Appeal No. 04-56761

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VERISIGN, INC.,

Plaintiff-Appellant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES & NUMBERS,

Defendant-Appellee.

On Appeal From The United States District Court
For The Central District of California
Honorable A. Howard Matz
Case No. CV 04-1292 AHM (CTx)

BRIEF OF APPELLEE INTERNET CORPORATION FOR ASSIGNED NAMES & NUMBERS

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for Appellee Internet Corporation for Assigned Names and Numbers (ICANN) states that ICANN is a California not-for-profit corporation with no parent or subsidiary. ICANN has no stockholders and, thus, no publicly held company owns 10% or more of ICANN's stock.

Dated: February 1, 2005

Respectfully submitted,

JONES DAY

By: ______________________
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STATEMENT OF JURISDICTION

ICANN concurs with the Statement of Jurisdiction set forth in Appellant VeriSign, Inc.'s (VeriSign's) Opening Brief.

STATEMENT OF THE ISSUES

I. Whether the District Court correctly granted ICANN's motion to dismiss VeriSign's First Amended Complaint for failure to adequately plead the "capture" of ICANN's Board of Directors or any other legally viable theory of relief under Section 1 of the Sherman Act.

II. Whether the District Court's order dismissing the First Amended Complaint should also be affirmed on the ground that VeriSign has failed sufficiently to allege injury to competition under Section 1 of the Sherman Act.

STATEMENT OF THE CASE

On February 26, 2004, VeriSign filed its initial complaint alleging that ICANN (the only named defendant) had violated Section 1 of the Sherman Act and various California state laws, and had breached a contract between it and VeriSign. VeriSign is one of the operators of Top Level Domains (TLDs) in the domain name system (DNS). ICANN is the private not-for-profit organization charged with management and coordination of the DNS. This complaint followed years of disputes between VeriSign and ICANN over ICANN's authority with respect to the DNS and VeriSign, in particular. The antitrust claim, which was the sole basis

for federal jurisdiction, asserted that ICANN's processes had been "captured and controlled" by various competitors of VeriSign, and as a result VeriSign was restricted from offering certain services in connection with its operation of one particular TLD, the .com TLD. (ER 22, ¶76; 25, ¶85; 112, ¶31.)

On May 19, 2004, the District Court granted ICANN's motion and dismissed the complaint without prejudice for failure to state a claim. The District Court reasoned that for liability to exist, VeriSign must "allege that ICANN's decisionmaking process was controlled … by economic competitors who have agreed to injure VeriSign." (ER 93.) The District Court's opinion stated:

> VeriSign's factual allegations fall far short of the mark [for proving a Section 1 conspiracy]. There is not even an allegation (much less factual allegations supporting it) that the Board of ICANN has actually conspired with any of VeriSign's competitors. Nor are there sufficient allegations that competitors control or influence ICANN. VeriSign has not alleged how ICANN operates, makes decisions, and regulates Internet registries and registry services. For all these reasons, VeriSign has not sufficiently alleged a Section 1 conspiracy.

(ER 93-94.)

As a separate basis to grant ICANN's Rule 12 motion, the District Court also ruled that VeriSign had failed to allege an "injury to competition" sufficient to maintain a Section 1 Sherman Act claim. The Court stated that "VeriSign's very theory of damage depends on and arises out of the fact that it has vigorous competitors who will be able to compete more vigorously. Moreover, this is not a case in which the marketplace is small and the participants are few." (ER 96.) "By VeriSign's own account, many of its competitors already offer (or plan to offer) similar or competitive services. [citation.] Its Complaint seems to be based on the unstated assumption that ICANN has a duty to help it compete more effectively. VeriSign has not alleged anything more than injury to its own business and therefore, does not have antirust standing." (ER 96-97.)

On June 14, 2004, VeriSign filed its First Amended Complaint (FAC). ICANN again moved to dismiss because, although the complaint had gotten much longer, it still failed to allege sufficiently any "capture" of ICANN's Board or any injury to competition. On August 26, 2004, the District Court again granted ICANN's motion and dismissed VeriSign's antitrust claim -- this time with prejudice -- and declined to exercise supplemental jurisdiction over the remaining state law claims. The District Court limited its second ruling to VeriSign's failure to allege the "capture" of ICANN's Board and thus did not consider ICANN's argument that VeriSign had failed to allege injury to competition sufficient to

maintain an antitrust claim. The District Court entered its final judgment on September 22, 2004. VeriSign timely appealed.

STATEMENT OF THE FACTS

Background Regarding ICANN

ICANN is a not-for-profit corporation organized under California law. (ER 105, ¶6.) ICANN's mission "is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." (SER 012-13, Art. 1, §1.)[1] ICANN was created for the purpose of undertaking this mission because the U.S. Government and many others believed that the Internet, as a truly global resource, was not appropriately the subject of oversight by any single nation, and that a global private sector body would be more efficient and thus preferable to a multinational governmental body.

In November 1998, ICANN entered into a Memorandum of Understanding (MOU) with the United States Department of Commerce (DOC). (ER 108, ¶18; *see generally*, SER 087-94.) In the MOU, the DOC and ICANN agreed to "jointly design, develop and test the mechanisms, methods, and procedures that should be

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[1] Both the 12 February 2002 ICANN Bylaws and the 13 October 2003 ICANN Bylaws were included in the record below. The District Court judicially-noticed the 12 February 2002 Bylaws which were in effect at the time of the alleged events. (ER 256, n.2.) ICANN submitted the 13 October 2003 Bylaws to

in place and the steps necessary to transition management responsibility for DNS functions now performed by, or on behalf of, the U.S. Government to a private-sector not-for-profit entity." (SER 087, §II.B.) The MOU provides that the DOC will maintain oversight responsibility of ICANN's management of the DNS until further agreements are arranged for this role to be fully transferred to the private sector. The DOC and ICANN have amended and extended the MOU several times; however, during the transition, the DOC retains ultimate authority over the management of the DNS. (SER 098, §I.B.11.)

One of ICANN's management functions has been to enter into agreements with the operators of various Internet "registries" -- those companies that maintain the "zone" or "master" file for the TLDs of the Internet. The most widely known TLD is the .com registry (which contains domain names like "amazon.com" and "google.com"). Internet registries are, in some senses, similar to telephone books in that the registry operators maintain a list (and a variety of other relevant information) about the Internet domain names in that registry.

ICANN is a consensus policy development body, managed by a Board of Directors consisting of fifteen persons selected in a variety of ways to produce broad global and functional representation. (SER 024-31, Art. VI.) The Board is

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explain the structure and mission of ICANN at the time VeriSign filed its complaint.

the ultimate decisional authority for ICANN, which attempts to formulate policy whenever possible via a "consensus building" process that permits all relevant Internet participants to participate in the debate and express their opinions. As the District Court noted, "ICANN is an unusual organization. It is not like a typical association, because it has numerous 'constituencies' that explicitly acknowledge that they have commercial interests that sometimes are at odds or in conflict with the interests of other constituents. Indeed, one of ICANN's rather formidable challenges is to promote coherent policies that accommodate, or at least take into account, the differing objectives of competing interests in the business of 'cyberspace.'" (ER 255:20-26.)

The role of the various Supporting Organizations and Advisory Committees of ICANN is to make recommendations to and advise the ICANN Board.[2] (ER 198, §2(b); 205-206, §3.) Any recommendation forwarded to the Board by a Supporting Organization is transmitted to all other Supporting Organizations so that each Supporting Organization may comment to the Board regarding the implications of such a recommendation. (ER 198, §2(d).) ICANN's goal is to

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[2] The relevant Bylaws grant the Supporting Organizations "primary responsibility" for "developing and recommending substantive policies regarding those matters falling within their specific responsibilities…." (ER 198, Art. VI, §2(b).) By contrast, advice from the Advisory Committees and other ICANN organizations is purely informative to the Board. Only VeriSign's Wildcard service is alleged to have involved a Supporting Organization. All of the other

promote consensus wherever possible, and thus it encourages debate and discussion among all interested parties, including the general public, which is represented through the At Large Advisory Committee and a global structure of consumer bodies and other local user groups. (ER 189, Art. II, §5; SER 013-14, Art. I, §2; 016, Art. III, §6; 045-50, Art. XI, §§2, 4.) Nevertheless, ICANN's Board retains the *final authority* to accept or reject a recommendation from its constituent units, as its Bylaws explicitly state and have stated since ICANN's inception:

> (e)...the Board [of Directors] shall accept the recommendations of a Supporting Organization *if the Board finds* that the recommended policy (1) furthers the purposes of, and is in the best interest of, the Corporation; (2) is consistent with the Articles and Bylaws; (3) was arrived at through fair and open processes (including participation by representatives of other Supporting Organizations if requested); and (4) is not reasonably opposed by any other Supporting Organization. *No recommendation of a Supporting*

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disputes referenced in the FAC involved only Advisory Committees or some other ICANN entity.

Organization shall be adopted unless the votes in favor of adoption would be sufficient for adoption by the Board without taking account of either the Directors selected by the Supporting Organization or their votes.

(f) *If the Board declines to accept any recommendation* of a Supporting Organization, it shall return the recommendation to the Supporting Organization for further consideration, along with a statement of the reasons it declines to accept the recommendation. If, after reasonable efforts, the Board does not receive a recommendation from the Supporting Organization that it finds meets the standards of Section 2(e) of this Article VI or, after attempting to mediate any disputes or disagreements between Supporting Organizations, receives conflicting recommendations from Supporting Organizations, and the Board finds there is a justification for prompt action, *the Board may initiate, amend or modify and then approve a specific policy recommendation.*

> (g) *Nothing in this Section 2 is intended to limit the powers of the Board* or the Corporation to act on matters not within the scope of primary responsibility of a Supporting Organization or *to take actions that the Board finds are necessary or appropriate to further the purposes of the Corporation.*

(ER 198-99, §2(e)-(g); *see* 205-06, §3; SER 045, Art. XI, §1 (emphasis added).)

