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INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VERISIGN, INC., a Delaware corporation,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation,

Defendant.

Case No. CV 04-1292 AHM (CTx)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT INTERNET CORPORATION OF ASSIGNED NAMES AND NUMBERS' MOTION TO DISMISS PLAINTIFF'S FIRST, SECOND, THIRD, FOURTH, FIFTH, AND SIXTH CLAIMS FOR RELIEF IN THE AMENDED COMPLAINT PURSUANT TO RULE 12(b)(6)

[Concurrently filed with ICANN'S Third Supplemental Request For Judicial Notice]

Date: August 23, 2004
Time: 10:00 a.m.
Honorable A. Howard Matz

INTRODUCTION

The essence of VeriSign's complaint is that ICANN routinely should be liable (or at least able to be sued and subjected to expensive discovery) in antitrust for simply doing the acts that the organization was designed to perform. VeriSign alleges that ICANN solicits and considers recommendations from subsidiary entities whose membership includes VeriSign competitors (and VeriSign), that those entities sometimes make recommendations adverse to VeriSign's interests, and that ICANN's Board or officers sometimes make decisions that do not serve VeriSign's interests. ICANN happily agrees with these allegations; while they look at ICANN with VeriSign-colored lenses, they accurately describe at least some of what happens at ICANN. But these allegations certainly do not make any kind of a showing that ICANN acted as a result of being "captured" by VeriSign's competitors, and that is a fatal flaw in VeriSign's antitrust complaint.

ICANN is not a traditional standard-setting organization, but that is probably the best analogy to be found in the case law. ICANN is established to serve (where possible) as a consensus-development body for the operation of the Domain Name System ("DNS"), which serves as a sort of index for the Internet. ICANN is responsible for seeing that certain critical technical aspects of the DNS continue to function; if they did not, the usefulness of the Internet to millions of users would be significantly degraded. Because the Internet is a global and complex resource, ICANN is a complicated and sometimes messy organization, but a wide cross-section of those who depend on the Internet -- including most of the world's national governments -- have determined that it is the most appropriate (and likely to be the most effective) mechanism for this purpose.

Like any standard-setting organization, ICANN must take input from the full range of interested parties, many of which have competing private interests. Allegations that such participation has taken place is not, and cannot be as a matter of law, sufficient to allow an antitrust complaint to survive. To the contrary, the

participation of industry competitors is a necessary and indispensable part of ICANN's decision-making process, as it is of any effective standard-setting organization. Thus, the law requires that VeriSign plead that ICANN has not acted as a neutral body but has instead been captured by competitors who have used ICANN as their tool to perform anticompetitive acts. VeriSign's First Amended Complaint ("FAC") does not even approach this threshold standard and thus must be dismissed.

Further, despite its heft, nothing in the FAC should alter the Court's conclusion in its opinion dismissing VeriSign's first complaint that "VeriSign has not alleged anything more than injury to its own businesses and, therefore, does not have antitrust standing." Order of May 18, 2004 ("Order") at 13:3-4. While VeriSign 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*.

Finally, VeriSign's breach of contract claims are frivolous. Two of the claims (the second and third) are based solely on ICANN's sending of its October 3 letter. A party does not breach an obligation by simply asserting that the other party is in breach. Likewise, the "repudiation" claim is baseless: ICANN has done nothing more than insist on VeriSign's compliance with its contract and threaten to seek the remedies set forth in the contract if VeriSign continued in breach. Finally, the claim for intentional interference is legally barred because the only basis for that claim is a communication obviously protected by the litigation privilege.

ARGUMENT

I. VERISIGN HAS NOT PROPERLY ALLEGED CAPTURE OF ICANN.

A. VeriSign Must Allege Capture of the Entity with Authority.

VeriSign argues "control over the actual decision-maker within an organization [] determines liability." Opp. at 14:22-24. ICANN agrees: the case law and this Court's order make clear that VeriSign must allege capture and control of the entity whose decisions caused VeriSign's alleged injury. *See e.g. Barry v. Blue Cross of Cal.*, 805 F.2d 866, 869 (9th Cir. 1986); *see* Order at 9:8-10. VeriSign has made no such allegation.

The only entity with decisional authority in ICANN is its Board of Directors. VeriSign never actually alleges capture of the ICANN Board, and in fact the FAC acknowledges that while subsidiary entities provided the Board with information and recommendations, the Board (or ICANN staff, acting under delegated authority from the Board) in each case was the ultimate decision-maker. Although VeriSign alleges "capture" of some subsidiary entities, VeriSign never alleges that those entities made the decisions that caused "injury" to VeriSign (because none did).

