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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; DOES 1-50, Defendants.	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 PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)** Date: May 17, 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 to Dismiss filed by defendant Internet Corporation for Assigned Names and Numbers ("ICANN").

I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

The Complaint in this action arises out of a multi-year course of conduct in which ICANN has (i) conspired with existing and potential competitors of VeriSign to restrain competition in important new domain name system services for the Internet, and (ii) repeatedly engaged in overt actions that constitute direct breaches of express contractual obligations of ICANN under its Registry Agreement. To avoid the consequences of its actions, ICANN's Motion to Dismiss ignores and contradicts clear and explicit allegations in the Complaint.

A. The Antitrust Claim

The Complaint is not, as ICANN argues, based on allegations that ICANN "conspire[d] with itself." (Mot. at 11.) Instead, the Complaint explicitly alleges that ICANN has conspired with third-party competitors and potential competitors of VeriSign who participate in ICANN and who have exercised control over ICANN to advance their own, independent, anti-competitive agendas. Pursuant to this conspiracy, ICANN has repeatedly delayed, blocked and set the prices for virtually every new service VeriSign has attempted to offer over a four-year period. VeriSign's resulting injury constitutes injury of the type the antitrust laws were intended to prevent. As the direct target of the conspiracy, VeriSign has standing to assert this claim.

Indeed, the risk of precisely the type of collusive conduct alleged in this Complaint was recognized by the Department of Commerce during discussions of the concept of creating a private corporation with "supporting councils" to undertake the limited mission of technical coordination of the domain name system.[1] This private

[1] ICANN is a private corporation operating under a Memorandum of Understanding ("MOU") with the Department of Commerce. Pursuant to the MOU, ICANN is to (i) enter into private contracts with domain name registries and registrars as part of an effort to preserve decentralization and competition in the domain name system and, in turn, under those contracts, (ii) provide technical coordination functions with respect to the domain name system. ICANN was not established by the United States government, and it has no statutory authority. Compl. ¶ 18; Management of Internet Names and Addresses, Statement of Policy, 63 Fed. Reg. 31,741, 31,744 (June 10, 1998). For a discussion of the operation of the domain name system, see paragraphs 10 to 16 of the Complaint.

organization ultimately became ICANN. In its recommendation on the creation of ICANN, the Department declared that ICANN should abide by "rules and decision-making processes that are sound, transparent, protect against capture by a self-interested party and provide an open process for the presentation of petitions for consideration."[2] The Registry Agreement incorporates these principles as ICANN's contractual obligations. (ICANN's RJN Ex. E § II.4.A.-D.) Nonetheless, as alleged in VeriSign's Complaint, ICANN has failed to operate with transparency or accountability and has allowed special interests to use its processes to advance their own competitive agendas.[3] VeriSign's claim and remedy are thus consistent with the recommendation of the Department: "Applicable antitrust law will provide accountability to and protection for the international Internet community."[4]

At its core, VeriSign's antitrust claim arises out of a course of conduct by ICANN and competitors of VeriSign designed to use ICANN's processes to accomplish objectives beyond ICANN's limited mission of technical coordination of the domain name system. Rather than adhere to its mission, ICANN and these third parties have used ICANN's processes to develop economic and competitive policy – while preventing accountability by refusing to act transparently or to establish independent review or reconsideration authority, as required by the Registry Agreement. The net result of this systematic abuse of position by ICANN has been to restrain competition

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[2] 63 Fed. Reg. at 31,750 ("The new corporation's processes should be fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders.").

[3] *See, e.g.*, Dan Hunter, *ICANN and the Concept of Democratic Deficit*, 36 Loy. L.A. L. Rev. 1149, 1153, 1177 (2003) (ICANN "ha[s] displayed all the worst features of regulatory capture"); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 Duke L.J. 187, 239-42 (2000) (ICANN's constituency structure has generated overrepresentation of some constituencies); M. Stuart Lynn, *President's Report: ICANN – The Case for Reform* (Feb. 24, 2002), *at* http://www.icann.org/general/lynn-reform-proposal-24feb02.htm (President of ICANN admitting: "In hindsight, the notion of truly 'bottom-up' consensus decision-making simply has not proven workable, partly because the process is too exposed to capture by special interests . . . .").

[4] 63 Fed. Reg. at 31,747. *See* Improvement of Technical Management of Internet Names and Addresses, Proposed Rules, 63 Fed. Reg. 8826, 8828 (Feb. 20, 1998) ("[T]he new corporation . . . can face antitrust liability if it is dominated by an economically interested entity, or if standards are set in secret. . . .").

for domain name services for the Internet, to hamper innovation with respect to the domain name system, and to injure VeriSign's business.

B. The Contract Claims

The Complaint seeks damages and injunctive relief based on actions and omissions by ICANN in direct contravention of its express obligations under the Registry Agreement. ICANN's Motion repeatedly mischaracterizes central allegations of the Complaint as nothing more than the assertion "that ICANN was not authorized to hold a different view of the Registry Agreement from VeriSign." (Mot. at 18.) In fact, the Complaint alleges much more.

Although ICANN's sole source of authority with respect to VeriSign is by contract, the Registry Agreement recognizes that ICANN's policies and practices with respect to other registries (generally competitors of VeriSign) and registrars (generally customers of VeriSign and in some cases competitors) will impact VeriSign's business. Therefore, the Registry Agreement explicitly provides that ICANN shall comply with the following obligations "[w]ith respect to all matters that impact the rights, obligations, or role of Registry Operator" (ICANN's RJN Ex. E § II.4.):

- "not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and not single out Registry Operator for disparate treatment" (Compl. ¶ 28);
- act in an "open and transparent manner" and adopt "reconsideration and independent review policies, [and] adequate appeal procedures" (¶¶ 28-29);
- take all reasonable steps, and make substantial progress, toward entering into agreements, similar to the Registry Agreement, with competing registries (¶ 29);
- not unreasonably delay or withhold consent to upgrades or other changes in the operation of or specifications for the registry (¶ 30);
- "not unreasonably restrain competition and, to the extent feasible, promote and encourage robust competition" (¶ 28); and
- act fairly and in good faith (¶ 30).