Despite the plain language of the Bylaws, VeriSign repeatedly claims in its Opening Brief, as it did below, that the Bylaws require the Board to implement certain decisions of ICANN's constituent units. Buried in a footnote at the back of VeriSign's Opening Brief is the putative basis for this assertion, which is nothing more than a Bylaws provision stating that the Board will exercise its power "[e]xcept as otherwise provided . . . including Section 2(b) of Article VI." (Opening Brief ("Open. Br.") at 61 n.22.) But Section 2(b) clearly states that Supporting Organizations "shall serve as advisory bodies to the Board" with "primary responsibility for developing and recommending substantive policies." (ER 191, Art. IV, §1(a); 198, §2(b).) Incredibly, VeriSign fails to inform the Court of this fact, or, as stated above, that Section 2 goes on to explicitly authorize the Board to *accept or to reject* such entities' "recommendations." (ER 198-99, §2(e)-(g); 205-06, §3.) In short, VeriSign's repeated claims that the Bylaws somehow

required the Board to accept the recommendations of its constituent units -- such as the former Domain Name Supporting Organization (DNSO) -- are not merely aggressive interpretations; they are completely fabricated.

Summary Of First Amended Complaint

VeriSign operates the .com registry pursuant to an agreement with ICANN that was entered into in May 2001 (the "Registry Agreement" or "Agreement"). (ER 51-67; 109-110, ¶23.) The Agreement sets forth the manner in which the registry will be operated. (ER 107, ¶14; 109, ¶¶19, 21.) The Agreement gives ICANN the express right to restrict or prohibit the offering of, or establish the terms and conditions upon which VeriSign offers, "Registry Services" within the .com TLD. (ER 109, ¶21.)

The instant litigation arises, in its entirety, from a dispute about the scope and meaning of provisions of the Agreement. VeriSign's claims arise out of its efforts to implement new (or to change existing) features in the operation of the .com registry and whether those features are permissible under the Agreement. (ER 112, ¶31.) VeriSign alleges in the FAC that none of these features is a "Registry Service" or otherwise is subject to the Registry Agreement. (ER 114, ¶35; 116, ¶42; 120, ¶50; 121, ¶58.) As a result, VeriSign alleges, ICANN has no authority to place any restrictions on, or have any input in, VeriSign's

implementation of these features. (ER 114, ¶35; 116, ¶42; 120, ¶50; 121, ¶58; 127, ¶73.) ICANN disagrees.

VeriSign has attempted to transmute this contract dispute into a federal antitrust lawsuit, presumably to raise the cost and risk of defense for ICANN, an entity with limited resources and multiple demands on those resources. VeriSign attempts this by ascribing actions taken by ICANN's Board of Directors -- and in one instance, ICANN's President -- to ill-defined conspiracies by VeriSign's competitors, who allegedly participated in various *advisory* bodies during the ICANN process leading up to these actions.

While VeriSign tries to wrap this all up with one pretty ribbon, there are actually three different and specific actions by ICANN that VeriSign complains of in its antitrust claim -- decisions relating to a Wait Listing Service (WLS), to the "Site Finder" or "Wildcard" feature, and to International Domain Names (IDNs). (ER 131-32, ¶88.) However, rather than alleging a single conspiracy by its competitors to "capture and control" ICANN, VeriSign's FAC purports to allege three different and unrelated conspiracies, one consisting of the alleged proponents of each of the three ICANN actions VeriSign challenges. Thus, VeriSign alleges that a group of six Internet registrars conspired with respect to WLS, another involving a completely different set of entities and individuals conspired in the case of its Wildcard feature, and still a third set of conspirators are alleged with

respect to IDNs. (ER 133, ¶90; 144, ¶128; 151-52, ¶157.) In addition, for the first time in its Opening Brief, VeriSign now claims that ICANN entered into *actual agreements* with these various alleged conspirators. Neither of VeriSign's purported "theories" is sufficient to state a claim.

WLS

Domain name subscriptions typically are for one or two years. At the end of that term, some domain name registrants elect not to renew their subscriptions, which currently causes those names to be deleted from the registry and permits others to register those names. The FAC alleges that VeriSign proposed to change this by implementing a wait-listing service to allow a prospective domain name registrant to reserve a currently registered domain name on a first-come, first-serve basis through any of approximately 175 ICANN-accredited registrars (the entities that sell domain name subscriptions to consumers), by submitting a request and paying an additional fee. (ER 116, ¶40.) If a domain name is thereafter deleted, the WLS subscription holder would become the new registrant of the domain name. (ER 116, ¶41.)

The FAC alleges that the Registrar Constituency issued a position paper on WLS; the Board initiated a Consensus Review Process; the Domain Name Supporting Organization (DNSO) -- which included some of the alleged co-conspirators -- appointed a Task Force; the Task Force issued a report

recommending that ICANN not permit WLS to proceed; and the Board *rejected* the DNSO recommendation and allowed WLS to proceed, with some conditions. (ER 135-39, ¶¶96-105.) VeriSign's FAC understandably obscures this last critical point because it is hardly consistent with its "capture" story.[3] The FAC also does not contain any support for the assertion that WLS "remains blocked," nor could it, since VeriSign has itself chosen not to offer WLS subject to the conditions required by the ICANN Board. (ER 117, ¶44; 137-38, ¶103; 141, ¶115.)

Wildcard Feature ("Site Finder")

When many users of the Internet type in an address that has not been registered in the registry, the users receive an "error" message or a "page cannot be displayed" message that states that the Internet web site does not exist. (ER 113, ¶33.) In September 2003 VeriSign implemented a so-called "Site Finder" feature by inserting a "wildcard" into the .com registry, causing all Internet users who type non-existent .com addresses to be automatically routed to a proprietary VeriSign web page, where they are exposed to advertising arranged by VeriSign. (ER 113,

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[3] Moreover, the FAC does not refer to either of the two lawsuits attacking the ICANN Board's decision to let WLS proceed that have been brought by the very "conspirators" that VeriSign alleges have captured the Board. *See* SER 003-10 (Judge Walter's order, dated November 10, 2003, denying plaintiffs' motion for preliminary injunction in the litigation styled *Dotster, Inc. et al. v. ICANN*, Case No. CV 03-5045 JFW (MAN), in which alleged "co-conspirators" Dotster, GoDaddy, and eNom were among the plaintiffs filing suit against ICANN with respect to WLS); SER 139-47 (lawsuit filed by Pool.com against ICANN in

¶33; 148-49, ¶¶143, 147.) The VeriSign web page identifies syntactically similar domain names to those incorrectly entered by the user, and generates revenue for VeriSign by displaying paid advertisements to the Internet users who are involuntarily diverted to the site. (ER 113, ¶33; 149, ¶147.)

VeriSign's FAC alleges that, on or about September 15, 2003, VeriSign inserted its wildcard into the .com registry. (ER 113, ¶32.) VeriSign provided no notice to ICANN or to Internet users that it would be adding the wildcard to the .com registry. (ER 68-71.) VeriSign's FAC then alleges that, after receiving a preliminary report from ICANN's Security and Stability Advisory Committee (SSAC) -- an advisory body that purportedly includes some alleged co-conspirators -- ICANN's President sent VeriSign a letter stating that, unless the wildcard was suspended, ICANN would "initiate legal proceedings" against VeriSign. (ER 68-71; 114, ¶¶36-37.) VeriSign alleges that, as a result of the President's letter, VeriSign was "forced to suspend" the Wildcard feature. (ER 114, ¶37.) VeriSign does not concede the obvious: if VeriSign disagreed with the legal position expressed by ICANN's President, it could have maintained the Wildcard feature and defended its contract interpretation against any breach of contract claims made

(continued...)

Ontario, Canada, styled *Pool.com v. ICANN*, in which Pool.com complains about ICANN's actions to permit WLS).

by ICANN. VeriSign has, however, acknowledged that the ICANN Board played no role in Site Finder and in drafting the letter. (SER 203:1-4.)

IDN

The FAC alleges that, in or about November 2000, VeriSign began an internationalized domain name (IDN) service in a "third-level domain testbed environment." (ER 121, ¶55.) The IDN allows users of the Internet to use non-ASCII (non-English) character sets to register domain names in the .com registry. (*Id.*) VeriSign alleges that it intended "to offer IDN on a permanent basis with respect to second-level domain names within the .com gTLD." (*Id.*)

The FAC avers that the ICANN Board created the Registry Implementation Committee (RIC) -- populated by the alleged co-conspirators and VeriSign -- to provide recommendations to the Board on IDNs. (ER 152-53, ¶¶158, 160.) The RIC subsequently developed and recommended a set of Guidelines to the ICANN Board for the use of IDNs, which recommendations the Board adopted in one form or another. (ER 152-54, ¶¶159, 162, 163.) Those registries that agreed to be bound by these Guidelines were granted written authorization by ICANN to deploy IDN (ER 154, ¶¶164; 155, ¶168; 157, ¶178); VeriSign refused to be bound by the Guidelines and thus did not get written authorization from ICANN (ER 155, ¶168).

