, the FAC specifically alleges actual anticompetitive effects, and thus injury to competition, as a result of the foreclosure of a beneficial new service for Internet users, holders of second-level domain names in the .com registry, as well as advertisers and sponsors of web links. (¶¶ 143, 145, 147, 151, 152.) Among other anticompetitive effects of its foreclosure from the market, the efficiency and beneficial features of Site Finder were lost for 32,000,000 holders of second-level domain names in the .com registry (whom Internet users may try to locate) and the 40,000,000 Internet consumers who used the service during the brief period it was running, when Site Finder was shut down by ICANN and its co-conspirators. (*Id.*) *See* Appendix.

3. Antitrust Injury and Injury to Competition Have Been Pled in the Relevant Markets for IDN: FAC ¶¶ 169–181

The FAC alleges the relevant markets (¶ 169, IDNs, ¶ 173, operation of TLD

registries), competitors and products (¶¶ 157, 170, 175-76), and the manner in which those markets operate (¶¶ 170, 172, 174-75, 177). It further alleges anticompetitive effects, and thus injury to competition, as a direct result of the unlawful acts of the conspirators, including: the denial of a beneficial and more efficient new service to millions of Internet users; restrictions in output of services in relevant markets; and inflated prices for competitive services. (¶¶ 172, 174, 177, 179.) Finally, the FAC alleges specific admissions by ICANN of the "importance of [IDN] . . . to enhance the accessibility of the domain-name system to all those using non-Roman alphabets." (¶ 171.) *See* Appendix.

* * *

ICANN's motion ignores these clear allegations of antitrust injury and injury to competition. Instead of addressing these allegations, ICANN argues, without citing to any case authority, that harm to one registry cannot affect competition in the market because there are over 250 TLD registries. (Mot. at 6.) Under ICANN's theory, competition would not be harmed if ABC and CBS conspired with a cable operator to drop NBC from its cable lineup, simply because hundreds of other networks, such as SoapNet and Noggin, would still be available – notwithstanding that consumers (*i.e.*, advertisers and viewers) would be deprived of the network that has had the highest audience ratings for the most desirable demographic group. This is wrong as a matter of logic and law.

Furthermore, there is no inconsistency, as ICANN suggests (Mot. at 5), between allegations that ICANN has breached its contractual obligations to VeriSign by reason of arbitrary and inequitable treatment, subjecting VeriSign to competitive disadvantages, on the one hand, and allegations that the foreclosure from the market of new VeriSign services injures competition in relevant markets. As alleged in the FAC, the foreclosure of VeriSign's innovative services has deprived consumers of new services that would have driven competition in relevant markets, including by decreasing prices and increasing output for services in these markets. *See* Appendix.

4. VeriSign Has Pleaded Relevant Markets

ICANN asserts that VeriSign's proposed "secondary domain name" and "web address directory assistance" markets[6] are factually wrong, contrary to case law, and contradicted by prior statements made by VeriSign in other cases. ICANN's arguments are factually untrue and without legal merit because, among other reasons, such questions of fact cannot be decided on a motion to dismiss.[7]

The "Secondary Domain Name Market." ICANN asserts that this market is flawed because it does not include both registered and *unregistered* domain names, which ICANN contends are reasonably interchangeable. (Mot. at 8.) The question of what products properly are within the alleged markets, however, is a question of fact for trial, when the Court can consider evidence and make determinations regarding product interchangeability. As the Supreme Court held in *Eastman Kodak*, the market can be as broad or narrow as "the 'commercial realities' faced by consumers." 504 U.S. at 482 ("the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines").

The cases cited by ICANN do not suggest otherwise. Those cases address factual issues and, fundamentally, address products, and markets for those products, that are different than the services, and relevant markets for such services, at issue in this case. In *Weber v. Nat'l Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000), the plaintiff alleged a Section 2 claim based on attempted monopolization of the market for the domain names "jets.com" and "dolphins.com." *Id.* at 673-74. The court rejected that argument, determining that the relevant market included domain names generally and not simply the two domain names identified by the plaintiff. *Id.* at 674. In contrast to

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[6] ICANN makes no such arguments with respect to VeriSign's markets for the "operation of TLD registries" and "IDNs." With respect to those alleged markets, ICANN merely asserts that VeriSign has failed to allege an injury to competition. As discussed, *supra* pp.6-8, VeriSign has adequately alleged injury to competition.

[7] Market definition is a question of fact and depends on product interchangeability. *See Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); *see also Oltz*, 861 F.2d at 1446 ("Defining the relevant market is a factual inquiry ordinarily reserved for the jury.").

Weber, the alleged market in this case does not consist of *particular domain names* or domain names at all. Rather, it consists of *services* that assist a particular group of consumers who have a particular demand for obtaining the registration for currently registered domain names if they become available for registration. While the number of domain names may be "essentially limitless," *id.* at 674, the services available to consumers to satisfy the demands at issue in this case are not. *Weber* is inapposite.

ICANN's reliance on *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159 (N.D. Ala. 2001), is misplaced for similar reasons. *Smith* concerned a Section 2 claim that defendant was monopolizing a market for "'expired' domain names." *Id.* at 1163. Like *Weber*, the market alleged in *Smith* consisted of *certain domain names themselves*, based on the theory that the expired domain name registrations maintained by defendant somehow were unique. *Id.* at 1168. *Smith* did not concern, as in this case, a market for the provision of *services for the reservation or transfer of existing domain names*. (FAC ¶¶ 106-07.) Thus, *Smith*, like *Weber*, has no relevance to the market definition alleged by VeriSign.