The Complaint expressly alleges that the same conduct that forms the basis for the Sherman Act violation, as well as other specifically alleged conduct by ICANN, constitutes direct violations of these contractual obligations of ICANN:

- ICANN has failed to operate in an open and transparent manner, instead working with VeriSign's competitors behind closed doors and ultimately demanding terms of service that are anticompetitive and unreasonable (¶¶ 46, 54, 70, 82, 94, 101, 115 (at p. 31:20-22), 120, 124 (at p. 36:8-10), 129 (at p. 38:1-2));
- ICANN has failed to adopt any independent review or reconsideration processes, preventing effective review of its actions (¶¶ 70, 82, 94, 101, 115 (at p. 31:22-23), 120, 124 (at p. 36:10-11), 129 (at p. 38:3-4));
- ICANN has failed to use reasonable efforts or make progress toward entering into similar registry agreements with other registry operators, leaving VeriSign at a competitive disadvantage (¶¶ 29, 79-81, 115 (at p. 31:8-12), 120, 124 (at p. 35:23-27), 129 (at p. 37:22-27));
- ICANN has adopted policies, standards and practices that single VeriSign out for arbitrary, disparate and inequitable treatment, including, for example: (i) by refusing to consent to a contractually contemplated approval of IDN, a service already offered by VeriSign's competitors; (ii) by repudiating ICANN's obligations under the Registry Agreement and forcing VeriSign's suspension of Site Finder, while authorizing a competing registry under contract with ICANN to offer a similar service, and (iii) by requiring VeriSign to agree to unwarranted conditions in connection with the proposed offering of the Wait Listing Service ("WLS"), while permitting others under contract with ICANN to offer similar services (¶¶ 35, 45-47, 62-65);
- ICANN has failed to promote competition, and indeed, has repeatedly acted to restrain competition (¶¶ 32, 53, 64, 68, 72, 74, 75, 81, 86, 115 (30:20-21), 121);
- ICANN has unreasonably delayed or withheld consent to upgrades to the registry by attaching unreasonable conditions to their implementation or insisting that

unreasonable processes be followed to solicit approval from existing and potential competitors of VeriSign (¶ 30);

- ICANN has breached its obligation of good faith and fair dealing by acting in bad faith to deprive VeriSign of the benefits of the agreement, for example, with respect to IDN, Site Finder, WLS, and its failure to place competing registries under contract (¶¶ 30, 63, 94, 101, 115, 124).

The Complaint in this action is thus based on far more than ICANN's "mere assertion" of a contractual interpretation. Rather, the Complaint is based upon ICANN's course of conduct over a three-year period, during which ICANN and VeriSign's competitors have used ICANN's policies to attempt to establish *de facto* regulatory control over VeriSign's business.

II. THE LEGAL STANDARD

On a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the allegations of the Complaint must be accepted as true and construed in the light most favorable to the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). It is "axiomatic that [t]he motion . . . is viewed with disfavor and is rarely granted." *McDougal v. County of Imperial*, 942 F.2d 668, 676 n.7 (9th Cir. 1991). 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." *Wyler Summit P'ship*, 135 F.3d at 661. 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." *See Air Line Pilots Ass'n, Int'l v. Transam. Airlines, Inc.*, 817 F.2d 510, 516 (9th Cir. 1987).

III. VERISIGN HAS PROPERLY PLED A SHERMAN ACT SECTION 1 CLAIM

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). The relevant inquiry is whether the complaint gives "the defendant fair notice of what the

plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 870 (9th Cir. 1991) (antitrust).

As the Ninth Circuit has held, "there are no special rules of pleading in antitrust cases." *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3 (9th Cir. 1963); *see also McLain v. Real Estate Bd.*, 444 U.S. 232, 246, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980). Indeed, "the Supreme Court has indicated that [courts] should be liberal in construing antitrust complaints." *Walker*, 323 F.2d at 3; *see also Datagate, Inc.*, 941 F.2d at 870 (noting the "liberal requirements" of Rule 8). Courts are especially hesitant to dismiss antitrust claims, "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 the Rex Hosp.*, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)).

A. VeriSign Has Properly Alleged A Conspiracy

1. The Pleading Meets the Requirements of Rule 8(a)

ICANN argues that VeriSign has not met its pleading burden because VeriSign does not identify ICANN's alleged co-conspirators and the co-conspirators' specific conduct. (Mot. at 9-11.) ICANN, however, does not assert that the allegations fail to provide adequate notice of the claim or that ICANN cannot frame a proper response.

Contrary to ICANN's argument, the Ninth Circuit has held that a plaintiff need not identify in its complaint the name, number or location of co-conspirators. *See Walker*, 323 F.2d at 8 (holding that an allegation of conspiracy between defendant "and other of its distributors" states a claim); *see also William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1052-53 (9th Cir. 1982) (holding that plaintiff was not required to name the conspirators because the complaint "did raise the possibility of a conspiracy between one or more of the named defendants and unnamed third parties"); *Bodine Produce, Inc. v. United Farm Workers Org. Comm.*, 494 F.2d

541, 561 (9th Cir. 1974) (holding that allegation of conspiracy between "defendants, or some of them" and "themselves and with other co-conspirators, including non-labor groups, the AFL-CIO and other labor organizations" states a claim).[5]

Courts in other circuits have similarly held that a claim of conspiracy with unnamed conspirators meets the notice pleading standard when it sets forth a "finite" group that can be identified through discovery.[6] The allegations of the Complaint meet this standard. In its Complaint, VeriSign alleges conspirators including "operators of gTLDs that compete with each other and with VeriSign; domain name registrars that are present or potential competitors of each other and of VeriSign for certain services; foreign governments and foreign registries that have ccTLDs that compete with the

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[5] Other courts have reached similar conclusions. *See, e.g., Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 681 (6th Cir. 1988) (plaintiff stated claim despite failing to name a co-conspirator); *Star Tobacco, Inc. v. Darilek*, 298 F. Supp. 2d 436, 445 (E.D. Tex. 2003) (names of specific co-conspirators were not required); *Daniel v. Am. Bd. of Emergency Med.*, 802 F. Supp. 912, 925 (W.D.N.Y. 1992) (holding that alleged conspiracy between members of Board and other non-party members of Board was sufficient); *Eye Encounter, Inc. v. Contour Art, Ltd.*, 81 F.R.D. 683, 689-90 (E.D.N.Y. 1979) (holding that complaint that names other co-conspirators in the form of John Doe defendants consisting of "certain of [defendants'] customers or distributors" states a claim). ICANN's cited cases do not support a different rule. In *Estate Construction Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221-22 (4th Cir. 1994), the court did not dismiss the complaint because the plaintiffs failed to name any co-conspirators; rather, the court found that the one paragraph allegation of a Sherman Act violation was conclusory. Likewise, in *Lombard's, Inc. v. Prince Manufacturing, Inc.*, 753 F.2d 974, 975 (11th Cir. 1985), and *Aquatherm Industries, Inc. v. Florida Power & Light Co.*, 971 F. Supp. 1419, 1429-30 (M.D. Fla. 1997), the plaintiffs' one or two paragraphs of conclusory conspiracy allegations were insufficient. Here, VeriSign's Sherman Act allegations are more extensive and detailed than the one to two paragraphs of conclusory allegations dismissed in those cases. Finally, in *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525, 1546 (C.D. Cal. 1987), the plaintiffs failed to allege any wrongful acts by the co-conspirators, as compared to the named defendants. Here, the Complaint does allege wrongful acts by the co-conspirators.