* * * * *

VeriSign's FAC makes a variety of conclusory allegations that various of ICANN's lower-level advisory committees were "captured and controlled" by VeriSign's competitors with respect to these particular features or services. But VeriSign's FAC fails to allege *any* fact demonstrating that ICANN's *Board* -- the only body that has authority to make decisions for ICANN -- was "captured" or "controlled" by any or all of these various "conspirators." (ER 267:1-8.) Given the variety of sources from which the Board receives recommendations on any given action, and given the fact that *none* of the specifically-named conspirators is alleged to have controlled a voting member of the Board -- much less a majority of that body -- VeriSign's allegations cannot be sufficient to allege capture of ICANN's Board which is the only decisional body in ICANN. Absent sufficient allegations of "capture," VeriSign cannot allege a violation of Section 1 of the Sherman Act.

Nonetheless, VeriSign's Opening Brief now argues that ICANN was not just "captured" by VeriSign's competitors, but that ICANN entered into *actual agreements* with those competitors that violated Section 1. This argument, which VeriSign seeks to manufacture out of three sentences in its seventy-four page FAC, was never presented to the District Court in connection with ICANN's motion to dismiss, and was never argued by VeriSign below, even at oral argument. But even assuming it was made below and VeriSign has preserved here the argument,

the FAC does not contain any "agreement" allegations sufficient to state a claim under Section 1. The ICANN Board's mere agreement to a proposed policy is legally insufficient -- *capture* of the Board with regard to that proposed policy is required. *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1029 (9th Cir. 1989) (*en banc*); *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 869 (9th Cir. 1986) (plaintiff must allege capture of the entity with "final authority" over organization's decisions); ER 262:13-14.

The District Court's Order Dismissing VeriSign's Antitrust Claim With Prejudice

On August 26, 2004, the District Court granted ICANN's motion to dismiss -- this time with prejudice -- and declined to exercise supplemental jurisdiction over the remaining state law claims. (ER 267:1-268:17.) In so doing, the District Court stated that "VeriSign recognizes that in order to sufficiently plead a conspiracy, it must allege that ICANN's decision-making process was controlled by economic competitors who have conspired to injure VeriSign. But what VeriSign alleges is different: that certain named competitors have conspired to control *advisory groups* that report to ICANN's ultimate decision-maker, the Board of Directors." (ER 260:21-28 (emphasis in original).) "Moreover, the FAC acknowledges that the final decision to regulate each of the VeriSign services at

issue was made by either the Board or the President, not the advisory bodies." (ER 261:10-12.)

"VeriSign's theory seems to be that the advisory bodies were the *de facto* decision-makers because the Board essentially rubber-stamped all of their recommendations." (ER 261:15-17.) But the District Court held that each of the allegations VeriSign's FAC put forth in support of that proposition were either ineffectually conclusory or did not support it at all. (ER 261-64.)

First, the District Court found as a matter of law that, contrary to VeriSign's assertion, "there is nothing inherently conspiratorial about a 'bottom-up' policy development process that considers or even solicits input from advisory groups." (ER 262:8-10.) Indeed, the Court noted, if VeriSign's allegation was correct, *any* decision that ICANN made would subject ICANN to suit under the antitrust laws because ICANN's decision-making process inherently involves the expression of views by competitors, and the Board inevitably adopt policies that certain of its constituents oppose. (ER 228-30.) Second, the District Court found that "the Bylaws in effect at the time of these events, which the Court judicially noticed, do *not* require the Board to accept the advisory bodies' policy recommendations" as VeriSign alleged they do. (ER 262:15-17.)

The District Court then continued by stating, "[m]oreover, there is no allegation (much less factual support for one) that the Board of ICANN actually

conspired with any of VeriSign's competitors. VeriSign does not allege any specific facts to support its theory that the Board complied with the conspirators' alleged attempt to 'hamstring' VeriSign -- no allegations regarding how much time the Board spent deliberating, how many meetings the Board held or how many objections or comments the Board considered. That the Board ultimately may have adopted an advisory group's policy recommendation, or that it was common practice for the Board to do so, does not mean that the Board merely 'rubber stamped' the proposals and allowed itself to be controlled by VeriSign's competitors." (ER 264:12-15.)

In sum, the District Court stated, "VeriSign has not alleged, and cannot allege, that the co-conspirators comprised a majority of the ICANN Board of Directors. It has not alleged and, given that the bylaws provide otherwise, it cannot allege that the 'supporting organizations' within ICANN's structure that do include competitors of VeriSign dominated the Board. [citation.] Nor has VeriSign pled with requisite specificity facts that, even circumstantially, establish that ICANN's Board was a 'rubber stamp.' [citation.] For all these reasons, VeriSign has not sufficiently alleged a Section 1 conspiracy." (ER 267:1-8.)

VeriSign's Opening Brief

Verisign's Opening Brief utilizes two inappropriate tactics in an attempt to strengthen its argument on appeal. First, VeriSign repeatedly refers to complaint allegations that simply do not exist in the FAC. For example:

- The Opening Brief argues that VeriSign has alleged that ICANN's competitors exercised control over ICANN's Board; however as the District Court noted, there are *no such allegations* in the FAC.
- The Opening Brief argues (in an effort to conform to the case law) that these competitors consist of a "finite group," but the FAC alleges *multiple* groups of unrelated conspirators -- each engaged in a separate and distinct conspiracy. (ER 133, ¶90; 144, ¶128; 151-52, ¶157.)[4]

VeriSign's second tactic, as noted earlier, is its attempt to switch antitrust theories, migrating from its patently inadequate "capture" theory to a theory never advanced (much less argued) to the District Court. According to the Opening

[4] Examples of other new legal and factual conclusions that are *not* in the FAC include: misstatements and omissions regarding the Bylaws (*Compare* Open. Br. at 5, 61 *with* ER 108, ¶17; 134, ¶95; 191; 198); allegations regarding the process of decision-making and the lower-level processes (*Compare* Open. Br. at 11, 19, 21, 25, 43, 46, 47, 55 *with* ER 135, ¶98; 145, ¶131; 147, ¶138; 153, ¶162; 137, ¶108; 154, ¶158; 153-54, ¶¶162-64; 264:6-7); purported "admissions" made by ICANN (*Compare* Open. Br. at 7, 17, 29, 58, 59 *with* ER 130-31, ¶85-86; 134, ¶95; 138, ¶103; 263:21; 131, ¶86; 263:25-27; 135-36, ¶¶96-98); misstatements regarding the Registry Agreement (*Compare* Open. Br. at 10, 15 *with* ER 55, §11.4.A-D; 136, ¶99); and legal conclusions regarding anticompetitive behavior (*Compare* Open. Br. at 12, 13, 17 *with* ER 116-17, ¶43; 135, ¶98; 138-39, ¶105).

Brief, not only was ICANN's Board "captured and controlled" by VeriSign's competitors, but ICANN's Board also entered into "agreements" with these competitors to injure VeriSign. (Open. Br. at 44, 46, 55.) The FAC contains no such allegations and even if it was alleged, VeriSign's opposition to ICANN's motion to dismiss the FAC never argued the existence of any such "agreements." Nor after reading the District Court's tentative ruling did VeriSign's counsel advance this assertion during oral argument. Since this is a court of appeals, and this argument was not advanced and rejected below, it is simply not available here.

Putting aside for the moment the propriety of the argument, VeriSign's argument rests on a grand total of three sentences (out of 230 paragraphs in the FAC) that make even a fleeting reference to any "agreement." (ER 135-36, ¶98; 144-45, ¶129; 152-53, ¶160.) And these sentences -- only *one* of which mentions the ICANN Board -- are wholly conclusory. (ER 135-36, ¶98 ("the Board of Directors of ICANN agreed with the WLS co-conspirators to assert control over WLS…."); ER 144-45, ¶129 ("the Site Finder co-conspirators joined and agreed with ICANN that ICANN would assert control over Site Finder…."); ER 152-53, ¶160 ("the IDN co-conspirators determined…to secure the agreement of ICANN to impose conditions delaying VeriSign's introduction of an IDN service.").) The law requires VeriSign to provide some supporting details concerning these "agreements." The law also requires that VeriSign sufficiently allege that these

"agreements" were the result of the Board being captured by VeriSign's competitors. No such allegations exist in the FAC. Thus, even if VeriSign could advance this new argument on appeal, the argument would fail as a matter of law.

* * * * *

VeriSign has been an active participant in all the ICANN activities of which it now complains. The results on these particular matters are not to its liking, which is perhaps understandable; every commercial entity would like to be able to make fully unfettered decisions. But VeriSign agreed to give up its unilateral right to make such decisions in return for the privilege of operating the largest TLD (and the commercial benefits that flow from that). For it now to claim that the very essence of the ICANN process -- the broad participation of all with interests, commercial or otherwise -- is inherently a violation of the antitrust laws is both disappointing and peculiar. Disappointing because it shows something less than a commitment to consensus decision-making and peculiar because if successful, VeriSign itself would no doubt be the target (as has already been the case with WLS) of antitrust attacks anytime that ICANN was persuaded by its arguments over those of its opponents.

The fact that the ICANN process encourages everyone, including competitors, to participate in its effort to achieve consensus cannot by itself mean, as VeriSign is essentially alleging, that every action ICANN takes inevitably

amounts to a Section 1 conspiracy. Virtually every decision ICANN makes produces "winners" and "losers" in some sense, but the days are long past when a simple allegation that a competitor's participation in a standards setting organization is sufficient to support a Section 1 claim, as the District Court properly held.