Finally, there is nothing inconsistent between the positions taken by VeriSign in *Syncalot* and *Registersite* and the position being taken here. *Syncalot* concerned VeriSign's Site Finder service -- not the WLS service. Those services are not competitive or interchangeable with each other, nor are they part of the same market. Thus, VeriSign's arguments in *Syncalot* concerned different services and different relevant markets than those at issue in this case. Similarly, in *Registersite*, the issue was not market definition at all. Rather, plaintiffs asserted that VeriSign had engaged in an illegal tying arrangement by tying a WLS subscription to the domain name registration for the domain name that was the subject of the WLS subscription. In moving to dismiss, VeriSign argued that, for purposes of the tying laws, a WLS subscription is analogous to an option to acquire a domain name and an option is not considered separate from the underlying product to be acquired. (ICANN's 2d Suppl. RJN Ex. M at 71.) Thus, VeriSign's argument in *Registersite* did not concern market

definition and is not inconsistent in any way with VeriSign's position here.

Furthermore, contrary to the legal predicate for ICANN's arguments concerning market definition, "the application of judicial estoppel [is restricted] to cases where the court relied on, or 'accepted,' the party's previous inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001). As a co-defendant in both cases it cites – *Syncalot* and *Registersite* – ICANN knows that *Syncalot* was voluntarily dismissed by the plaintiffs prior to any court decision; and, in *Registersite*, the Court declined to rule on the argument referenced by ICANN here when granting VeriSign's motion to dismiss. (*See* VeriSign's Suppl. RJN Exs. 2-3, filed concurrently.)

The "Web Address Directory Assistance Services Market." ICANN argues that VeriSign admitted in the *Syncalot* action that such a market definition ignores the reasonable interchangeability standard by not including "obvious substitute products, such as web search engines and other resources." (Mot. at 9-10.) The argument to which ICANN refers addressed the attempt by the plaintiffs to define the relevant market to include only VeriSign's Site Finder service and then claim VeriSign had market power. The FAC, by contrast, nowhere states that the relevant market excludes other substitute products and, to the contrary, states the reverse. (¶¶ 142-44.) Further, unlike any allegation in *Syncalot*, the FAC specifically alleges that competition in the market for web address directory services has been restrained by VeriSign's exclusion from that market. (¶¶ 152-56.) Indeed, in another action involving Site Finder, *Popular Enterprises, LLC v. VeriSign, Inc.*, No. 6:03-cv-1352-ORL-19JGG (M.D. Fla.), the court has determined, for purposes of the sufficiency of the pleadings, that VeriSign's presence in such a broad market, including potentially other search services, *has* the ability to affect competition. (*See* VeriSign's Suppl. RJN Ex. 4 at 5.)

Lastly, ICANN argues that VeriSign's claim must fail because one or more of the Site Finder co-conspirators "must be alleged to participate in the relevant market." (Mot. at 10.) To the contrary, the FAC explicitly alleges that co-conspirators are existing or potential competitors of VeriSign. (¶ 141.) It is axiomatic that potential

competitors for specific services, who would benefit by the exclusion, as alleged here, are included in the relevant market and can be the subject of a conspiracy claim.[8]

D. Plaintiff Has Properly Alleged A Section 1 Conspiracy

As described in the Order, trade associations or other industry groups can be held liable under Section 1. (Order at 8:13-18.) "'[T]he proper inquiry is whether [decisionmakers] sharing substantially similar economic interests collectively exercised control of [the organization] under whose auspices they have reached agreements which work to the detriment of competitors.'" (*Id.* at 9:4-7 (quoting *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1029 (9th Cir. 1989)).) In order to show concerted action for purposes of a Section 1 violation under such a theory, VeriSign must prove that "ICANN's decisionmaking process was *controlled* or *greatly influenced* by economic competitors."[9]

Ignoring again the allegations of the FAC, ICANN argues that VeriSign cannot make this showing because "the best it can do is attempt to allege capture of certain ICANN *subsidiary* entities" (Mot. to 1 (emphasis in original)); what VeriSign "fails to allege in this long-winded complaint is that the ICANN Board of Directors . . . has been captured or is controlled" (*id.* at 2); and "only the ICANN Board is responsible for decisionmaking" (*id.* at 11). Each of these arguments, however, directly contradicts

[8] *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("[A] 'market' is the group of sellers or producers who have the 'actual or *potential* ability to deprive each other of significant levels of business.'") (citation omitted) (emphasis added); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 378, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973) (noting the Court "recently re-emphasized the vice under the Sherman Act of territorial restrictions among potential competitors"); I ABA Section of Antitrust Law, *Antitrust Law Developments* 79 (5th ed. 2002) ("Horizontal restraints consist of restrictions established by agreements among actual or potential competitors."). None of Defendant's cases holds otherwise. *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1375-76 (9th Cir. 1996), stands for the well-established proposition that a terminated employee/shareholder does not have antitrust standing. Unlike the alleged conspirators here, the plaintiff in *Vinci* was not an existing or potential competitor. *Id.* at 1376. Similarly, in *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985), the court considered whether nurses and physicians are in the same relevant market – not whether potential competitors can conspire.

[9] (Order at 9:8-10 (emphasis added)). *See also Podiatrist Ass'n v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 15 (1st Cir. 2003) (where board action at issue, inquiring whether it was "a rubberstamp" for the concerted action).

explicit allegations of the FAC. Indeed, the Complaint specifically pleads capture of the *Board* with respect to WLS and IDN (¶¶ 91-104, 158-63); as well as capture of the relevant decision-maker at ICANN for Site Finder -- which was *not* the Board, as the Board never adopted any resolution with respect to Site Finder (¶¶ 130-37). Furthermore, the FAC specifically pleads that ICANN's Bylaws required its Board to adopt anticompetitive decisions made by constituency groups controlled by VeriSign's competitors. (¶¶ 86, 95, 102.) As applicable case law makes clear, it is precisely such control in fact of specific decisions and decision-makers that establishes an actionable conspiracy.