Instead, the FAC concedes that the only decision-maker for ICANN is the Board (or the only people operating under delegated authority from the Board, the ICANN staff).[1] Thus, in order to state a claim, VeriSign must allege that the Board or the relevant staff employees have been "captured" by VeriSign competitors so that they are no longer a neutral body but rather an arm of those competitors. VeriSign obviously has not made any such allegations.

VeriSign's cases confirm that ICANN has articulated the correct legal standard. For example, in *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456

[1] For example, the FAC concedes that with respect to WLS, the final step in the decision-making process was a Board resolution. FAC ¶ 104. In the case of SiteFinder, the FAC alleges that ICANN's Security and Stability Advisory Committee ("SSAC") issued a report, and that ICANN (in this case, the ICANN CEO) "took action based on the SSAC report and forced VeriSign to shut down the service." FAC ¶¶ 134, 136. And, 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." FAC ¶ 163.

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 when the organization did not ratify the conduct. 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 authorized the subcommittee chairman to issue a response to "unofficial communications" without involving the subcommittee itself. *Id.* at 561. Since the subcommittee chairman took the challenged action acting with authority delegated by the ASME, proof that the chairman was a competitor was sufficient for antitrust liability.

There is no comparable delegation in the ICANN structure, for example, the SSAC or IDN Registry Implementation Committee. Those committees simply give advice that the Board considers along with comments of other ICANN participants (including VeriSign). Indeed, the only decisional authority delegated by the ICANN Board is to its staff employees, and the FAC contains no assertions that the ICANN CEO, who signed the October 3 letter with respect to VeriSign's wildcard product, was "captured" by anyone.

Hahn v. Oregon 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.* The 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. Since VeriSign has not alleged (and could not do so truthfully) that its competitors make up a majority (or even a significant part) of the ICANN board, that type of capture is absent here.

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 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, and 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.[2]

B. VeriSign Has Not Alleged Capture Of the Board.

Tellingly, while VeriSign quoted its (still deficient) "antitrust injury" allegations in an appendix, it did not do the same for its "capture" allegations. To do so would have revealed their inadequacy. VeriSign *claims* that it has alleged capture of the Board and *claims* that it has sufficiently outlined the conspiracy, but the allegations simply do not exist.

In fact, the complaint does not contain a single *factual* allegation from which one could reasonably infer that VeriSign's competitors captured ICANN's Board (or CEO). There are no allegations that the conspirators comprised a majority of the

[2] *Allied Tube* does not even address what must be pled in a Section 1 case against a standard-setting organization because the Court's focus was on whether the defendant-competitors had immunity under *Noerr*.

Board. There are no allegations as to how the three different groups of alleged co-conspirators communicated their various (and presumably separate) plots to the Board. 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 would take steps to injure VeriSign not of its own free will and judgment, but because it was "captured" by VeriSign's competitors. But these are the very kind of allegations that are essential to distinguish an actual case of "capture" of a standard-setting organization from ordinary, everyday consensus-building. In contrast to the situations where plaintiffs were excluded from a board's decision-making process, VeriSign admits that it fully participated in the ICANN process with respect to every one of the decisions that it is attacking. Other people and entities took positions that were contrary to VeriSign's positions, but so what? The mere fact that one participant's proposals were opposed by opinions expressed by other participants is obviously not sufficient to vest the party that lost the debate with an antitrust claim. 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. American Petroleum Inst.*, 846 F.2d 284, 293-294 (5th Cir. 1988).

WLS. According to VeriSign, paragraphs 98 and 103 "specifically plead[] capture of the Board of Directors of ICANN." Opp. at 15:10-12. No plausible reading of these paragraphs supports this. 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 Paper, to assert control over WLS; and (3) the Board initiated a Consensus Review Process and referred the matter to the DNSO. But, the fact that ICANN considered input from subsidiary entities does not mean that ICANN was captured by those entities or by individuals

within those organizations, even if it ultimately agrees with them in whole or part.[3] *See, e.g., Barry,* 805 F.2d at 868.

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.

The remainder of Paragraphs 98 and 103 consist of conclusory allegations that are insufficient to state a claim. Where are the allegations that votes by the *Board* were controlled or captured by ICANN's competitors? VeriSign makes no such claim because it knows that it has obligations to this Court not to present allegations that have no basis in fact. And "[a]lthough Section 1 claims are not subject to a heightened pleading standard, the plaintiff must plead facts to support each element of the claim…' The pleader 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.'" Order at 5:22-6:5 (*quoting Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987)).