STANDARD OF REVIEW

This Court reviews the District Court's Order granting ICANN's motion to dismiss *de novo*. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). A dismissal for failure to state a claim may be affirmed by the Court on any basis supported in the record. *Public Utility Dist. No. 1 of Grays Harbor County Washington v. IDACORP Inc.*, 379 F.3d 641, 646 (9th Cir. 2004) (*citing Ove v. Gwinn*, 263 F.3d 817, 821 (9th Cir. 2001)). While review is generally limited to the contents of the FAC, the Court "may consider documents on which the complaint 'necessarily relies' and whose 'authenticity...is not contested.'" *Warren*, 328 F.3d at 1141 n.5 (*citing Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)).

The Court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint," *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998), and "[the Court does] not ... necessarily assume the truth of legal conclusions merely because they are cast

in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Warren*, 328 F.3d at 1139.

SUMMARY OF ARGUMENT

The essence of VeriSign's FAC is that ICANN should routinely be liable in antitrust for simply doing the acts that the organization was designed to perform. Like any standard-setting organization, ICANN must take input from the full range of interested parties, many of which have competing private interests. One way that ICANN solicits and considers these competing interests is through recommendations from subsidiary entities whose membership includes VeriSign's competitors (and VeriSign). Those entities sometimes make recommendations to the ICANN Board that are adverse to VeriSign's interests, and sometimes they do not. The ICANN Board sometimes agrees with the recommendations of those subsidiary entities and -- as final decision-maker for ICANN -- adopts them as ICANN policy. But approving or rejecting the recommendations of subsidiary entities is not a violation of the Sherman Act, and such allegations are insufficient to support the notion of "capture" by VeriSign's competitors. This is the fatal flaw of VeriSign's FAC.

In an effort to mask this flaw, VeriSign's Opening Brief argues theories that simply do not exist in fact, in law, and definitely not in the FAC. For instance, VeriSign's Opening Brief argues that ICANN can be liable in antitrust when its

Board "agrees" with VeriSign's competitors to adopt policies not in VeriSign's interest. But VeriSign never presented this argument to the District Court, and the law is clear that arguments that are not raised and argued below are not preserved on appeal. Yet even if VeriSign's argument is preserved, the FAC does not sufficiently allege an "agreement" between the ICANN Board and VeriSign's competitors, and such allegations could not create Section 1 liability in any event. If this were the law, ICANN presumably could be liable in antitrust for every policy it adopts because each Board decision usually begins with a recommendation and, undoubtedly, every recommendation has its opponent.

To avoid this result, the law specifically requires that a party alleging a Section 1 violation by a standard-setting organization must allege *capture* and *control* of the entity within that organization whose *final decision-making authority* caused the alleged injury. Moreover, it is not enough to make conclusory allegations; the party must allege *facts* that support that claim.

VeriSign's FAC contains *no* facts that meet this requirement. All that VeriSign's FAC alleges is possible capture of ICANN's *subsidiary entities* which the Bylaws state *do not* have final decision-making authority. The only entity with final decision-making authority in ICANN is its Board.

VeriSign further alleges that the District Court inappropriately engaged in "fact-finding" with respect to: (1) ICANN's Bylaws; (2) a former ICANN

President's report; and (3) a statement in the FAC about ICANN's funding. But the District Court did nothing of the sort. With respect to ICANN's Bylaws, the District Court merely took judicial notice of the *plain meaning* of the language of the Bylaws to show that they do not say what the FAC alleges. And with respect to the former President's report and ICANN's funding, the District Court *accepted as true* those allegations and then explained -- without inferring or assuming any additional facts -- why those allegations were insufficient to allege a Section 1 violation.

The FAC also fails to allege injury to competition. Indeed, this was one of the bases for the District Court's dismissal of VeriSign's initial complaint. Despite its heft, nothing in the FAC alters the District Court's prior conclusion that "VeriSign has not alleged anything more than injury to its own businesses and, therefore, does not have antirust standing." (ER 97:3-4.) While VeriSign's Opening Brief argues that competition has been harmed by the exclusion of VeriSign's products, the FAC admits that multiple competitors in the same markets provide services identical or similar to those that VeriSign seeks to offer. The fact that VeriSign has been placed at a competitive disadvantage, even if true, does not establish the requisite harm to the *market*. Especially where the alleged markets are worldwide and involve numerous competitors. The FAC's failure to allege

injury to competition thus presents a separate ground to affirm the District Court's Order.

ARGUMENT

Section 1 of the Sherman Act prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade." 15 U.S.C. § 1 (2005). To allege a Section 1 violation, VeriSign must allege: "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989); *Kingray, Inc. v. Nat'l Basketball Ass'n*, 188 F. Supp. 2d 1177, 1187, 1196-97 (S.D. Cal. 2002) (dismissing complaint for failure to adequately allege conspiracy, intent to harm competition, and actual harm to competition); ER 258.

A plaintiff *must* plead facts that support each element of the claim. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 n.17 (1983) (with respect to federal antitrust claims, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed"); *Les Shockley Racing, Inc.*, 884 F.2d at 508 (plaintiff "must, at a minimum, sketch the outline of the antitrust violation with allegations of supporting factual detail"); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987) ("[A] court must ask whether

plaintiff 'could show any set of facts, consistent with the allegations of its complaint, that would constitute a violation of antitrust laws.'").[5] Plaintiff "may not evade these requirements by merely alleging a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the 'plaintiffs will get nowhere merely by dressing them up in the language of antitrust.'" *Rutman Wine Co.*, 829 F.2d at 736; ER 258:24-259:3. Conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss. *Warren*, 328 F.3d at 1139; *Associated Gen. Contractors of Am. v. Metropolitan Water Dist. of S. Cal.*, 159 F.3d 1178, 1181 (9th Cir. 1998); *In re Syntex Corp. Secs. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996). A complaint merely "dressed up" in the language of antitrust should be dismissed, and the dismissal should be with prejudice if amendment would be futile. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990).

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[5] *See also Migdal v. Rowe Price-Fleming Int'l*, 248 F.3d 321, 326 (4th Cir. 2001) ("The presence [] of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint cannot support the legal conclusion."); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 240 (1st Cir. 2004) ("[E]ven under the liberal pleading requirements of Rule 8(a), a plaintiff must 'set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.' [Citation.]"); *Found. for Interior Design Educ. Research v. Savannah College of Art & Design*, 244 F.3d 521, 530 (6th Cir. 2001) (same); *Ryan v. Mary Immaculate Queen Ctr.*, 188 F.3d 857, 860 (7th Cir. 1999) (same).

VeriSign relies on *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), but that decision is not to the contrary. (Open. Br. at 36-38.) The Court merely addressed the general pleading standard in civil suits and in no way said or implied that a bare legal conclusion unaccompanied by supporting factual allegations could withstand a motion to dismiss. *Swierkiewicz*, 534 U.S. at 514. *See Associated Gen. Contractors of Cal.*, 459 U.S. at 528 n.17 ("Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").

I. The District Court Correctly Dismissed VeriSign's First Amended Complaint.

VeriSign's FAC recites a long list of events where it asserts it was treated unfairly, and it names some of the persons or entities that it holds responsible for this unfair treatment. But VeriSign's angst does not state a claim under the antitrust laws. Once the irrelevant hyperbole and conclusory allegations are distilled, all that is alleged is that certain persons or entities held views different than VeriSign's and conveyed them to ICANN's Board for its consideration. Most of the alleged "co-conspirators" are not even competitors of VeriSign, and thus would have little reason to conspire against it. Others (like ICANN itself, which is prohibited from doing any "commercial business" such as functioning as an Internet registry or registrar) are not commercial competitors in the Internet space

at all, and thus could not possibly be liable for violating Section 1, since "restraining trade" would not benefit them in any way.[6]

Reduced to its essence, VeriSign has merely alleged that those holding opposing views have been persuasive in some ICANN advisory bodies; that in some instances, VeriSign's preferred position has not prevailed (while in other instances it has (ER 117, ¶44; 137-38, ¶103; 141, ¶115; SER 005)); and that those bodies have sometimes made recommendations that were not consistent with VeriSign's interests. But none of those bodies could bind ICANN; none has the ability to make decisions for ICANN; and none is even alleged to have taken control of the only decisional entity within ICANN, its Board of Directors. And in the case of Site Finder, ICANN's Board never acted at all. These facts are impossible to reconcile with a "capture" theory.

This no doubt explains VeriSign's new theory on appeal -- that the FAC alleges agreements between the ICANN Board and the "co-conspirators" -- but that theory also finds no support in the FAC. VeriSign never raised the argument in its

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[6] In order to state a Section 1 claim, the conspirators must be alleged to participate in the relevant market with the plaintiff. *See Glen Holly Entm't. Inc. v. Tektronix Inc.*, 352 F.3d 367, 372 (9th Cir. 2003) ("the 'injured party [must] be a participant in the same market as the alleged malefactors.'") (*quoting Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985)); *American Ad Mgmt., Inc. v. General Tel. Co.*, 190 F.3d 1051, 1057 (9th Cir. 1999) ("Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury."); *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996) (same).

opposition to ICANN's motion to dismiss, nor did it raise the argument to the District Court during oral argument. And the argument fails in any event because VeriSign's allegations do not even approach the threshold for stating a Section 1 claim. We deal with the arguments in the order raised by VeriSign in its Opening Brief.

A. VeriSign Cannot Raise For the First Time on Appeal Its Argument That It Has Alleged "Agreements" To Injure VeriSign Between The ICANN Board And The Alleged Co-Conspirators.