This Court's Order recognizes that the same principles that were applied by the Supreme Court in *Hydrolevel* are applicable in this case. In *Hydrolevel*, the court held that an organization could be liable for conspiring with plaintiff's competitor, notwithstanding that the organization itself did not compete with plaintiff. Defendant was a non-profit society of mechanical engineers with over 90,000 members drawn from all related fields. 456 U.S. at 559. Defendant had a full-time staff and also was assisted by volunteers from industry and government. *Id.* Threatened with the introduction of a new boiler product by the plaintiff, a competitor used a subcommittee of the association in which it participated to publish a letter questioning the safety of the new product. *Id.* at 560-62. The court held the association could be liable under such circumstances because the competitor "was able to use [the association's] reputation to hinder Hydrolevel's competitive threat." *Id.* at 572-73.[10] It did not matter that the decision-maker was not the Board of the association (contrary to ICANN's position here) because "[w]hen it cloaks its subcommittee officials with the authority of its reputation, ASME . . . gives them the power to frustrate competition in the marketplace." *Id.* at 570-71.

[10] The court further explained: "Furthermore, a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. . . . Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers." *Id.* at 571 (quoted in part in Order at 8:21-9:1).

Similarly, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988), which was cited in ICANN's earlier motion to dismiss (at p. 12) as authority with respect to the liability of an association, the Supreme Court found that the National Fire Protection Association could be liable under Section 1, when a competitor used the association to foreclose introduction of a new competitive product. *Id.* at 509-10. The association had over 31,000 members from industry, academia, labor, firefighters, government and medicine. *Id.* at 495. Nonetheless, control was found where a competitor packed the annual meeting with its supporters and won a vote detrimentally impacting the plaintiff. *Id.* at 496-97. Although the decision reached at the annual meeting was appealed to the board of the association, the board denied the appeal only on the independent ground that no rule of the association had been violated. *Id.* at 497.

Finally, in *Hahn*, 868 F.2d at 1032, quoted above and in this Court's Order, the court of appeals reversed the entry of summary judgment in favor of the defendant. In *Hahn*, the plaintiffs challenged a prepaid health care plan for alleged price fixing with respect to a certain class of services. *Id.* at 1027. The district court granted summary judgment based on the same arguments ICANN (incorrectly) makes here: (i) the majority of the Board did not compete economically with the plaintiffs and (ii) there was no evidence that any of the members of the association who did compete with plaintiffs had conspired with the Board. *Id.* at 1028. However, the Ninth Circuit reversed, holding that the issue of control was a question of fact for trial. *Id.* at 1029-30.

Under the principles set forth in the Order and in these cases, it is the factual question of control over the actual decision-maker within an organization that determines liability and not, as ICANN argues, numerical control of the Board of Directors and not a reading of the Bylaws (which here support control) based on the unsupported factual assumption that the organization would have acted as envisioned

by its Bylaws.[11] As illustrated below, the FAC includes extensive allegations of concerted action among ICANN and VeriSign's competitors with respect to the WLS, Site Finder and IDN services.

Allegations of Control Regarding WLS: FAC ¶¶ 90-105. The FAC specifically alleges how the decision-making process at ICANN was captured; the circumstances that made such capture possible; how the ICANN decision-makers, including the Board, contributed to the conspiracy and subsequent unlawful conduct; the timing of the co-conspirators' actions in forming the conspiracy and in furtherance of it; as well as admissions by ICANN of capture, the reasons for it, and its effects on competitors and the legitimacy of the ICANN process. (¶¶ 92, 95-98, 100, 102, 103.) Furthermore, contrary to ICANN's argument, the FAC specifically pleads capture of the Board of Directors of ICANN (*e.g.*, ¶¶ 98, 103); the specific contributions of the Board to the conspiracy and its formation; the requirement of the Bylaws that the Board adopt the anticompetitive policies of the constituencies of competitors, and admissions of the President that the Bylaws required such control (¶¶ 86, 95, 102);[12] and actions of the Board in violation of its own Bylaws (*e.g.*, ¶¶ 86, 93, 95, 98, 100, 102, 104, 105).[13]

Allegations of Control Regarding Site Finder: FAC ¶¶ 128-139. The FAC

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[11] *See also Am. Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946) ("Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."); *Podiatrist Ass'n*, 332 F.3d at 16 (after finding there was no evidence of structural control, the court considered whether "physicians exercised the requisite degree of control over policymaking in any other fashion").

[12] Although ICANN disputes this interpretation of the Bylaws, the relevant Bylaw is clear on its face, as alleged in the FAC, and ICANN's President has admitted VeriSign's interpretation of the Bylaws, as alleged in the FAC. (FAC ¶ 95.) *See generally Hahn*, 868 F.2d at 1029-30 (reversing summary judgment for defendant, in part, because economic interest of board members in restraining trade could not be determined as a matter of law).

[13] The fact that ICANN was sued by certain registrars for its purported approval of WLS does not immunize ICANN from liability for the conspiracy alleged here. In fact, the "approval" was conditioned on a set of conditions dictated by the co-conspirators in their report to ICANN, conditions themselves alleged to constitute a restraint of trade; to this day, ICANN has not executed the amendment authorizing WLS; and the "approval" only occurred after a multi-year delay. (FAC ¶¶ 103, 105.)

alleges that ICANN and VeriSign's competitors "joined and agreed" that ICANN would falsely assert control over Site Finder as a Registry Service. (FAC ¶ 129.) The co-conspirators "captured and controlled the processes of SECSAC with respect to Site Finder." (*Id.* ¶ 130.) SECSAC, which was controlled by the co-conspirators, wrote a sham report, lacking any factual support, and submitted it to ICANN urging that Site Finder be terminated. (*Id.* ¶ 133.) Pursuant to the conspiracy, "ICANN purported to assert 'authority' over Site Finder and took action based on the SECSAC Report, and without proper independent review or consideration, to force VeriSign to shut down the service." (*Id.* ¶ 136.) ICANN's Board never adopted a lawful resolution and failed to adopt the required independent review procedures, and ICANN and the SECSAC improperly added members to the SECSAC in violation of its own Bylaws. (*Id.* ¶¶ 132, 138-39.) ICANN's request for and agreement to follow the SECSAC recommendations were an essential part of the conspiracy. (*Id.* ¶¶ 136-37.)