[6] *Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242, 247 (S.D.N.Y. 1997) (holding that conspiracy allegation of "'certain' of New Balance's retailers" stated a claim because the retailers "constitute a finite universe, and one from which a subset of New Balance's co-conspirators might be readily identified"); *accord Hewlett-Packard Co. v. Arch Assocs. Corp.*, 908 F. Supp. 265, 269 (E.D. Pa. 1995) (holding that conspiracy between HP and "certain members of its authorized distribution network" is sufficient because distributors are "a finite group whose members can be determined through discovery").

gTLD registries operated by VeriSign." (Compl. ¶ 18.) These are all finite groups, from which co-conspirators can be identified through discovery.

Furthermore, ICANN cites no authority for its argument that the "specific involvement of the unnamed claimed conspirators" must be alleged. (Mot. at 9.) In addition, this argument is contrary to the principles and reasoning underlying the authorities cited above. Discovery is the appropriate procedure for the identification of each unnamed co-conspirator and the related facts concerning its specific involvement. Some or all of the conduct in any conspiracy is typically concealed from public view and not known to the pleader. A plaintiff should have an opportunity to develop the facts related to each of these elements through discovery; such facts are not necessary to fair notice of the claim, and ICANN never asserts that they are.

In any event, VeriSign has pled conspiratorial conduct sufficient to provide notice of its claims to ICANN. The Complaint specifically alleges, for example:

- "ICANN discussed VeriSign's proposed offering of WLS with, and sought agreements with respect to WLS from, ICANN's registrar constituency, the members of which are in competition or potential competition with VeriSign, potential customers of VeriSign for WLS, and other Internet constituency groups. Based in part on opposition to WLS from its registrar constituency, ICANN announced to the Internet community that WLS is a Registry Service within the meaning of the 2001 .com Registry Agreement." (¶ 44.)
- "While VeriSign's offering of WLS is being delayed by ICANN's conduct, members of ICANN's registrar constituency who have objected to WLS, and others, are free, without these impediments by ICANN, to offer similar services that are competitive with WLS, and numerous registrars have offered and are offering such services." (¶ 45.)
- "[T]he delay [in VeriSign's introducing IDN] has benefited other businesses that offer similar or competitive services, including those who have acted in

concert with ICANN to cause ICANN to impose the foregoing conditions and impediments on VeriSign." (¶ 65.)

- "The improper conduct of ICANN has been facilitated by, and has inured to the benefit of, competitors and potential competitors of VeriSign who have misused ICANN's processes, often with the active and knowing encouragement and participation of ICANN, to impede VeriSign's offering of new services and to fix, and attempt to fix, the prices for services offered by VeriSign." (¶ 76.)
- "The acts of ICANN in restricting or purporting to 'regulate' the non-Registry Services offered, or proposed to be offered, by VeriSign, and to delay the introduction or to set the prices or terms of those services, as alleged above, are the collective and conspiratorial acts of ICANN and its members, including constituent groups within ICANN and the members of those groups, and represent the collective action of competitors in the relevant market and submarkets." (¶ 85; s*ee* ¶¶ 18, 38.)

2. <u>The Complaint Properly Pleads an Actionable Conspiracy</u>

ICANN contends that the alleged conspiracy is not legally cognizable because (i) ICANN cannot conspire with itself, (ii) ICANN and VeriSign do not compete, and (iii) the government encouraged the formation of ICANN. (Mot. at 11-14.) These arguments, however, are based on misstatements of the law, as well as on improper and incomplete "evidence" extrinsic to the Complaint.

First, VeriSign does not dispute that a corporation cannot conspire with its wholly owned subsidiary (*Copperweld*) or a company with which it has merged all its operations (*Healthcare*). That is not, however, the principle applicable here. Rather, the operative principle in this case, as established by the Supreme Court, is that entities, associations and organizations comprised of competitors are subject to antitrust scrutiny for unlawful conspiracies under Section 1. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) ("There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious

potential for anticompetitive harm."). It is well established that collective groups, such as ICANN, can be liable under Section 1 of the Sherman Act when their collective actions unreasonably restrain competition.[7]

In *American Society of Mechanical Engineers v. Hydrolevel Corp*., 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982), for example, the Court held that a nonprofit organization that set codes and standards for areas of engineering and industry could be liable under Section 1 of the Sherman Act for allowing a product manufacturer to use the organization's processes to harm a competitor. The manufacturer – whose executives served on the organization's subcommittees – convinced one subcommittee to issue an informal opinion that a competing product manufactured by the plaintiff did not comply with the organization's codes, interfering with the plaintiff's ability to compete in the marketplace. The Court held that imposing liability on a standard-setting organization, "which is best situated to prevent antitrust violations through the abuse of its reputation," is "most faithful to the congressional intent that the private right of action deter antitrust violations." *Id.* at 572-73.

The Ninth Circuit has reached the same conclusion where persons with outside economic interests control an entity and cause it to restrain trade. *See Hahn v. Or. Physicians' Serv*., 868 F.2d 1022, 1029 (9th Cir. 1988) ("[T]he proper inquiry is whether practitioners sharing substantially similar economic interests collectively exercised control of a plan under whose auspices they have reached agreements which work to the detriment of competitors."); *see also Va. Acad. of Clinical Psychologists v. Blue Shield*, 624 F.2d 476, 481 (4th Cir. 1980) (finding conspiracy among corporation

[7] *See, e.g., Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999) (professional association); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (collegiate athletic association); *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982) (professional society); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975) (state bar); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (sports league).

and physicians who controlled it: "It is not sufficient to assert, as defendants do, that a corporation cannot conspire with itself. We must look at substance rather than form.").

VeriSign's Complaint alleges that ICANN conspires with and is controlled by VeriSign's competitors within ICANN, who jointly act to restrain trade for the benefit of their independent economic interests. (Compl. ¶¶ 7, 18, 47, 81.) Such allegations are sufficient to support a Section 1 claim. *See, e.g.*, *Hahn*, 868 F.2d at 1030 (finding that defendant prepaid health care service had capacity to conspire with physicians who competed with plaintiffs and controlled decisional body).