This Court will not consider theories raised for the first time on appeal. *Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1090-91 (9th Cir. 2000); *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 615 n.1 (9th Cir. 1990). A theory is "raised for the first time on appeal" if the party asserting the theory has not met its "duty to make the district court aware that they intend to rely on [that] particular [] theory." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 444 (3rd Cir. 1997); *see Podiatrist Ass'n, Inc. v. La Cruz Azul de P.R., Inc.*, 332 F.3d 6, 20 (1st Cir. 2003) (*citing McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991) ("It is hornbook law that *theories* not raised *squarely* in the district court cannot be surfaced for the first time on appeal.") (emphasis added). "[A] fleeting reference in a [] complaint to facts that might support a proposed [theory] is [in]sufficient, on its own, to preserve that [] theory

for appellate review." *Queen City Pizza*, 124 F.3d at 444. "Particularly where important and complex issues of law are presented, a far more detailed exposition of argument is required to preserve an issue." *Id.* (citation omitted).

VeriSign never made the argument to the District Court that VeriSign's alleged competitors entered into actual agreements with ICANN's Board to injure VeriSign. Its statement that "much of the argument of the parties below" dealt with capture, but that VeriSign also argued the existence of an actual agreement, is at best disingenuous. (Open. Br. at 39 n.14.) VeriSign cites to *one sentence* in its Memorandum in Opposition. This stray reference from the middle of a district court brief does not come close to preserving the argument for appeal. *See, e.g., McCoy*, 950 F.2d at 22 (holding that a claim presented to the district court in the form of two sentences and one citation was the "merest of skeletons" and thus too underdeveloped to be presented on appeal); *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 100 (3rd Cir. 1990).

Incredibly, VeriSign then faults the *District Court* for failing to give this argument sufficient attention. (Open. Br. at 42 (complaining that "only one sentence in the district court's opinion addresses" the point).) But it is clear from the two opinions below that the District Court had no trouble identifying the issues raised by the parties.

In any event, VeriSign's new argument is meritless. VeriSign claims that "the FAC is replete with allegations that ICANN and its Board 'actually conspired' with the identified co-conspirators," (Open. Br. at 42) but this is simply not true. In fact, *nowhere* in the FAC does VeriSign allege an agreement between the ICANN Board and the alleged co-conspirators that would be sufficient to support a Section 1 violation. Indeed, the three sentences that contain the words are wholly conclusory.

As shown above, in order to survive a motion to dismiss a Section 1 claim, plaintiff must allege facts to support each element of its claim. (*See* Argument, *supra*, at 27.) With regard to allegations that a defendant has conspired to engage in anticompetitive acts, conclusory allegations about an actual agreement, with no supporting detail, are insufficient to show a conspiracy. *Kingray, Inc.*, 188 F. Supp. 2d at 1188-92. Rather, the pleader must provide "some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place." *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992) ("Although [the plaintiff] alleges [the defendant] engaged in price fixing, it alleges no facts to support this conclusory assertion. [The plaintiff's] complaint does not disclose the existence of a pricing agreement. Accordingly, we conclude [the plaintiff] cannot

establish a section one claim against [the defendant] based on price fixing."). "A general allegation of conspiracy . . . without a statement of the facts constituting the conspiracy, is a mere allegation of a legal conclusion and is inadequate of itself to state a cause of action." *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979); *see Floors-N-More, Inc. v. Freight Liquidators*, 142 F. Supp. 2d 496, 501 (S.D.N.Y. 2001) ("plaintiff must do more than allege the existence of a conspiracy—it must allege some facts in support of the claim."); *Credit Chequers Info. Servs., Inc v. CBA, Inc.*, 1999-1 Trade Cas. (CCH) ¶ 72,518 (S.D.N.Y. 1999) (general allegations of conspiracy are not sufficient to state a Section 1 claim).

VeriSign's FAC fails to allege any facts outlining an actual agreement or conspiracy between the ICANN Board and the alleged co-conspirators. Contrary to the arguments set forth in VeriSign's Opening Brief, the FAC only contains three sentences -- out of 230 paragraphs -- in which VeriSign provides even a fleeting reference to an "agreement." (ER 135-36, ¶98; 144-45, ¶129; 152-53, ¶160.) Moreover, these sentences -- only one of which mentions the ICANN Board -- are wholly conclusory. (ER 135-36, ¶98 ("the Board of Directors of ICANN agreed with the WLS co-conspirators to assert control over WLS…."); ER 144-45, ¶129 ("the Site Finder co-conspirators joined and agreed with ICANN that ICANN would assert control over Site Finder…."; ER 152-53, ¶160 ("the IDN co-

conspirators determined...to secure the agreement of ICANN to impose conditions delaying VeriSign's introduction of an IDN service.").)

The FAC contains no allegation as to when, where, or how the alleged agreement was entered into, the substance of the alleged agreement, or the effect of the alleged agreement, as required to prevent dismissal.[7] *Estate Constr. Co.*, 14 F. 3d at 221 (dismissing a Section 1 claim for a failure to allege the "details of the time, place and alleged effect of the conspiracy."). Most importantly, it provides no explanation for why ICANN, with no commercial interests at stake, would have

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[7] VeriSign cites non-controlling authority in an attempt to support its claim that no factual allegations are required to allege a Section 1 agreement. Further, each case is inapposite. For example, *Perington Wholesale, Inc. v. Burger King Corp.* demonstrates that merely naming co-conspirators and using the term "conspiracy" does not put a defendant on notice. 631 F.2d 1369, 1372 (10th Cir. 1979). Indeed, *Perington* suggests that if any allegation in the FAC were to "*negate*[] the claim of conspiracy," and if the alleged conspiratorial conduct is not "adequately specified," the allegation *fails* to put a defendant on notice. *Id.* In *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n,* 891 F.2d 1473, 1482 (10th Cir. 1989), the plaintiff -- although pleading a Section 1 violation in a conclusory fashion -- *also* pleaded parallel behavior by the parties that bore "no reasonable relation to the operation and maintenance" of the business, thus inferring that something "other" than normal business practices was at hand. In *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery*, the plaintiff alleged agreements among the competitors to institute tying arrangements and alleged the tying devices in detail. 938 F.2d 846 (8th Cir. 1991). Finally, in *In re Commercial Explosives Litig.*, the plaintiffs extensively pleaded a scheme in which the defendants "discussed and agreed" to engage in various recognized forms of anticompetitive conduct. 1996 WL 795270, Civil Nos. 2L96-MD-1993S, 2:96-CV-709S (D. Utah Dec. 20, 1996). VeriSign's FAC lacks any of these characteristics, especially given the fact that ICANN has no commercial interests at stake, and thus the likelihood that it would ever have the incentive to enter into an anticompetitive agreement is remote.

any reason to enter into any such agreement. *Pa. ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 181 (3rd Cir. 1988) (dismissing a Section 1 claim for a lack of factual allegations regarding the means by which the alleged conspiracy came about).

Indeed, VeriSign has alleged three completely different conspiracies involving WLS, Site Finder and IDNs -- each with different co-conspirators. Thus, VeriSign's FAC should have included allegations regarding *at least* three sets of agreements that ICANN's Board had entered into with these co-conspirators. Instead, the FAC contains no allegations regarding *any* such agreements.

More importantly, however, general allegations of an "agreement" between competitors and ICANN's Board are not sufficiently specific. The law requires more than simply an agreement by the ICANN Board to adopt a policy; VeriSign must allege a Section 1 violation, which means that allegations of capture or other subversion of the ICANN Board are required. If VeriSign's legal position was correct, every time ICANN's Board agreed with a proposal, the Board would be subject to a Section 1 claim because every proposal has its opponent. But the law is otherwise. *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1029 (9th Cir. 1989) (*en banc*); *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 869 (9th Cir. 1986) (plaintiff

must allege capture of the entity with "final authority" over organization's decisions); ER 262:13-14. *See* Argument, *infra*, at §I.B.

In short, not only has VeriSign failed to preserve any claim that the ICANN Board has entered into actual agreements with the co-conspirators to injure VeriSign in violation of the Sherman Act, but even if the argument had been properly preserved, VeriSign's FAC fails to plead *any facts* to support the theory.

B. The District Court Correctly Found That VeriSign's First Amended Complaint Did Not Allege Capture of ICANN.

1. The District Court Applied The Correct Standard For Capture.

Under certain circumstances, a standards setting organization or similar body which includes competitors can be found liable for violating Section 1 of the Sherman Act if its decisions have been "captured" by some group of those competitors and have caused competitive harm. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). In this Circuit, for liability to exist under that theory, VeriSign must allege *capture and control* of the entity whose *final decision-making authority* caused VeriSign's alleged injury. *Hahn*, 868 F.2d at 1029 (*en banc*); *Barry*, 805 F.2d at 869 (plaintiff must allege capture of the entity with "final authority" over organization's decisions); ER 262:13-14. *See also*

Podiatrist Ass'n, Inc., 332 F.3d at 16 (no capture where competitors participated on committees but "boards retained the ultimate say."); *Pa. Dental Ass'n v. Med. Service Ass'n of Pa.*, 745 F.2d 248, 258 (3rd Cir. 1984), *cert denied*, 471 U.S. 1016 (1985) (must show capture of entity with "ultimate responsibility" for decisions).

The only entity with decisional authority in ICANN is its Board of Directors. (ER 198-99, §2(e)-(g).) But VeriSign never alleges capture of the ICANN Board. Instead, the FAC acknowledges that, while Supporting Organizations and Advisory Committees provided the Board with information and recommendations, the Board was the ultimate decision-maker in each case (except Site Finder) where ICANN decided to prohibit, restrict, or allow one of VeriSign's services. (ER 135-36, ¶98; 137, ¶102; 147, ¶138; 153-54, ¶163.) Although VeriSign does allege the "capture" of some advisory bodies, VeriSign never alleges (and it could not allege) that *those* entities made the decisions VeriSign dislikes.