Allegations of Control Regarding IDN: FAC ¶¶ 157-168. VeriSign alleges that ICANN entered into a conspiracy with named ccTLDs to delay VeriSign's entry into IDN language markets and subject it to other anticompetitive conditions. (FAC ¶¶ 157, 160, 162.) The FAC specifically alleges that the co-conspirators captured ICANN's decision-making with respect to IDN, including controlling the Registry Implementation Committee, whose decision was then rubber-stamped by the Board of Directors of ICANN (*id.* ¶¶ 160, 163). Further, the FAC specifically alleges that the key consultant to the Board with respect to IDN, whose recommendation ICANN adopted, was an agent of the co-conspirators (*id.* ¶ 163); and that the Board delayed approval of VeriSign's implementation of IDN, while authorizing its co-conspirators to proceed with their implementation of IDN (*id.* ¶¶ 163, 168).

III. THE SECOND THROUGH SIXTH CLAIMS FOR RELIEF STATE CONTRACT AND TORT CLAIMS UNDER CALIFORNIA LAW

ICANN continues to assert, erroneously, that VeriSign's state-law contract and tort claims would impose liability on ICANN solely for "assert[ing] . . . its

interpretation of the parties' contract." (Mot. at 17.) To the contrary, as VeriSign has repeatedly stated (*e.g.*, FAC ¶¶ 38, 46, 53, 54, 64, 67; Opp'n to ICANN's Orig. MTD at 15-24, filed Apr. 22, 2004; Opp'n to Anti-SLAPP Mot. at 16-20, filed Apr. 29, 2004), these claims rest on far more than mere differences in interpretation. The FAC sets forth in detail the specific acts and omissions by ICANN that constitute actual, past breaches of the Registry Agreement and interference with VeriSign's contractual relationship with a third party.

A. The Contract Claims Are More Than Adequately Alleged

VeriSign's contract claims need only set forth the basic facts supporting the existence of a contract, its terms, the actions ICANN took to breach it, and damages. *E.g.*, *Margarita Cellars v. Pac. Coast Packaging, Inc.*, 189 F.R.D. 575, 578-79 (N.D. Cal. 1999) (denying motion to dismiss); *Westways World Travel v. AMR Corp.*, 182 F. Supp. 2d 952, 963 (C.D. Cal. 2001) (same). Indeed, ICANN only challenges VeriSign's pleading of the element of "breach." (Mot. at 17.) Whether ICANN's alleged conduct constitutes a breach of contract is a question of fact that cannot be resolved on a Rule 12(b)(6) motion to dismiss. *See, e.g.*, *Ky. Cent. Life Ins. Co. v. LeDuc*, 814 F. Supp. 832, 841 (N.D. Cal. 1992).

1. ICANN Breached Express Terms of the Parties' Contract

The FAC alleges that ICANN breached specific terms of the Registry Agreement that were intended to protect VeriSign in its role as registry operator and to ensure that ICANN's policies, practices and conduct would not impair VeriSign's ability to compete, including with other TLD registries. Each of these breaches independently is sufficient to support the Second, Third, Fifth, and Sixth Claims for Relief in the FAC.

First, ICANN agreed it would not act "arbitrarily . . . or inequitably and not single out [VeriSign] for disparate treatment." (FAC ¶ 27; ICANN's RJN Ex. E § II.4.C.) The FAC alleges ICANN breached this provision by, among other actions, imposing unwarranted conditions on VeriSign's offering of WLS while permitting registrars under contract with ICANN to offer similar services without restriction

(¶¶ 44, 46, 211, 220); unreasonably refusing to consent to VeriSign's providing IDN service, while authorizing other competing registries to offer IDN service (¶¶ 60-61, 64); and subjecting VeriSign to demands to suspend Site Finder, while permitting a competing registry under agreement with ICANN, and other registries, to offer similar services (¶¶ 34, 36, 38, 190, 197, 211, 220). The FAC alleges these (and other) actions amount to disparate treatment of VeriSign, and, in violation of other obligations of ICANN under the contract, placed VeriSign at a competitive disadvantage vis-à-vis other registry operators. (¶ 77; *see also* ¶¶ 108, 112, 151.)

Second, ICANN agreed to exercise its contractual responsibilities in an "open and transparent manner" and to "ensure, through its reconsideration and independent review policies, adequate appeal procedures for [VeriSign], to the extent it is adversely affected by ICANN" actions or policies. (*Id.* ¶¶ 27-28; ICANN's RJN Ex. E § II.4.A. & D.) Far from acting openly and transparently, ICANN refused to meet with or receive information from VeriSign when it decided to shut down Site Finder and to prevent VeriSign's offering of other services. (FAC ¶¶ 38, 46, 53, 64, 139, 190, 197, 211, 220.) Furthermore, ICANN never adopted a procedure for the independent review of its actions, as the contract requires. (*Id.* ¶ 105; *see also id.* ¶¶ 38, 46, 64, 82, 190, 197, 211, 220.)[14]

Third, ICANN expressly agreed not to "unreasonably restrain competition" and affirmatively to "promote and encourage robust competition." (*Id.* ¶ 27; ICANN's RJN Ex. E § II.4.B.) ICANN breached this obligation by, among other actions, forbidding

[14] The contract's plain language contradicts ICANN's assertion that it is only under a "non-mandatory" duty to establish independent review policies (Mot. at 20). In terms that are both mandatory and conjunctive, the contract states ICANN "*shall* . . . ensure, through its reconsideration *and* independent review policies, adequate appeal procedures." (ICANN's RJN Ex. E § II.4.D. (emphasis added).) Were there any uncertainty regarding this provision's meaning at this stage, it would have to be resolved in favor of VeriSign's allegation that the provision imposes an "affirmative obligation[]" on ICANN (FAC ¶ 28). *See Wyler Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 663 & n.10 (9th Cir. 1998) (reversing dismissal; district courts may not resolve the purpose and history of disputed contractual provisions on motion to dismiss).

or hindering VeriSign from competing with businesses that offer services competitive with (but inferior to) Site Finder, WLS, and IDN (FAC ¶¶ 34, 36, 38, 44, 46, 60-61, 190, 197, 211, 220), shutting down VeriSign's incentive marketing program (*id.* ¶¶ 67, 77-78), and failing to enter into registry agreements similar to the .com Registry Agreement with operators of TLD registries that compete with VeriSign[15] (*id.* ¶¶ 79-81; ICANN's RJN Ex. E § II.4.B).