The case of *Pennsylvania Dental Association v. Medical Service Association*, 745 F.2d 248 (3d Cir. 1984), cited by ICANN, is not to the contrary. The Third Circuit acknowledged that the *Pennsylvania Dental* defendant had the capacity to conspire, but affirmed the district court's grant of summary judgment after discovery revealed that only a small fraction of the persons responsible for making the association's decisions were competitors of plaintiffs. *See id*. at 258. Those are not the facts alleged here and the case is not at the summary judgment stage. Indeed, the Complaint alleges the co-conspirators of ICANN acted in their own, separate interests and that these competitors caused the restraints of trade of which VeriSign complains. (Compl. ¶¶ 18, 47.)

Second, ICANN's argument that "since ICANN and VeriSign do not compete, VeriSign cannot allege a Section 1 claim against ICANN" ignores VeriSign's allegations that the co-conspirator decision-makers, who control and use ICANN's policies and procedures to restrain trade, are competitors of VeriSign. (Mot. at 11; Compl. ¶¶ 7, 18, 32, 38-39, 47, 65, 68.) In *Hahn*, 868 F.2d at 1030, for example, the Ninth Circuit held that the facts supported a Section 1 conspiracy where the plaintiff-podiatrists did not compete with the defendant health plan, but did compete with physicians who controlled the plan.

The cases cited by ICANN concerning trade associations do not support its position. For instance, ICANN cites *Allied Tube* for the proposition that "standard-setting associations consisting of members *without economic interest in suppressing*

competition enjoy greater leeway under the antitrust laws." (Mot. at 12 (citing *Allied Tube*, 486 U.S. at 510 n.13) (emphasis added).) However, no such "leeway" exists here – VeriSign specifically alleges that ICANN's co-conspirators *have* an economic interest in suppressing competition from VeriSign.[8]

Third, ICANN's final argument that the Department of Commerce's involvement in its background somehow makes it less capable of conspiring was contradicted by the Department itself. At the time ICANN was established, the Department specifically stated: "[A]pplicable antitrust law will provide accountability." 63 Fed. Reg. at 31,747.[9]

B. VeriSign Has Sufficiently Alleged an Anticompetitive Effect

ICANN argues that VeriSign has failed to allege injury to competition, again by ignoring the allegations of the Complaint. An anticompetitive effect occurs when conduct "harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality." *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433 (9th Cir. 1995). Although ICANN assumes that injury to one competitor, VeriSign, cannot be injury to competition,[10] the Ninth Circuit has strongly warned

[8] (Compl. ¶¶ 38, 44, 45, 47, 65.) The other cases cited by ICANN are inapposite. In *American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 620-21 (6th Cir. 1999), the organization members were found to possess a unity of economic interest with the organization. Here, VeriSign alleges the opposite – that the co-conspirators are pursuing interests independent from ICANN's. (Compl. ¶¶ 18, 47.) In *Moore v. Boating Industry Association*, 819 F. 2d 693, 699 (7th Cir. 1987), the court found that neither the association *nor* its members competed with the plaintiff. The case of *Bowers v. NCAA*, 9 F. Supp. 2d 460, 497 (D.N.J. 1998), stands for the narrow proposition that antitrust challenges to academic eligibility rules are impermissible. ICANN ignores the relevant principle that the NCAA is subject to antitrust liability when it operates as an *economic* actor. *See, e.g.*, *NCAA*, 468 U.S. 85 (NCAA rules on television broadcasting subject to antitrust scrutiny).

[9] ICANN's cases do not support a different result. *See Nat'l Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Found.*, 64 F.3d 1130, 1134 (8th Cir. 1995) (court never considered whether there was a conspiracy, instead deciding case on other grounds); *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154, 158-59 (D. Or. 1966) (evidence showed that trade association's mere lack of vigilance, not a conspiracy to restrain trade, led it to refuse to enact commercial standards favorable to the plaintiff's product).

[10] Even ICANN's cases reject this proposition. *See Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508-09 (9th Cir. 1989) ("Of course, convergence of

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against just such logic.[11] Moreover, numerous cases in this Circuit have found harm to competition where only *one* competitor is harmed or excluded from the market, because consumers faced fewer product or service choices or higher prices from the remaining competitors – precisely the allegations here (Compl. ¶¶ 39, 47, 55, 65). *See, e.g.*, *Pinhas v. Summit Health, Ltd*., 894 F.2d 1024, 1032 (9th Cir. 1989) (injury to competition adequately pled by alleging that conspiracy prevented plaintiff from providing services to customers at lower price than competitors); *Oltz v. St. Peter's Cmty. Hosp*., 861 F.2d 1440, 1448 (9th Cir. 1988) (injury to competition from exclusion of plaintiff because consumers of plaintiff's services "were hindered from obtaining them" and prices rose); *Indus. Bldg. Materials, Inc. v. Interchem. Corp*., 437 F.2d 1336, 1342-43 (9th Cir. 1971) (injury to competition from "conspiracy and unfair tactics" to eliminate distributor because consumers would no longer be able to comparison shop, manufacturer would have more power to control prices, and distributor could no longer continue in business and distribute competitive products).

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injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discrete and the market participants are few."); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812 (9th Cir. 1988) (only when a competitor's injury stands alone, "without more," will it be insufficient); *see also Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 948, 951-52 (9th Cir. 1998) (cited by ICANN and decided on a summary judgment motion, following a thorough examination of competition in the market).

[11] In *Hasbrouck v. Texaco, Inc*., 842 F.2d 1034, 1040 (9th Cir. 1988), for example, the court explained:

> The oft-quoted chestnut distinguishing between protecting competition and protecting competitors has been misconstrued with some regularity by antitrust defendants who appear to argue in all types of antitrust cases that the effect of unlawful conduct on competitors is irrelevant. The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that harm competitors harm competition. However, the converse is *not* true. Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. The aphorism may not be invoked blindly in response to a showing that competitors have been harmed; otherwise it would often serve to shield unlawful conduct that adversely affects competition. (footnote omitted)

VeriSign alleges that the conspiracy has harmed competition because customers, including registrars and registrants, have not been able to purchase certain of its "new innovative value-added services . . . [which] enhance the value and attractiveness of second-level domain names registered in the .com gTLD." (Compl. ¶ 32; *see also id.* ¶¶ 39, 47, 55, 65, 69, 72, 86.) By restraining VeriSign, the conspiracy has deprived customers of some new offerings altogether and reduced competition for others.[12] These allegations of harm to competition are more than sufficient.