The cases that VeriSign cites to this Court confirm that the District Court articulated the correct legal standard. For example, in *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the question before the Supreme Court was whether an organization can be held liable under antitrust laws for the anticompetitive acts of its agents. The allegation in that case was that employees of McDonalds and Miller, Inc. ("M&M") (a Hydrolevel competitor) devised and executed a plan to seek an ASME interpretation of regulations governing low-

water fuel cutoffs and then used their positions on an ASME subcommittee to issue an authoritative ASME interpretation that suggested that Hydrolevel's products were unsafe. *Id.* The interpretation, which was itself the alleged act of the ASME having anticompetitive effect, was never subjected to review or consideration by the larger committee or the Board because ASME committee procedures expressly delegated to the subcommittee chairman -- who happened to be the vice-president of M&M -- final decision-making authority to issue the response. *Id.* at 561. Since the subcommittee chairman took the challenged action acting under this delegated authority, proof that the chairman was a competitor was sufficient to allege an antitrust claim.

VeriSign argues in its Opening Brief that *Hydrolevel* stands for the proposition that an organization can be held liable for violations of the antitrust laws where the alleged restraints on trade were not the result of direct action by the organization's board and "there was no allegation that competitors comprised a majority of, nor controlled, the board of directors." (Open. Br. at 50.) But *Hydrolevel* merely reaffirms that the *final decisionmaker* is the relevant entity in the capture analysis. In *Hydrolevel*, that entity happened to be a subcommittee, based upon the delegation of power to that subcommittee to make the challenged decision. *Hydrolevel* offers no support for the notion that the "capture" of a subsidiary entity, without final decision-making authority, can suffice.

Hahn v. Or. Physicians' Serv., 868 F.2d 1022, 1026 (9th Cir. 1989), involved a Section 1 claim against a physicians' organization. The plaintiff podiatrists argued that the organization engaged in horizontal price fixing when it set a fee schedule of maximum rates of reimbursement. *Id.* This Court held that, because plaintiffs had shown that physicians formed a majority of the board and that these physicians were in competition with plaintiffs, a trier of fact could reasonably find a violation of Sherman Act Section 1. *Id.* at 1029-30. This, of course, is precisely the point. The Board there, as here, was the final decisionmaker with regard to the decision in question, and hence was the relevant entity for purposes of any "capture" analysis.[8] By comparison, in *Hahn* the competitors comprised a majority of the Board; here, they have zero votes on the Board.

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), a manufacturer of electrical products sued certain members of the National Fire Protection Association -- not the association itself -- alleging that the members violated Section 1 when they agreed to exclude plaintiff's new polyvinyl chloride

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[8] VeriSign claims that the District Court "limited the doctrine of capture to cases where a majority of the board of directors of the association are competitor co-conspirators." (Open. Br. at 48 (*citing* ER 267).) A plain reading of the concluding remarks in the District Court's Order, however, demonstrates that the Order was not so limited. (ER 262-67.) Moreover, the District Court noted that *none* of the alleged co-conspirators was a voting member of the Board, which seems a pretty relevant fact.

product from the National Electrical Code by packing the annual meeting with new members who agreed to vote against plaintiff's proposal. *Id.* at 497. As in *Hydrolevel*, the plaintiff did not need to show capture of the NFPA Board because the Board was not involved in the decision under challenge. The only individuals involved were the Association members who voted on the proposal; the decision-making ended with their vote. *Id.* at 507 (plaintiff showed that its competitors "organized and orchestrated the actual exercise of the Association's decision making authority.") Although the plaintiff appealed the vote to the Board, the Board elected not to review the decision.

Here, the ultimate decisionmaker for ICANN is the Board.[9] Thus, in order to state a claim, VeriSign must allege that the Board has been "captured" by VeriSign competitors so that it is no longer neutral but rather an arm of those competitors.

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[9] The FAC confirms this. With respect to WLS, the final step in the decision-making process was a Board resolution. (ER 138, ¶104.) With respect to IDNs, the FAC alleges that the Board had the final say when it "adopted and endorsed the approach set forth in the [Committee's] draft guidelines." (ER 153-54, ¶163.) In the case of the Wildcard feature, the FAC alleges that SSAC issued a report, and that the ICANN President "took action based on the SSAC report and forced VeriSign to shut down the service." (ER 146, ¶134; 147, ¶136.) But all that ICANN's President did was send a letter advising VeriSign of ICANN's position. There was no Board action, let alone *any action* to restrict or prohibit Site Finder. VeriSign (presumably taking account of the weakness of its legal position) simply chose to avoid the dispute and cannot now credibly argue that its decision was compelled.

2. The District Court Correctly Found That the FAC Did Not Allege Capture Of The ICANN Board.

The FAC does not contain a single *factual* allegation from which one could reasonably infer that VeriSign's competitors captured ICANN's Board:

- there are no allegations that the conspirators comprised a majority of the Board (because they do not);
- there are no allegations that the conspirators controlled *any* voting member on the Board (because they do not);
- there are no allegations as to how the co-conspirators in any of these various different situations managed to convince (or "capture") the Board so that in each case the Board (which has no commercial interest here) would take steps to injure VeriSign;
- there are no allegations that the Board's actions were not of its own free will and judgment because it was "captured" by VeriSign's competitors.

These are the types of allegations that are essential to distinguish an actual case of "capture" of a standard-setting or similar organization from ordinary, everyday consensus-building that standard-setting organizations are *supposed* to engage in.[10]

[10] Further, in stark contrast to the situations where plaintiffs were excluded from an organization's decision-making process, VeriSign concedes that it fully participated in the ICANN process with respect to every one of the challenged

WLS. VeriSign's primary argument is that VeriSign's competitors captured the DNSO and the ICANN process generally, but VeriSign fails to allege capture of the Board in particular. In order to plead a theory of organizational "capture," the allegations must address the "final authority" in the process. *Barry*, 805 F.2d at 869. Influence in a subsidiary advisory capacity is not enough, so long as the top-level entity "retain[s] the final say." *Podiatrist Ass'n, Inc.*, 332 F.3d at 16.

To the extent that VeriSign's "capture" theory rests on the allegation that the ICANN Bylaws *required* the Board to accept the recommendations of the DNSO (*e.g.*, Open. Br. at 55), that allegation is fabricated, as shown above. (*See* Argument *supra*, Section I.) VeriSign has not appealed the propriety of the District Court's judicial notice of the Bylaws -- although VeriSign does dispute the District Court's decision to interpret the Bylaws based on the actual text of the Bylaws rather than what the FAC claims the text of the Bylaws states. However, a court is not bound by a representation in a pleading about the contents of a document that is simply false on its face. *See, e.g., Steckman v. Hart Brewing,*

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decisions. Other entities expressed positions that were contrary to VeriSign's positions, but disagreeing with VeriSign does not amount to an antitrust conspiracy. It could not be so or no participatory standard-setting organization could ever function. VeriSign's allegations amount to nothing more than a claim that ICANN is a "walking conspiracy," a claim that is axiomatically insufficient to survive a motion to dismiss. *See Consolidated Metal Prods., Inc., v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988).

Inc., 143 F.3d 1293, 1295-96 (9th Cir. 1998) (court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint").

VeriSign argues that paragraphs 98, 102, and 103 of the FAC "specifically plead [ ] capture of the Board of Directors of ICANN." (Open. Br. at 55.) VeriSign misrepresents these paragraphs. These paragraphs do not even arguably allege facts supporting a legal conclusion that the Board was captured by interest groups adverse to VeriSign. Paragraph 98 alleges three "facts" with respect to the Board: (1) the Board agreed with the Position Paper issued by the Registrar Constituency; (2) the Board decided, based on the Position Paper, to assert control over WLS; and (3) the Board initiated a Consensus Review Process and referred the matter to the DNSO. None of these allegations suggests (much less avers) a "capture." The fact that ICANN considered input from these subsidiary entities does not mean that ICANN was captured by those entities or by individuals within those organizations. *See, e.g., Barry*, 805 F.2d at 868. VeriSign does not allege otherwise, nor could VeriSign ever allege otherwise, because in fact ICANN's Board *rejected* the DNSO's recommendation and elected to *approve* WLS (contrary to the position of the alleged conspirators). Indeed, several of the named conspirators and other registrars subsequently sued ICANN attacking ICANN's WLS decision as invalid.

Paragraph 102 alleges that ICANN's Board accepted the recommendations of the DNSO, which had adopted the position of the named conspirators and other registrars, because the Board was required to do so by the ICANN Bylaws. As noted above, this description of the Bylaws is simply wrong (Statement of the Facts, *supra*, at 6-9), and in any event ICANN did not accept the DNSO recommendation as VeriSign confirms.