Therefore, contrary to ICANN's narrow, selective portrayal, VeriSign's contract claims are not based on ICANN's mere assertion of a different contract interpretation, but on ICANN's past *actions and omissions* in violation of explicit obligations in the parties' contract.[16]

2. ICANN Breached the Implied Covenant of Good Faith

The Complaint alleges unequivocally that ICANN has acted unfairly and arbitrarily toward VeriSign in specific areas where the contract invests ICANN with discretion that it is bound to exercise in good faith. (FAC ¶¶ 29, 62, 68, 190, 197, 211, 220.)

"A 'breach of a specific provision of the contract is not a necessary prerequisite' to a breach of [the] implied covenant . . . ." *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 937 (9th Cir. 1999) (quoting *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373, 6 Cal. Rptr. 2d 467 (1992)). Rather, the covenant also forbids "conduct which (while not technically transgressing [any] express covenant) frustrates the other party's rights [to] the benefits of the contract." *Marsu, B.V.*, 185 F.3d at 937-38. The covenant "finds particular application in situations where one party is invested with a discretionary power affecting the rights of another." *Chodos v.*

[15] VeriSign alleges that ICANN's obligation to promote competition includes, among other duties, entering into registry agreements with other TLD registries, to ensure they compete on equal footing with VeriSign. (FAC ¶ 79.) Although ICANN purports to understand its duty differently (Mot. at 20-21), its proposed interpretation must give way to VeriSign's at this pleading stage. *See Wyler*, 135 F.3d at 663 & n.10.

[16] ICANN has incorporated into the motion its previously stated objection to VeriSign's request for attorneys' fees under the Registry Agreement. (Mot. at 19 n.10.) VeriSign likewise refers the Court to its prior response. (Opp'n to Orig. MTD at 18 n.16.)

W. Publ'g Co., 292 F.3d 992, 997 (9th Cir. 2002). In those situations, the party must exercise its discretion "honestly and in good faith." *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 366-67, 66 Cal. Rptr. 2d 921 (1997).

Actions that can violate the covenant include (i) placing the other party at a competitive disadvantage, *In re Vylene Enters., Inc.*, 90 F.3d 1472, 1477 (9th Cir. 1996), and (ii) dishonest acts, such as "asserting an interpretation contrary to one's own understanding," Restatement (Second) of Contracts § 205 cmt. e;[17] *Converse v. Fong*, 159 Cal. App. 3d 86, 90, 205 Cal. Rptr. 242 (1984). In all events, a party breaches the implied covenant if it "subjectively lacks belief in the validity of its act" *or* engages in "objectively unreasonable conduct, regardless of . . . motive." *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 61 n.13, 122 Cal. Rptr. 2d 267 (2002).

The FAC alleges just such conduct here. For instance, ICANN had discretion to consent to VeriSign's providing IDN service, but exercised this discretion in bad faith by imposing arbitrary and unreasonable conditions on its consent. (*See* FAC ¶¶ 59-62; VeriSign's RJN Ex. 1, App. K at 6.) Similarly, ICANN agreed not to "unreasonably withhold or delay consent" to reasonable updates to the registry's operation and specifications (FAC ¶ 29; VeriSign's RJN Ex. 1, App. C at 4-5 (Part 5)), but arbitrarily withheld and delayed such consent.[18] (*E.g.*, FAC ¶¶ 44-46.)

Furthermore, ICANN's attempts to broaden the definition of "Registry Services," and to assume regulatory power over VeriSign's proposed new services, were arbitrary and in bad faith, and singled out VeriSign for disparate treatment. (*Id.* ¶¶ 38, 45, 53, 62, 66, 70, 82, 190, 197, 211, 220.) VeriSign squarely avers ICANN undertook these actions "on grounds known by it to be false and baseless." (*Id.* ¶ 206.) This course of conduct supports liability on an implied covenant theory under the Second, Third, Fifth,

[17] California courts frequently turn to the Restatement provision on the implied covenant of good faith, as well as its official comments, for guidance. *See, e.g.*, *Carma*, 2 Cal. 4th at 371-72; *R.J. Kuhl Corp. v. Sullivan*, 13 Cal. App. 4th 1589, 1602, 17 Cal. Rptr. 2d 425 (1993).

[18] None of the implied covenant cases that ICANN has cited involved one party's misuse of a discretionary power over the rights of another. (Mot. at 19 n.10; Orig. MTD at 19.)

and Sixth Claims because, if taken as true, as it must be on a Rule 12(b)(6) motion, ICANN "subjectively lack[ed] belief in the validity of its act[s]," acted "objectively unreasonabl[y]," and asserted an interpretation "contrary to [its] own understanding."[19]

3. ICANN Repudiated the Contract by Placing Improper Conditions on the Performance of Its Obligations

Repudiation occurs when a party either clearly refuses to perform or "[a]nnex[es] an unwarranted condition to an offer of performance." *Steelduct Co. v. Henger-Seltzer Co.*, 26 Cal. 2d 634, 646, 160 P.2d 804 (1945); *Kimberly Assocs. v. United States*, 261 F.3d 864, 870 (9th Cir. 2001) ("'The archetypical repudiation . . . occurs when one party . . . attempts to unilaterally alter the contract or to condition his performance on terms that were not part of the bargain.'"). VeriSign alleges ICANN threatened to declare VeriSign in breach, thereby threatening VeriSign with early termination and loss of the right to operate the .com registry, if VeriSign would not permit ICANN to wield a power not granted by the contract – the power to control and prohibit non-Registry Services. (FAC ¶¶ 36, 46, 64, 66, 70, 190, 197, 211, 220.) Viewed in the context of the parties' course of dealing, therefore, ICANN conditioned its performance of the contractual duty most valuable to VeriSign – its duty to "recognize [VeriSign] as the sole operator for the Registry" (ICANN's RJN Ex. E § II.1) – on VeriSign's surrendering to demands that ICANN had no right to make under the contract.[20]