C. VeriSign Has Properly Alleged Antitrust Injury/Standing

The injury to VeriSign alleged in the Complaint flows directly from the exclusionary conduct of ICANN and VeriSign's competitors. (*E.g.*, Compl. ¶¶ 38-39, 44, 47.) As a consequence, the Complaint sufficiently pleads antitrust injury and standing. *See, e.g., Glenn Holly Entm't v. Tektronix, Inc.*, 352 F.3d 367, 372 (9th Cir. 2003) ("[T]he party alleging the injury must be either a consumer . . . or a competitor of the alleged violator in the restrained market.") (citation omitted).

Nonetheless, ICANN argues there is no antitrust injury because VeriSign "voluntarily" inflicted harm on itself. (Mot. at 16-17.) This argument rests on ICANN's denial of explicit allegations in the Complaint. Those allegations must be accepted as true for purposes of a motion to dismiss under Rule 12(b)(6).[13]

ICANN's argument that "voluntary acquiescence" precludes antitrust injury is also contrary to the law. In *Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368 (9th Cir. 1983), defendant newspaper publisher threatened its dealer plaintiffs with

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[12] ICANN suggests that VeriSign's allegations of anticompetitive harm are inconsistent because VeriSign's competitors offer services similar to Site Finder. (Mot. at 15.) VeriSign's service, however, only works for domain names in the registries VeriSign operates, while the other gTLD and ccTLD services only operate in their specific registries. (*See* Compl. ¶ 23).

[13] Indeed, ICANN's argument relies on factual assertions outside the Complaint that (i) "VeriSign has never sought to utilize the dispute resolution provisions of the contract," and (ii) "VeriSign made entirely voluntary decisions sometimes to defer to ICANN's contractual interpretation." (Mot. at 16-17.) Simply stated, these are at most issues for trial. *Glenn Holly*, 352 F.3d at 378 n.5 (rejecting the defendants' efforts to inject "factual disputes into their argument" on review of 12(b)(6) ruling).

cancellation of contracts if they dealt with a competing seller of advertising circulars attempting to enter the market. *Id*. at 1371. The Ninth Circuit held, "[i]f in fact the dealers and [competing seller] would have reached an agreement but for the actions of Oregonian, we would conclude that the dealers have shown antitrust injury . . . ." *Id*. Thus, even though the failure of the dealers to contract with the competing seller was a result of their own "voluntary" decision, the dealers could still show that defendant's threats were the proximate cause of their injury.[14] Here, VeriSign alleges that ICANN's demands and threats forced VeriSign to suspend the introduction and operation of new services. (Compl. ¶¶ 37, 45.) Such allegations sufficiently plead that ICANN's conduct was the proximate cause of VeriSign's injury.[15]

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

In its Motion, ICANN again ignores and selectively mischaracterizes multifaceted allegations of past conduct constituting repeated breaches of contract, as well as detailed allegations setting ICANN's most recent acts in the context of years of ICANN's unwarranted demands, discrimination and harassment directed at VeriSign. In fact, the lengthy and detailed Complaint pleads a course of conduct and specific acts

[14] *See Bd. of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1150-52 (10th Cir. 1983) (plaintiff NCAA member could challenge restrictive broadcast rules under antitrust laws prior to breaking them and being expelled from NCAA); *see also Blue Shield v. McCready*, 457 U.S. 465, 483-85, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982) (holding that plaintiff had antitrust injury and standing despite her voluntary decision to purchase services from un-reimbursable psychologist rather than a reimbursable psychiatrist).

[15] Neither of the cases cited by ICANN hinged on the allegedly "voluntary" or "involuntary" nature of the plaintiff's injuries. In *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 12 (1st Cir. 1999), the court held that a terminated distributor had failed to allege antitrust injury because its injuries flowed from the termination, "and not from any anticompetitive effects" of the manufacturer's market power. Similarly, *SouthTrust Corp. v. Plus System, Inc.*, 913 F. Supp. 1517, 1522 (N.D. Ala. 1995), is also inapposite, because the plaintiff, a bank, could show no antitrust injury from a contract provision that "enhance[d] consumer welfare by limiting prices consumers will pay for ATM services." Here, unlike in those cases, VeriSign alleges that ICANN's conduct harms not only VeriSign but also consumers, and therefore VeriSign has met its burden with respect to pleading harm to competition.

and omissions by ICANN that constitute breaches of the Registry Agreement and interference with VeriSign's contract with a third party. In particular, VeriSign alleges ICANN has overstepped express limits on its contractual authority, failed to discharge certain affirmative contractual obligations, and repudiated the contract by conditioning its performance on VeriSign's surrendering to broader powers than the contract confers on ICANN.

A. These Claims Need Only Satisfy Minimal Pleading Requirements

VeriSign's contract claims need only set forth the basic facts demonstrating the existence of a contract, its terms, and what actions the defendant took to breach it. *E.g.*, *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; adding damages); Fed. R. Civ. P. (8)(a)(2). On a motion to dismiss for failure to state a claim, a court may not resolve doubts about the intent of contracting parties. *See Consul Ltd. v. Solide Enters., Inc.*, 802 F.2d 1143, 1149 (9th Cir. 1986) (reversing dismissal). Rather, it must accept as true the complaint's allegations concerning a contractual term's history, purpose, and meaning. *See Wyler Summit P'ship*, 135 F.3d at 663 & n.10 (reversing dismissal because district court resolved a factual issue – the purpose of a disputed contractual provision – on motion to dismiss); *see also Westlands Water Dist. v. United States*, 850 F. Supp. 1388, 1408 (E.D. Cal. 1994) (denying motion to dismiss because "[t]he parties must be given an opportunity to fully develop the background, intent, and meaning of the disputed contracts"). Similarly, whether the defendant breached a term of a contract is typically a question of fact that cannot be resolved on a motion to dismiss. *See, e.g.*, *Ky. Cent. Life Ins. Co. v. LeDuc*, 814 F. Supp. 832, 841 (N.D. Cal. 1992) (declining to dismiss claim because whether defendants breached their duties was a question of fact).

1. ICANN Breached Express Terms of the Parties' Contract

In the Registry Agreement, VeriSign and ICANN agreed to certain terms designed to ensure that ICANN's policies and practices would not impair VeriSign's

ability to compete in the marketplace, including with other registry operators. The Complaint directly alleges that ICANN has breached these obligations.