Paragraph 103 contains allegations regarding the supposed harm that VeriSign has suffered as a result of ICANN's decision, as well as an allegation that ICANN "admitted" "that the conditions on the implementation of WLS were adopted as a consequence of and in deference to the position of the Registrar Constituency." Even accepting these as true, neither the fact that VeriSign was harmed nor the fact that ICANN agreed with a recommendation of one of its subsidiary bodies is a proper allegation of "capture." *See Consolidated Metal Prods., Inc.*, 846 F.2d at 293.[11]

Site Finder. VeriSign alleges that its competitors exerted control over the SSAC advisory entity, not the ICANN Board or even ICANN's President who issued the challenged letter. Indeed, VeriSign admits that it has not alleged capture of the Board but argues that allegations of Board capture are not required with

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[11] The remainder of Paragraphs 98 and 103 consist of conclusory allegations that are likewise insufficient to state a claim. Such bare legal conclusions unsupported by concrete factual allegations fail to state a claim.

respect to Site Finder because "the Board never adopted any resolution." (SER 203:1-4; *see* ER 145-47, ¶¶ 130-37.) In one sense, VeriSign is correct: the Board did not adopt a resolution with respect to Site Finder. Instead, the "harm" to VeriSign related to Site Finder occurred when ICANN's President sent a letter to VeriSign stating his view that Site Finder constituted a breach of contract and if VeriSign did not suspend the use of Site Finder, ICANN would seek to enforce its contractual obligations. It was this letter and this letter alone that apparently led to VeriSign's decision to suspend Site Finder, and it was that letter -- as alleged in the FAC -- that caused "injury" to VeriSign related to Site Finder.[12] (ER 160, ¶¶190, 191.) A statement that one party to a contract will assert its legal rights under that contract cannot be an action that violates Section 1 of the Sherman Act. In any event, the FAC contains no allegations that the President was "captured" by the SSAC, which after all is simply an advisory body made up of technical experts, most of whom have no connection at all with anyone that competes with VeriSign.

IDNs. Once again, VeriSign attempts to obfuscate its capture allegations by referring vaguely to unspecified aspects of the "decision-making" process. As shown above, this is inadequate. The cases require that "capture" be alleged as to

[12] As described below, the Site Finder incident is perhaps the clearest illustration that VeriSign has not suffered antitrust injury, even assuming VeriSign was able to make sufficient allegations of capture. VeriSign chose to withdraw Site Finder rather than to press forward with its view of its contractual rights; that

the specific entity with final decision-making authority with respect to the challenged actions, and here that is the ICANN Board.

VeriSign identifies two paragraphs, 160 and 163, that it contends "specifically allege" capture of the Board with respect to IDNs. (Open. Br. at 56-57.) Paragraph 160 contains only "antitrust jargon": "IDN co-conspirators combined to pursue a common plan.... Pursuant to this combination the IDN co-conspirators determined to capture and control the IDN process at ICANN...ICANN and the IDN co-conspirators combined to accomplish and in fact accomplished these unlawful objectives." Pleading legal conclusions does not state a claim. But even more relevantly, all that is alleged here is that some people took some positions, and ICANN's Board agreed with them.

Paragraph 163 alleges: (1) the ICANN Board "adopted and 'endorsed the IDN implementation approach set forth in the draft Guidelines' and authorized the President of ICANN 'to implement the Guidelines,'" (2) the consultant to the Board on IDN was also a consultant to CNNIC (one of the alleged IDN co-conspirators), and (3) a representative of CNNIC joined the Board. But, again, neither the fact that the Board adopted the recommendation of its subsidiary advisory body -- the Board usually will adopt *somebody's* recommendation -- nor

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voluntary decision can hardly create liability for ICANN (or anyone else for that matter). (*See* Argument, *infra*, Section II.)

the fact that VeriSign's competitors participated in the formulation of that recommendation is sufficient to allege a capture. If the Board had adopted VeriSign's recommendation, then under VeriSign's articulation of the standard, ICANN could be sued by *VeriSign's* competitors, and VeriSign could also have been sued as a Section 1 co-conspirator. (ER 152, ¶159.) Participation is not capture, and VeriSign only alleges participation.

* * * * *

VeriSign might not like ICANN's conduct. It might believe that ICANN is too easily persuaded by VeriSign's opponents. It might believe that ICANN's actions violated the Registry Agreement between the parties (as alleged in VeriSign's other claims for relief in the FAC). If so, it is free to litigate (as it is now doing in California state court) its contract claims. But it plainly has not alleged a valid antitrust claim under Section 1 of the Sherman Act. At most, VeriSign has alleged that its competitors participated at intermediate steps in the decisional process, and that ICANN's Board has accepted in whole or in part certain recommendations of its advisory bodies in which those competitors participated. This is not enough to state an antitrust claim.

3. The District Court Properly Evaluated The Allegations Of Capture In The First Amended Complaint Without Engaging In Any "Fact-Finding."

In an attempt to create error where none exists, VeriSign claims the District Court "improperly ignored, argued with and weighed the probative value" of certain allegations in the FAC relating to the purported capture of ICANN's Board. (Open. Br. at 57-64.) VeriSign's arguments find no support in the record. Instead, the District Court's Order makes it clear that the court properly "took the facts as it found them," and proceeded to determine, as a matter of law, whether those facts were sufficient to plead capture. In short, the District Court did exactly what a court is supposed to do in ruling on a motion to dismiss.

(a) The District Court Properly Disregarded The False Allegations Concerning ICANN's Bylaws.

VeriSign contends that the District Court improperly ignored the allegations in the FAC to the effect that ICANN's Bylaws require the Board to adopt the policy positions of the DNSO, based on the Court's own "interpretation" of those Bylaws. (*See* Open. Br. at 60-62.) VeriSign's argument fails because no issue of "interpretation" was ever before the Court. Rather, the Court merely took judicial notice of the *plain meaning* of the language of the Bylaws which provides that: (1) "no recommendation of a Supporting Organization shall be adopted unless"

specific enumerated thresholds are met which are evaluated by the ICANN Board alone (ER 198-99, §2(e)); (2) "If the Board declines to accept any recommendation, … the Board may initiate, amend or modify and then approve a specific policy recommendation" (ER 198-99, §2(f)); and (3) "Nothing in this Section 2 is intended to limit the powers of the Board … to take actions that the Board finds are necessary or appropriate to further the purposes of the Corporation" (ER 198-99, §2(g)).

Thus, it is plain on their face that the Bylaws do *not* require the Board to adopt the positions of the DNSO contrary to VeriSign's allegation.[13] The District Court was under no obligation to accept as true allegations that are flatly contradicted by facts subject to judicial notice.[14] *See Interstate Natural Gas Co. v. So. Cal. Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953).

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[13] Moreover, the Bylaws *never* state that Advisory Committees and other ICANN entities are anything more than advisory.

[14] It does not appear that VeriSign is challenging the District Court's decision in and of itself to take judicial notice of the Bylaws, and there would be no basis for such a challenge. A court may, on a motion to dismiss, consider documents referenced in a complaint regardless of whether those documents are attached as exhibits, so long as the authenticity of the documents is not contested. *See, e.g.*, *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994). VeriSign did not contest the authenticity of the Bylaws, and thus the District Court plainly did not abuse its discretion in taking judicial notice of them. A party may not escape a Rule 12 challenge by making allegations that are flatly contradicted by the materials properly before the Court, in this instance, Bylaws that VeriSign referenced frequently in its FAC.

Nor is there any merit to VeriSign's contention that the District Court improperly assumed ICANN acted only in accordance with the District Court's interpretation of the Bylaws. To the contrary, the District Court took judicial notice of the Bylaws solely for the purpose of ascertaining what those Bylaws required and what they did not require, not to determine how ICANN actually functioned. Indeed, the FAC never argues that ICANN acted contrary to the Bylaws in this respect, but rather that ICANN acted *pursuant* to the Bylaws. (*See e.g.,* ER 137, ¶102.) VeriSign's allegation in the FAC has nothing to do with whether the Bylaws were followed. Thus, any improper "fact-finding" in this regard could not have resulted in any prejudice to VeriSign, and would not provide a basis for reversing the District Court's Order in any event. *See* 28 U.S.C. § 2111; *see also McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984).

(b) The District Court Accepted As True And Properly Construed The Other Allegations Of Capture.

VeriSign also contends the District Court improperly engaged in "fact-finding" to discount the probative value of certain other "capture" allegations in the FAC. In particular, VeriSign challenges the District Court's treatment of the purported "admissions" by ICANN's former President concerning the ICANN decision-making process (*see* Open. Br. at 58-60), and the allegations about the

funding ICANN receives from members of the Registrar Constituency (*see id.* at 62-64). However, the District Court's Order on its face reflects no "fact-finding" of any sort. Instead, the Court *accepted as true* each of the allegations in question, and then explained -- without inferring or assuming any additional facts -- why those allegations were insufficient under the Sherman Act to plead the capture of ICANN's Board.

Thus, for example, the District Court accepted as true the former President's alleged statement that ICANN employed a "bottom-up" policy development process but concluded as a matter of law that such a process is not inherently conspiratorial. (ER 262:8-14.) The District Court also accepted as true the former President's alleged statements to the effect that the "Supporting Organizations" in ICANN's decision-making process were *susceptible* to capture but pointed out that the former President's statements did not relate at all to the possibility of capture of the Board itself.[15] (ER 263:21-264:6.) Finally, the District Court accepted as true the allegation that the Registrar Constituency was the "single largest source" of ICANN's funding but noted the absence of any allegation that the "WLS co-conspirators" provide the majority of such funding. (ER 263:10-19.)