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[19] Citing no authority, ICANN suggests VeriSign may not recover damages caused by ICANN's bad-faith redefinition of Registry Services because VeriSign was free to ignore ICANN's improper conditions but chose "voluntarily" to accede to them. (*See* Mot. at 18.) This is a matter for proof. The FAC alleges VeriSign had no reasonable alternative but to submit to ICANN's requirements because ignoring ICANN would have risked loss of the right to operate the .com registry, a material segment of VeriSign's business. (FAC ¶¶ 36-37, 228.) Similarly, ICANN's citation to *Konecko* (Mot. at 18) is unavailing because VeriSign alleges ICANN did *not* have "the legal right" to threaten VeriSign's continued operation of the .com registry under the circumstances existing here. (*E.g.*, FAC ¶ 70.)

[20] ICANN urges the Court to decide, based only on the pleadings, that its repudiations were not sufficiently unequivocal to support liability. (Mot. at 19.) The Ninth Circuit has squarely rejected the notion that it is a question of law whether a party's "actions constitute a repudiation of [a] contract." *See Minidoka Irrigation Dist. v. Dep't of Interior*, 154 F.3d 924, 927 & n.2 (9th Cir. 1998). ICANN's actions, including its Suspension Ultimatum, cannot be evaluated in a vacuum; they were the culmination of

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Such conduct, if proven, would establish actionable repudiations of the Registry Agreement by ICANN, which independently support the Second, Third, Fifth, and Sixth Claims for Relief. *See Pac. Coast Eng'g Co. v. Meritt-Chapman & Scott Corp.*, 411 F.2d 889, 895 (9th Cir. 1969) (bad-faith assertion of "untenable" interpretation of contract is "not consistent with a continuing intention to observe contractual relations," constituting repudiation); *County of Solano v. Vallejo Redev. Agency*, 75 Cal. App. 4th 1262, 1276, 90 Cal. Rptr. 2d 41 (1999); Cal. Civ. Code § 1440.

4. The Contract Claims Are Sufficient Whether or Not VeriSign's Proposed Services Are "Registry Services"

ICANN argues that since VeriSign's proposed new services allegedly are not "Registry Services," it is free under the contract to single out VeriSign for disparate treatment, and arbitrarily to restrict and regulate VeriSign, with regard to those services. (Mot. at 21-22.) This argument founders under the weight of the contract's language, common sense, and the law of repudiation.

First, ICANN's obligations – not to single out VeriSign for disparate treatment, to act openly and transparently, promote competition, and ensure adequate appeal procedures -- are *not limited* in their application to Registry Services. As the contract plainly states and VeriSign alleges, these duties "are owed by ICANN to VeriSign in connection with any conduct of ICANN that impacts VeriSign's 'rights, obligations, or role [as] Registry Operator.'" (FAC ¶ 27 (quoting ICANN's RJN Ex. E § II.4).) Therefore, the duties to VeriSign that ICANN has breached exist independently of whether ICANN's actions do or do not affect Registry Services.

Second, ICANN has contended, and seemingly still contends, that certain of

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years of dealing between the parties, including disputes that had escalated over time. What ICANN intended to convey, and what VeriSign reasonably understood ICANN's conduct and threats to mean, raise material factual issues. *See id.* at 927 (repudiation may be shown by words and acts viewed together). ICANN also suggests that its repudiation was not of the "entire" agreement. (Mot. at 19.) It is hard to imagine a more complete repudiation, however, than ICANN's refusal, except on stated conditions, to recognize VeriSign as the .com TLD operator.

VeriSign's proposed services *are* Registry Services. (FAC ¶¶ 36, 38, 43, 46, 64, 72-76.) Thus, ICANN has claimed the right to "regulate" these services under the Registry Agreement; yet it now seeks to avoid its supposedly correlative obligations under that agreement. ICANN cannot have it both ways, nor can it simultaneously maintain inconsistent *factual* theories.

Third, it is precisely because the contract gives ICANN no power over non-Registry Services that ICANN committed a repudiation when it conditioned its own performance on VeriSign's surrender to regulatory authority over such services (*supra*).

B. The FAC States A Claim For Tortious Interference With Contract

Intent is the only element of VeriSign's tortious interference claim that ICANN challenges (Mot. at 22). VeriSign can satisfy its burden to plead this element even if it alleges that disruption of the contract was not ICANN's "primary purpose." *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 56, 77 Cal. Rptr. 2d 709 (1998). It is sufficient that the disruption was "incidental to [ICANN's] independent purpose and desire but known to [it] to be a necessary consequence of [its] action." *Id.*; *see also Sebastian Int'l, Inc. v. Russolillo*, 162 F. Supp. 2d 1198, 1205 (C.D. Cal. 2001).[21]

The FAC alleges "ICANN knew of the existence of this contract [between VeriSign and Provider], and ICANN's conduct with respect to Site Finder, including . . . its issuance of the Suspension Ultimatum, . . . *was designed and intended to disrupt this contractual relationship*." (FAC ¶ 203 (emphasis added).) VeriSign also alleges that ICANN's conduct was "intentional [and] undertaken for the purpose of harming VeriSign and assisting its competitors." (*Id.* ¶ 206; *see also id.* ¶ 136.) In addition,

[21] ICANN's reliance on *Weststeyn Dairy 2 v. Eades Commodities Co.*, 280 F. Supp. 2d 1044 (E.D. Cal. 2003) (cited Mot. at 22 n.14), is misplaced. In that case, the defendant was "a competing creditor, seeking to enforce its security interest," which accorded it "a privilege to protect its economic interests, [and] . . . validate[d its] intentional acts designed to disrupt Plaintiff's relationship with [another]." *Id.* at 1089. Accordingly, the defense of "economic privilege" or "justification" applied. *Id.* Here, in contrast, VeriSign alleges ICANN was *not* justified in forcing VeriSign to suspend Site Finder (*see, e.g.*, FAC ¶¶ 34, 36, 37, 70, 190, 197, 206), which interfered with VeriSign's relationship with Provider (*id.* ¶ 203). Moreover, ICANN did not occupy the unique position of creditor, as did the defendant in *Weststeyn*.