First, ICANN agreed it would not "apply standards, policies, procedures and practices arbitrarily, unjustifiably or inequitably and not single out [VeriSign] for disparate treatment." (Compl. ¶ 28; ICANN's RJN Ex. E § II.4.C.) The Complaint alleges ICANN breached this provision by, among other actions, insisting that VeriSign suspend Site Finder while permitting a competing registry under agreement with ICANN, and registries not under agreement, to offer similar services. (Compl. ¶ 35.) ICANN also breached this provision by imposing unwarranted conditions on VeriSign's offering of WLS while permitting registrars under contract with ICANN to offer, without restriction, similar services that are competitive with WLS. (*Id.* ¶¶ 45, 47.) The Complaint alleges these actions placed VeriSign at a competitive disadvantage in comparison to other registry operators under contract with ICANN that have been allowed to offer similar services without the restrictions, delays, and impediments that ICANN has placed on VeriSign. (*Id.* ¶ 77; *see also id.* ¶¶ 82, 115, 124.) ICANN's motion ignores these alleged breaches.

Second, the Complaint alleges ICANN agreed to take all reasonable steps, and to make substantial progress toward, entering into agreements similar to the Registry Agreement, with other registries competing with VeriSign. (*Id.* ¶ 29; ICANN's RJN Ex. E § II.18.B.) The concept was to place all registries on equal footing. (Compl. ¶ 79.) In disregard of this obligation, ICANN made little or no effort, and failed to make substantial progress, toward entering into agreements with competing registries, thereby adversely affecting VeriSign from a competitive standpoint. (*Id.* ¶¶ 79-81.) ICANN's motion does not address this alleged breach.

Third, the Complaint alleges ICANN agreed to exercise its contractual responsibilities "in an open and transparent manner" and to establish and maintain "adequate appeal procedures" to be available if VeriSign were "adversely affected by ICANN standards, policies, procedures or practices." (*Id.* ¶¶ 28-29; ICANN's RJN Ex.

E § II.4.A. & D.) ICANN's actions breached these provisions, because ICANN did not act in an open or transparent manner and had no functioning mechanism for independent review of its actions. (Compl. ¶¶ 46, 54, 70, 82, 94, 101, 115 (at p. 31:19-26), 124 (at p. 36:7-14).) ICANN's motion also ignores these alleged breaches.

Contrary to ICANN's narrowly focused and selective argument, these allegations of breach are not based on ICANN's "mere assertion" of a different contract interpretation, but on *ICANN's actions and omissions in violation of the parties' contract*. Each of these alleged breaches independently and sufficiently supports these contract claims. *See Linden Partners v. Wilshire Linden Assocs.*, 62 Cal. App. 4th 508, 531-32, 73 Cal. Rptr. 2d 708 (1998) ("Any nonperformance of a duty under a contract when performance is due is a breach."). ICANN's motion addresses none of them.[16]

2. ICANN Breached the Implied Covenant of Good Faith

ICANN contends VeriSign has not alleged a breach of the implied covenant of good faith and fair dealing, because the parties did not agree in the contract "that ICANN would not make threats to enforce its contractual rights." (Mot. at 19.) Again, ICANN mischaracterizes the pleading by asserting that VeriSign has alleged no more than dueling interpretations of the contract. In fact, the Complaint unambiguously alleges that ICANN has acted unfairly and arbitrarily toward VeriSign in specific areas

[16] Citing only cases involving *third-party indemnity* provisions, ICANN contends the Registry Agreement does not authorize VeriSign to recover attorneys' fees. (Mot. at 20 n.12.) But its authorities are inapposite to the attorneys' fee provision at issue here, which on its face states that it was "intended to operate between the contracting parties, [not] only as against nonparties." *Int'l Billing Servs., Inc. v. Emigh*, 84 Cal. App. 4th 1175, 1183, 101 Cal. Rptr. 2d 532 (2000) (affirming fee award and rejecting argument that provision was intended to apply solely as against third parties). The Registry Agreement expressly entitles VeriSign to recover from ICANN, among other things, any "legal fees" arising from VeriSign's compliance with an ICANN specification or policy. (Compl. ¶¶ 98, 103; ICANN's RJN Ex. E § II.6 (entitled "Protection from Burdens of Compliance With ICANN Policies.").) Unlike in the cases ICANN cites, therefore, here "[t]here is nothing in the language of [the provision] *specifically limiting* [its] application to third party lawsuits." *See Wilshire-Doheny Assocs., Ltd. v. Shapiro*, 83 Cal. App. 4th 1380, 1396, 100 Cal. Rptr. 2d 478 (2000) (emphasis added). Moreover, any dispute over what the parties intended the provision to mean cannot be resolved on the basis of the pleadings. *Wyler Summit P'ship*, 135 F.3d at 663 & n.10 (on motion to dismiss, court must accept pleader's alleged meaning).

where the contract invests ICANN with discretion that it is bound to exercise in good faith. (Compl. ¶¶ 31, 45-47, 60-63.)

"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)). That is because the covenant is implied "to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenant) frustrates the other party's rights [to] the benefits of the contract." *Marsu, B.V.*, 185 F.3d at 937-38 (quoting *Los Angeles Equestrian Ctr., Inc. v. City of Los Angeles*, 17 Cal. App. 4th 432, 447, 21 Cal. Rptr. 2d 313 (1993)). The covenant "finds particular application in situations where one party is invested with a discretionary power affecting the rights of another." *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 996-97 (9th Cir. 2002) (quoting *Carma*, 2 Cal. 4th at 372). In those situations, the party vested with discretion 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). The kinds of conduct that violate the implied covenant are not "susceptible to firm definition but must be examined on a case-by-case basis." *Hicks v. E.T. Legg & Assocs.*, 89 Cal. App. 4th 496, 508-09, 108 Cal. Rptr. 2d 10 (2001) (quoting *Carma*, 2 Cal. 4th at 372).

The Complaint alleges conduct by ICANN that is precisely the type of conduct that has been found to violate the implied covenant. Specifically, actions violative of the covenant include (i) actions that place the other party at a competitive disadvantage, *see In re Vylene Enters., Inc.*, 90 F.3d 1472, 1477 (9th Cir. 1996) (restaurant franchisor breached implied covenant by opening a competing restaurant near franchisee's restaurant), and (ii) dishonest acts, such as "conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding," and "abuse of a power to determine compliance or to terminate the contract," Restatement (Second) of Contracts

§ 205 cmt. e;[17] *see also Converse v. Fong*, 159 Cal. App. 3d 86, 90, 205 Cal. Rptr. 242 (1984) (party empowered to determine whether other's contractual performance is "satisfactory" is under "an implied duty to use good faith and diligence in performing"). 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, 61-62 n.13, 122 Cal. Rptr. 2d 267 (2002). Just such conduct is alleged here.