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[15] VeriSign claims the District Court drew an inference against the relevance of the former President's statements based on the timing of such statements. However, the District Court's Order contains no mention of any such inference and expressly *disclaims* any reliance on such an inference. (ER 264:2-5 ("However

In short, the Order reflects nothing more than thoughtful, reasoned legal analysis of the facts *as they are alleged* in the FAC. Moreover, even if it were true -- as VeriSign contends -- that the District Court failed to construe the subject allegations in a light most favorable to plaintiff, such failure was harmless. There is no light in which the former President's purported "admissions" and/or the alleged funding by the Registrar Constituency may be construed so as to establish the necessary capture of ICANN's Board (and certainly not with respect to the specific matters referenced in the FAC). Were VeriSign's argument correct, any party that was on the "short end" of an ICANN Board decision involving registrars could file an antitrust suit against ICANN on the basis that the former President was wary of possible "capture" of ICANN's subsidiary organizations and that the Registrar Constituency is responsible for a significant amount of ICANN's funding. But VeriSign cannot connect these allegations to the specific issues about which VeriSign complains, and thus they cannot form the basis for a Sherman Act claim against ICANN. Further, any improper discounting of the probative value of these peripheral matters could not have resulted in any prejudice to VeriSign and would not provide any basis for reversing the District Court's Order.

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applicable the [former] President's concerns still may have been at those later times,...").)

II. This Court May Also Affirm The District Court's Order On The Ground That VeriSign Failed To Allege Injury To Competition.

"A dismissal for failure to state a claim may be affirmed on any basis supported in the record." *Public Utility Dist. No. 1 of Grays Harbor County Washington*, 379 F.3d at 646 (citing *Ove*, 263 F.3d at 821); *see River City Markets, Inc v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1463 (9th Cir. 1992). The primary reason for this exception is to preserve the interests of judicial economy: "[i]t would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." *S & S Logging Co. v. Barker*, 366 F.2d 617, 623 & n.5 (9th Cir. 1966) (*citing SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

In order to allege a Section 1 claim, "[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); ER 259:9-14. These requirements are referred to as "antitrust standing." *See, e.g., Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001); ER 259:15. There is no antitrust violation "[i]f the injury

flows from aspects of the defendant's conduct that are beneficial or neutral to competition . . . . [A]n act is deemed *anticompetitive* . . . only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995), *cert. denied*, 516 U.S. 987 (1995) (emphasis in original); ER 259:16-22.

The District Court's Order dismissing VeriSign's original complaint found that VeriSign failed sufficiently to allege an injury to competition. "VeriSign has not alleged anything more than injury to its own business and, therefore, does not have antitrust standing." (ER 97:3-4.) Instead of alleging injury to competition that would support antitrust standing, the District Court found that "the crux of VeriSign's injury is that it is being placed at a 'competitive disadvantage' *vis-à-vis* other TLDs since ICANN prevents, delays, or restricts VeriSign's ability to make new services its competitors offer from being made available to customers in the .com gTLD it operates." (ER 96:15-19.)

The District Court elected not to address the "injury to competition" arguments that the parties made with respect to VeriSign's FAC, but there was no doubt that the FAC did not cure the flaws in the original complaint. VeriSign amended its original complaint to add "injury to competition" allegations with respect to four "relevant product markets." (ER 139, ¶106; 142, ¶120; 147, ¶140;

155, ¶169.) But in each of the alleged product markets, the claimed injury remains injury to VeriSign alone, not injury to competition as required by *Brunswick*, its progeny, and the District Court's Initial Order. (*See, e.g.*, ER 143, ¶124; 151, ¶154; 156, ¶174.)

The removal of one competitor does not by itself equate to injury to competition. *Les Shockley Racing, Inc.*, 884 F.2d at 508. Section 1 requires claimants to "plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market." *Id.* But the gravamen of VeriSign's FAC is that ICANN elected to "regulate" VeriSign while permitting VeriSign's competitors to offer competitive products -- indeed, the inability to compete against its significant competitors was the essence of VeriSign's claimed injury.[16] Even assuming the truth of VeriSign's allegations that it has been rendered less able to compete, the FAC is silent about the impact on the *market*. The Opening Brief argues that the alleged "conspiracies" had an anticompetitive effect because they resulted in a decrease in efficiency, increase in prices, and unavailability of products, but in fact the FAC contains *no* such allegations.

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[16] (ER 113, ¶34 ("Other gTLD and ccTLD registries that compete with the .com gTLD...are currently offering services similar to SiteFinder"); ER 117-18, ¶44 ("While VeriSign's offering of WLS is being delayed...[n]umerous registrars have offered and are offering such services"); ER 123-24, ¶64 ("the delay of

As the District Court found, "this is not a case in which the marketplace is small and the participants are few." (ER 96:22-23.) According to the FAC, the relevant markets are worldwide, not local. (ER 139, ¶106; 142, ¶120; 147, ¶140; 150, ¶148; 155, ¶169; 156, ¶173.) And with respect to the number of participants, VeriSign concedes that there are approximately 250 TLD competitors, many of which already offer competitive services or plan to do so.[17] (ER 106, ¶11; 109, ¶19; 112, ¶31; 113, ¶34; 117-18, ¶44; 124-25, ¶65; 125, ¶67; 140-41, ¶¶111-12; 156, ¶172.)

Recognizing that it has not pleaded the existence of any discrete market in which it could allege that ICANN's actions actually affected competitive conditions in that market, VeriSign argues instead that each of its services and features is so new and beneficial that *VeriSign's* mere absence from the market significantly harms competition. (ER 115-16, ¶38; 123-24, ¶64; 142, ¶118; 142-43, ¶121; 144, ¶126; 150, ¶150; 157-58, ¶¶179-80.) But the FAC (like VeriSign's

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VeriSign's IDN has benefited other businesses that offer similar or competitive services...").)

[17] For example, in the alleged relevant market for "the provision of services for the secondary domain name market," VeriSign alleges that WLS would compete with services offered by "others." (ER 140, ¶111.) With respect to Site Finder, VeriSign compares its feature to features provided by search engines (presumably including Yahoo, Google, and countless others) as well as features provided by Internet service providers *and* certain web browsers. (ER 148-49,

original complaint) explicitly alleges that services similar to VeriSign's *are* available to consumers, and that VeriSign has been injured *only* because it has been rendered less able to compete. While injury to a single competitor *may* be probative of harm to competition, it is given weight *only* "when the relevant market is both narrow and discrete and the market participants are few." *Les Shockley Racing,* 884 F.2d at 508-09 (citing *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1440 (9th Cir. 1988)).[18]

The markets referenced in the FAC are each quite broad. For example, with respect to WLS, VeriSign attempts to construct a narrow market by characterizing the market in which WLS would compete as one for "unregistered domain names," a subset of the market for domain names. But VeriSign knows there is no subset

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¶¶142-44.) Finally, in the alleged IDN market, VeriSign alleges "competition among TLD registries" (presumably all 250). (ER 156, ¶72.)

[18] The case law VeriSign relies on is inapposite. (Open. Br. at 65.) In each case, the market at issue truly was discrete and narrow, and thus injury to a single competitor could amount to injury to competition. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-62 (1986) (holding that "actual detrimental effects" on competition could be inferred from injury to a competitor dental provider because the market for dental care was contained within two specific localities and the members of the alleged conspiracy were the primary dental providers within those regions); *Oltz*, 861 F.2d at 1448 (holding that actual detrimental effects on competition could be inferred from injury to a competitor anesthesia service provider where the exclusion of one provider reduced competition to four providers); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 450 (9th Cir. 1979) (holding that actual detrimental effects on competition could be inferred

market for "unregistered domain names," as VeriSign argued in its motion to dismiss the antitrust claims of its WLS competitor in *RegisterSite, et. al. v. ICANN, et al.* (*See* SER 118:9-19; 179:10-17.)

VeriSign has not alleged an injury to competition by merely claiming injury to itself, and it has not alleged the injury to competition required to state a violation of Section 1 of the Sherman Act. Accordingly, the District Court's decision can be affirmed on this basis as well.

CONCLUSION

For the foregoing reasons, the District Court correctly dismissed VeriSign's FAC for failure to state a claim. ICANN respectfully requests that this Court affirm the District Court's Order granting ICANN's motion to dismiss.

Dated: February 1, 2005

Respectfully submitted,

JONES DAY

By:
Jeffrey A. LeVee

Attorneys for Defendant-Appellee
INTERNET CORPORATION FOR
ASSIGNED NAMES & NUMBERS

(continued...)

from injury to a competitor import care dealer where the market was reduced from five dealers to one dealer).

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, ICANN states that it is not aware of any related case currently pending in this Court.

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INTERNET CORPORATION FOR
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CERTIFICATE OF COMPLIANCE

Purusant to Federal Rule of Appellate Procedure section 32(a)(7)(c) and Ninth Circuit Rule 32-1, I certify that ICANN's Answering Brief is proportionately spaced, has a typeface of 14 points and contains 12,140 words.

Dated: February 1, 2005

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INTERNET CORPORATION FOR ASSIGNED NAMES & NUMBERS

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013.

On February 1, 2005, I caused to be served the document described as:

BRIEF OF APPELLEE INTERNET CORPORATION FOR ASSIGNED NAMES & NUMBERS

on the interested parties in this action.

_____ **BY (U.S. MAIL).** I placed ____ the original ____ a true copy thereof enclosed in sealed envelope(s) to the addressee(s) as follows:

__X__ **BY PERSONAL SERVICE**. I placed ___ the original __X__ true copies thereof enclosed in sealed envelope(s) and caused such envelope to be hand delivered via messenger to the offices of the addressee(s) as follows:

LAURENCE HUTT, ESQ.
ARNOLD & PORTER
777 S. Figueroa, 44th Fl.,
Los Angeles, CA 90017

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in affidavit.

______(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__X__ (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction this service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 1, 2005, at Los Angeles, California.

Elba Alonso de Ortega
Type or Print Name

Signature