VeriSign alleges the interference resulted from a conspiracy among ICANN and VeriSign's competitors to shut down Site Finder. (*Id.* ¶¶ 37, 155.)

ICANN's improper assertion of the litigation privilege (Mot. at 22-24) does not bar this claim.[22] A claim cannot be dismissed on the basis of an affirmative defense, such as the litigation privilege, unless (1) the defense clearly appears on the face of the pleading, *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1219 (9th Cir. 1992); and (2) the defense is complete, *Plessinger v. Castleman & Haskell*, 838 F. Supp. 448, 452 (N.D. Cal. 1993). The allegations of the FAC negate, rather than trigger, the litigation privilege. Specifically, VeriSign alleges ICANN shut down Site Finder *in bad faith*, basing its acts of interference on "grounds known by it to be false and baseless." (FAC ¶ 206; *see also id.* ¶ 70.) Moreover, ICANN's threats were made to further a conspiracy to shut down Site Finder, and did not reflect a genuine intent to pursue litigation. (*Id.* ¶¶ 37, 155.)

Taking these allegations as true, the litigation privilege is inapplicable. A statement made in anticipation of litigation is not protected by the litigation privilege if the speaker lacks a "good faith contemplation of going to court." *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 35, 61 Cal. Rptr. 2d 518 (1997). The speaker's good faith is a question of *fact* that cannot be resolved at the pleading stage. *Id.* at 35 n.10, 39; *see also Shropshire v. Fred Rappoport Co.*, 294 F. Supp. 2d 1085, 1100 (N.D. Cal. 2003). Because VeriSign alleges ICANN's threats were made in bad faith, the litigation privilege does not "clearly appear[] on the face" of the FAC.

IV. ICANN'S RIPENESS ARGUMENTS ARE UNFOUNDED

If ICANN's exposition of the ripeness doctrine were correct, no party could ever

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[22] ICANN erroneously suggests that the privilege also bars VeriSign's breach of contract claims. (Mot. at 22 n.15.) The cases it cites, however, – *Laborde* and *Pollock* – do not address the privilege's application to contract claims. *See Navellier v. Sletten*, 106 Cal. App. 4th 763, 773-74, 131 Cal. Rptr. 2d 201 (2003) (holding that the privilege did not bar breach of contract claims and distinguishing *Laborde* and *Pollock*). Decades of California Supreme Court authority limit the privilege to *tort* claims. *See, e.g., Olszewski v. Scripps Health*, 30 Cal. 4th 798, 830, 135 Cal. Rptr. 2d 1 (2003).

sue for breach of contract unless it had previously secured a judicial declaration of its rights under the contract, because a core issue in every breach of contract case is the meaning of the parties' agreement. Clearly that is not the law, and none of the cases cited by ICANN even remotely suggests it is.[23] Indeed, it is the expressed policy of the Ninth Circuit that declaratory relief claims be adjudicated in the same action as any related contract or tort claims. *See, e.g., Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998).[24]

V. CONCLUSION

For all of the foregoing reasons, the FAC states proper claims against ICANN. Accordingly, the Court should deny the motion to dismiss in its entirety.

DATED: July 28, 2004.

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[23] The "contingent future events" that can render a controversy unripe are not the *legal* determinations that have to be made in the action, but rather any extrinsic events that "require further *factual* development." *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1404 (9th Cir. 1994) (emphasis added). Where, as here, a party alleges it has been damaged by a breach of contract, the dispute has matured sufficiently to warrant judicial intervention. *See Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996). The cases ICANN cites are inapposite, because both involved plaintiffs who were uninjured. (Mot. at 24 (citing *Sys. Council EM-3* and *Johnson*).)

[24] ICANN also argues that VeriSign may not pursue an antitrust claim in this action because it would unduly complicate the litigation. (Mot. at 25.) Once again, there is no support for ICANN's position. The cases ICANN cites all address only whether a *defendant* may raise antitrust issues in *defense* of a contract claim. (Mot. at 25 (citing *Dickstein, Viacom Int'l Inc.*, and *Arkla Air Conditioning Co.*).) All apply the holding of *Kelly v. Kosuga*, 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959), which, for a variety of policy reasons inapplicable here, discourages federal courts from allowing defendants to use federal antitrust law to avoid their otherwise binding contractual obligations. *See El Salto, S.A. v. PSG Co.*, 444 F.2d 477, 482 (9th Cir. 1971) (discussing the *Kelly* rule). *See also Alaska Barite Co. v. Freighters Inc.*, 54 F.R.D. 192, 195 (N.D. Cal. 1972) (declining to extend the *Kelly* rule to antitrust *counterclaims*).

APPENDIX

APPENDIX: EXCERPTS FROM FIRST AMENDED COMPLAINT

Anticompetitive Effect of Foreclosure of WLS:

112. ICANN and the WLS co-conspirators have blocked and delayed the implementation of WLS for almost three years and have imposed anti-competitive conditions on its implementation. The WLS co-conspirators have used this delay to introduce competitive but *inferior, and often higher priced, products to WLS*, beating VeriSign to the market by reason of their conspiratorial conduct. By reason of these delays, among other things, *consumers have been denied a superior service and have paid artificially inflated prices for inferior services.*

113. The WLS would have *expanded the range of alternatives available to prospective registrants* seeking to register currently-registered second-level domain names and to registrars seeking to offer such "backorder" services to customers. *None of the currently available backorder services is able to guarantee that its customer will obtain the desired domain name registration* if it becomes available. Indeed, *many providers of competitive services exploit this inefficiency in the system* to auction a domain name to multiple "backorder" customers who have paid for the same domain name, thereby using the *uncertainty in existing services to cause a further waste of consumer resources.*

114. In contrast to current competitive services, a WLS subscriber would be guaranteed that it would get the domain name if that domain name became available. The WLS would thereby have been a *superior service that would have stimulated quality and price competition* in the relevant markets.