The Complaint expressly invokes the implied covenant (*e.g.*, ¶¶ 30, 94, 101, 115, 124) and pleads numerous examples of ICANN's breaches. (*See* Compl. ¶¶ 60-63; VeriSign's RJN Ex. 1, App. K at 6 (although ICANN has discretion to authorize VeriSign to use tagged domain names, ICANN has exercised this discretion in bad faith by arbitrarily and unreasonably conditioning its consent); Compl. ¶¶ 31, 45-47[18] (although parties agreed ICANN would not "unreasonably withhold or delay consent to reasonable updates, upgrades or other changes in the operation of or specifications for the registry,"[19] ICANN has arbitrarily delayed introduction of WLS service, by imposing an ever-changing array of unwarranted conditions on the service).)

Similarly, ICANN's alleged attempts to broaden the definition of "Registry Services" and to assume regulatory power over VeriSign's proposed new services were arbitrary, unjustifiable, inequitable, and in bad faith, and singled out VeriSign for disparate treatment in violation of ICANN's express contractual undertaking. (Compl. ¶¶ 46, 54, 63, 70, 82, 94, 101, 115 (at p. 30:5-17).) The Complaint squarely avers

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[17] California courts frequently look to the Restatement's 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] Neither of the implied covenant cases that ICANN cites (Mot. at 19) involves one party's misuse of a discretionary power over the rights of another.

[19] ICANN refers to this term as an "implied understanding" and argues that the Registry Agreement's integration clause "trumps" it. (Mot. at 20 n.11.) In fact, the written contract expressly contemplates that VeriSign would periodically update and upgrade the registry's operation and specifications. (VeriSign's RJN Ex. 1, App. C at 4-5 (Part 5: "Patch, update, and upgrade policy").)

ICANN undertook these actions "on grounds known by it to be false and baseless." (*Id.* ¶ 110.) This alleged course of conduct supports a claim under the implied covenant, because, if these allegations are taken as true, as they 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."[20] *Storek & Storek, Inc.*, 100 Cal. App. 4th at 61-62 & n.13; Restatement (Second) of Contracts § 205 cmt. e.

3. ICANN Repudiated the Contract by Imposing Improper Conditions on Its Performance

ICANN has no authority under the Registry Agreement to regulate, restrict, or prohibit services that are not contractually defined registry services offered by VeriSign. (Compl. ¶ 31.) Yet, ICANN conditioned its continued performance under the contract on VeriSign's permitting ICANN to regulate, restrict, and prohibit non-registry services. This constitutes a repudiation of the contract by ICANN.

[20] Citing no authority, ICANN suggests that VeriSign cannot sue for damage caused by ICANN's bad-faith redefinition of Registry Services because VeriSign was "free to ignore ICANN's assertions" but chose "voluntarily" to suspend its services. (*See* Mot. at 18, 20.) Similarly, it argues that VeriSign cannot seek injunctive relief because any harm it suffered was "self-inflicted." (*Id.* at 18-19 n.10.) This is a matter for proof; the Complaint alleges VeriSign was "*forced* to suspend Site Finder" by virtue of ICANN's threats (Compl. ¶ 38 (emphasis added)), which is a sufficient allegation for pleading purposes. Moreover, VeriSign has alleged that if it ignored ICANN's demands, it would have risked ICANN's attempting to terminate the Registry Agreement and loss of the right to operate the .com registry. (*Id.* ¶¶ 38, 132.) Because VeriSign had no reasonable alternative under the circumstances but to submit to ICANN's threats, these allegations state not only a breach of contract claim, but potentially also a tort claim under California law. *See CrossTalk Prods., Inc. v. Jacobson*, 65 Cal. App. 4th 631, 644-45, 76 Cal. Rptr. 2d 615 (1998) (approving cause of action for "economic duress" based on wrongful acts that leave the plaintiff "no reasonable alternative" but to accept the defendant's unjustified demands); *Sha-I Corp. v. City & County of San Francisco*, 612 F.2d 1215, 1219 (9th Cir. 1980) (breach of the implied covenant of good faith is sufficiently wrongful to support a claim of economic duress). Of course, each of these factual questions – the consequences that would have befallen VeriSign had it ignored the threats, and whether it had any reasonable alternative but to accede – cannot be resolved on the basis of the pleadings. *See MZ Ventures, LLC v. Mitsubishi Motor Sales of Am., Inc.*, 1999 WL 33597219, at *9-*10 (C.D. Cal. Aug. 31, 1999) (denying motion for judgment on the pleadings because of the "inherently factual" nature of these questions).

Repudiation occurs when a party 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).[21] In particular, VeriSign alleges ICANN threatened to declare VeriSign in breach of the Registry Agreement, thereby threatening VeriSign with early termination and loss of the right to operate the .com registry, if VeriSign did not agree to discontinue a non-Registry Service – Site Finder. (*Id.* ¶¶ 37, 132.) ICANN thus effectively conditioned its performance of the contractual duty most valuable to VeriSign – ICANN'S 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. VeriSign further alleges ICANN knew the Registry Agreement gave it no authority to regulate Site Finder. (Compl. ¶ 110.)[22]

Such conduct, if proved, establishes an actionable repudiation of the Registry Agreement by ICANN. *See Pac. Coast Eng'g Co. v. Meritt-Chapman & Scott Corp.*, 411 F.2d 889, 895 (9th Cir. 1969) (bad-faith assertion of "untenable" contract interpretation 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.

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[21] *See also Kimberly Assocs. v. United States*, 261 F.3d 864, 870 (9th Cir. 2001) ("The archetypical repudiation . . . occurs when one party to a contract attempts to unilaterally alter the contract or to condition his performance on terms that were not part of the bargain.") (quoting *Alaska Pulp Corp. v. United States*, 48 Fed. Cl. 655, 659 (2001)); Restatement (Second) of Contracts § 250 cmt. b ("[L]anguage that under a fair reading amounts to a statement of intention not to perform except on conditions which go beyond the contract constitutes a repudiation.").

[22] ICANN asks the Court to take judicial notice of its Suspension Ultimatum. (ICANN's RJN Ex. F.) Whether or not the existence and contents of this letter are appropriate subjects of judicial notice, it will nonetheless remain a matter for proof whether ICANN's threats do or do not amount to a repudiation. 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). Among other things, the Suspension Ultimatum cannot be understood in a vacuum; it was the culmination of years of dealing between ICANN and VeriSign, including disputes that escalated to that point in time. What ICANN intended to convey, and what VeriSign reasonably understood ICANN's threats to mean, raise material factual issues.