116. Representatives of ICANN repeatedly have acknowledged the unique benefits for consumers and competition that the WLS would provide. In July 2003, for example, ICANN's President testified before a Senate Committee that "[t]he VeriSign [WLS] proposal offered a *significant improvement from a consumer perspective to the various services already offered* by registrars," and that "[I]t would be anomalous to 'protect' competition between providers of non-guaranteed products by preventing the *new competition of a guaranteed product* that at least some consumers would likely prefer."

118. By preventing and delaying the offering of WLS and imposing conditions that would materially interfere with the WLS and adversely impact its availability and attractiveness to consumers, the WLS co-conspirators have *deprived consumers of a new, superior competitive service that would have offered them substantial and unique benefits* over existing competitive services. In addition, the WLS would have *forced the co-conspirators to improve the service, pricing or terms on which they offered competing services.*

123. The registrar customers for the WLS offer registration services for .com as well as other TLDs. The WLS would have increased the utility and popularity of second-level domain names registered in the .com gTLD, by making it *easier and less costly for potential domain name registrants to reserve the ability to register a desired domain name in the .com gTLD* even if that name were currently registered. This in turn would have *stimulated competition between the .com registry and other TLD registries.*

126. The conduct of ICANN and the WLS co-conspirators denied consumers and registrars a superior service at lower prices and, instead, forced consumers to purchase *inferior services at artificially high, anti-competitive prices*. Such conduct further *restricted output, including, without limitation, by limiting the efficient transfer of existing domain name registrations*.

Anticompetitive Effect of Foreclosure of Site Finder:

143. In contrast to such general purpose search services, with Site Finder, when a non-existent web address is typed, the user does not receive a 404 error message page and, instead, is automatically presented with a web page suggesting possible alternative addresses for the webpage the user is seeking, a search engine box, and other useful information. Thus, for many consumers, Site Finder would have offered *substantially more efficient and convenient functionality than existing search engine services*. Site Finder would have been a *material improvement for Internet users* who otherwise receive error messages when attempting to locate a predetermined website and who have to engage in multiple steps to attempt to find the address of the site.

145. During the several days that Site Finder was operational, *more than 40,000,000 Internet users made use of the service and benefitted from it*. Before Site Finder was launched, and after Site Finder was closed down, *many of these users had no such service available to them*.

147. Site Finder would also have provided a *unique alternative for sponsors of web links and advertisers* choosing to reach Internet users. Those link sponsors and advertisers contract with search providers to provide links to their content and advertisers aimed at Internet users who are seeking particular types of content. Because *Site Finder would reach a large number of users seeking more specialized content*, and because it would offer greater ease of use for them than competing services, Site Finder would offer *significant and unique benefits* to many sponsors of web links and advertisers, and thus *stimulate competition* with other web address directory assistance services.

151. ...These registries recognize the unfulfilled demand for services similar to Site Finder. However, none of their services could be used to locate web addresses for domain names registered in the .com registry.

152. There are approximately *32,000,000 second level domain names* registered in the .com registry. While more than 40,000,000 consumers used Site Finder to locate pre-determined websites with domains registered in the .com registry during the brief period Site Finder was operational. On an annualized basis Site Finder would have created a *huge benefit both for Internet users and websites* using domain names registered in the .com registry, and an equal *loss to consumers was caused by reason of ICANN shutting down Site Finder*.

Anticompetitive Effect of Foreclosure of IDN:

171. At times relevant hereto, ICANN repeatedly "recognized the importance of adding to the domain-name system Internationalized Domain Name (IDN) capabilities to *enhance the accessibility of the domain-name system to all those using non-Roman alphabets*." Nonetheless, the conduct alleged herein delayed the introduction of a system by VeriSign that *would have brought IDN to millions of Internet* users using non-Roman alphabets worldwide.

172. IDN meets the *important need for a global multilingual DNS solution*, supporting the billions of people who require or want Internet access in their native languages. IDN enhances the ability of domain name registrants to reach audiences around the world through a single web identity irrespective of the target audience's language. It expands competition among TLD registries that could offer domain names in non-ASCII character sets; at times relevant to this action, *no TLDs offered such services*.

174. IDN significantly *increases Internet availability and e-commerce opportunities for speakers of non-English languages* and for those who do business with them, and it would therefore increase the value and attractiveness of second-level domain names in the .com gTLD.

177. ... Those registrants who wish to reach multilingual audiences and who seek to maintain a single, consistent web identity are the potential consumers of IDNs. *Without IDN, these registrants are required to register domain names in multiple TLDs* supporting each language and character set that they need. The IDN co-conspirators used the delay in VeriSign's receipt of authorization from ICANN to offer IDN services – a delay they had brought about in combination and conspiracy with ICANN – to *reduce the output of IDN services to registrants* and to channel registrants to their ccTLDs and away from VeriSign's .com gTLD.

179. The delay in approving VeriSign's entry into the relevant market and submarkets for IDN has had the effect of *artificially raising prices for and restricting output for IDN services* for the following, among other, reasons. First, VeriSign's IDN service was a *small fraction of the price charged by CNNIC* prior to VeriSign's entry into the market. Second, the increase in usage of IDN services once VeriSign entered the market *demonstrates the unmet demand of consumers* while ICANN and the IDN co-conspirators delayed VeriSign's entry into the IDN market. Third, consumers were *denied important product choices* by the delay of VeriSign's entry into the market. VeriSign's IDN product was *superior* to the IDN product offered by CNNIC, including in terms of its *reliability and features*. Consumers also would have been able to *choose from a wider group of registrars and ISPs* if VeriSign's entry had not been delayed.