B. The Complaint States A Claim For Interference With Contract

The only element of VeriSign's interference claim that ICANN challenges is *intent* (*i.e.*, that it intended to interfere with VeriSign's contract with Provider). (Mot. at 21-22 & n.13.) This element, however, is alleged in detail in the Complaint.

The intent element of an intentional interference claim is satisfied even if the actor's "primary purpose" is not "disruption of the contract." *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 56, 77 Cal. Rptr. 2d 709 (1998). It is sufficient if the disruption was "incidental to the actor's independent purpose and desire but known to [it] to be a necessary consequence of [its] action." *Id*. (citation omitted); *see also Sebastian Int'l, Inc. v. Russolillo*, 162 F. Supp. 2d 1198, 1205 (C.D. Cal. 2001).

VeriSign alleges that "ICANN knew of the existence of this contract [between VeriSign and Provider], and ICANN's conduct with respect to Site Finder, including, without limitation, its issuance of the Suspension Ultimatum, as alleged in this Complaint, *was designed and intended to disrupt this contractual relationship*." (Compl. ¶ 107 (emphasis added).) In addition, VeriSign alleges that ICANN's conduct was "intentional [and] *undertaken for the purpose of harming VeriSign* and assisting its competitors." (*Id*. ¶ 110 (emphasis added).) These allegations more than satisfy VeriSign's pleading obligation.

Moreover, ICANN's improper assertion of the litigation privilege, which is an affirmative defense in any event (Mot. at 22-23 (citing Cal. Civ. Code § 47(b)), does not bar this claim as a matter of law. "For a complaint to be dismissed because the allegations give rise to an affirmative defense [1] the defense clearly must appear on the face of the pleading," *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1219 (9th Cir. 1992) (citation omitted), *and* [2] "the defense must be complete," *Plessinger v. Castleman & Haskell*, 838 F. Supp. 448, 452 (N.D. Cal. 1993). Here, the Complaint does not allege facts supporting the elements of the litigation privilege.[23]

[23] The litigation privilege "is generally described as one that precludes liability in tort, not liability for breach of contract." *Navellier v. Sletten*, 106 Cal. App. 4th 763, 773,

(Footnote Cont'd on Following Page)

As ICANN recognizes (Mot. at 22), the litigation privilege does not protect a statement made in anticipation of litigation unless the statement is "a serious proposal made in 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).[24] Whether litigation is "seriously proposed *in good faith*" is a question of *fact* that cannot be resolved at the pleading stage. *Id.* at 35 n.10, 39.

Indeed, as in *Fuhrman*, the allegations in the Complaint negate, rather than trigger, application of the privilege. For example, VeriSign has alleged that ICANN based its acts of interference on "grounds *known by it to be false and baseless*." (Compl. ¶ 110 (emphasis added).) Moreover, VeriSign alleges ICANN demanded the suspension of Site Finder "*without any proper ground therefor*." (*Id.* ¶¶ 94, 101 (emphasis added); *see also id.* ¶¶ 82, 70 ("No proper basis existed for ICANN's issuance of the Suspension Ultimatum. . . ."), 35 ("ICANN has never objected to the offering of [Site Finder] services by" other registry operators).)[25]

V. ICANN'S RIPENESS ARGUMENTS ARE UNFOUNDED

ICANN argues that VeriSign's first through sixth claims for relief are not ripe because they all depend on "a predicate finding" that ICANN's interpretation of the

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131 Cal. Rptr. 2d 201 (2003). ICANN has asserted the privilege only as against the tort claim. (Mot. at 22-23.)

[24] *See Fuhrman v. Cal. Satellite Sys.*, 179 Cal. App. 3d 408, 422-23, 231 Cal. Rptr. 113 (1986) (reversing sustaining of demurrer on basis of litigation privilege because complaint "cast[] serious doubt on the good faith of defendants and raise[d] a factual question whether the letters fell within the privilege"), *disapproved on other grounds by Silberg v. Anderson*, 50 Cal. 3d 205, 266 Cal. Rptr. 638 (1990).

[25] ICANN's reliance on *Weststeyn Dairy 2 v. Eades Commodities Co.*, 280 F. Supp. 2d 1044 (E.D. Cal. 2003), is misplaced. In that case, the defendant company was "a competing creditor, seeking to enforce its security interest," which accorded it "a privilege to protect its economic interests, [and] . . . validate[d] intentional acts designed to disrupt Plaintiff's relationship with [a third party]." *Id.* at 1089. Accordingly, the defense of "economic privilege" or "justification" applied. *Id.* Here, in contrast, VeriSign alleges that ICANN was *not* justified in issuing its Suspension Ultimatum (*see, e.g.*, Compl. ¶¶ 94, 101, 110), which interfered with VeriSign's relationship with Provider (*id.* ¶ 107). Moreover, ICANN did not occupy the unique position of a creditor, as did the defendant in *Weststeyn Dairy*.

contract is wrong. (Mot. at 24-25.) If ICANN's exposition of the ripeness doctrine were correct, no party could ever 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.[26] Clearly that is not the law, and none of the cases cited by ICANN even remotely suggests it is.[27]

VI. CONCLUSION

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

DATED: April 22, 2004.

ARNOLD & PORTER LLP

By: _____
Laurence J. Hutt
Attorneys for Plaintiff

[26] 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 actual injury from 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) (breach of contract claim not ripe unless party alleges "immediate and certain injury"). ICANN has not challenged VeriSign's damage allegations (*e.g.*, Compl. ¶¶ 39, 47, 55, 65, 68). The cases it cites are inapposite, because both involved plaintiffs who were uninjured. (Mot. at 25 (citing *Sys. Council EM-3* and *Johnson*).)

[27] ICANN also argues that VeriSign should not be allowed to pursue certain claims in this action – particularly antitrust – because they will unduly complicate the litigation. (Mot. at 25.) Once again, there is no support for its position. *See* 4 *Moore's Federal Practice* § 18.02[1] (3d ed. 2004); *see also Salveson v. W. States Bankcard Ass'n*, 731 F.2d 1423, 1426, 1430 (9th Cir. 1984). The cases ICANN cites do not remotely support its position, because 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, discourages federal courts from applying federal antitrust law to relieve defendants from 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). This line of cases has no application to the issue here – whether a plaintiff may pursue contract and antitrust claims in one action based on largely overlapping transactions and events. *Cf. 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).*

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