IDNs. VeriSign identifies two paragraphs, 160 and 163, that it contends "specifically allege" capture of the Board. Opp. at 16:17-20. Again, the actual text of these paragraphs reveals their insufficiency. Paragraph 160 contains only

[3] To the extent that VeriSign's capture claim rests on the allegation that the Bylaws required the Board to accept the recommendations of its supporting organizations, the claim must fail because that allegation is contradicted by the Bylaws. RJN Ex. L (Feb. 12, 2002 Bylaws, Art. VI §§ 2(b), 2(e) and 2(g)); ICANN's Motion To Dismiss ("MTD") FAC at 14:14-24. A "'court will not accept as true allegations that are contradicted by facts that can be judicially noticed…'" Order at 5:9-12 (*quoting* 5A Wright & Miller, *Fed. Prac. and Proc.* § 1363 (2d. ed. 1990).

"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.

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 -- presumably, the Board typically will adopt *somebody's* recommendation -- nor the fact that VeriSign's competitors participated in the formulation of that recommendation is sufficient for capture. If the Board had adopted VeriSign's recommendation, then under this articulation of an antitrust claim, VeriSign would have been a Section 1 co-conspirator because VeriSign also participated in the process. FAC ¶ 159. The point is that participation is not the same thing as capture, and VeriSign can only allege participation.

SiteFinder. VeriSign admits that it has not alleged capture of the Board but argues that Board capture is not required since "the Board never adopted any resolution." Opp. at 13:1-4. This points out the lack of substance in this claim: nothing happened here except that the ICANN CEO, acting under delegated authority from the Board, wrote VeriSign a letter that stated his view that the implementation of this product by VeriSign breached its contract with ICANN. VeriSign alleges that it was the October 3 letter that prompted VeriSign to suspend its wildcard service, and since VeriSign does not allege that the ICANN CEO was "captured" by ICANN's competitors in his decision to send the letter, VeriSign's allegations are insufficient. FAC ¶¶ 190, 191. VeriSign's allegations regarding

subsequent events involving the SSAC obviously are beside the point because VeriSign suspended the product immediately after receiving the October 3 letter.

II. VERISIGN HAS NOT ALLEGED HARM TO COMPETITION.

VeriSign concedes that injury to competition "is an element of the antitrust violation itself and depends on adverse effects or injury to competition *in the market as a whole*." Opp. at 4:12-13 (emphasis added). But its claim of antitrust injury continues to rest *solely* on VeriSign's exclusion from the market and the alleged consequences that VeriSign and "the market" have suffered as a result.

As to the consequences to VeriSign, the removal of one competitor does not by itself equate to injury to competition. *Les Shockley Racing, Inc. v. National Hot Rod Ass'n.*, 884 F.2d 504, 508 (9th Cir. 1989) 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 entire complaint is that ICANN elected to "regulate" VeriSign while permitting VeriSign's competitors to offer competitive products.[4] Even assuming *arguendo* that these are accurate statements, the FAC is essentially silent about their impact on the *market*.

As this Court has found, "this is not a case in which the marketplace is small and the participants are few." Order at 12:22-23. According to the FAC, the relevant markets are worldwide, not local. FAC ¶¶ 106, 120, 140, 148, 169, 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. FAC ¶¶ 11, 19, 31, 34, 44, 65, 67, 111-12, 172. This is a deficiency the FAC shares with VeriSign's original complaint. *Compare orig.* Compl. ¶¶ 77-78 *with* FAC ¶¶ 77-78. VeriSign's attempt to cure this deficiency by

[4] FAC ¶ 34 ("Other gTLD and ccTLD registries that compete with the .com gTLD…are currently offering services similar to SiteFinder"); FAC ¶ 44 ("While VeriSign's offering of WLS is being delayed…[n]umerous registrars have offered and are offering such services"); FAC ¶ 64 ("the delay of VeriSign's IDN has benefited other businesses that offer similar or competitive services…").

alleging three new relevant markets is insufficient, for essentially the same reasons.[5]

Recognizing that it has not pled the existence of a discrete market in which it could allege that ICANN's actions actually affected market competition, VeriSign argues instead that each of its services is so new and beneficial that VeriSign's mere absence from the market significantly harms competition. FAC ¶¶ 38, 64, 118, 121, 126, 150, 179-80. 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 509 (citing *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1440 (9th Cir. 1988)).[6] VeriSign makes no such allegations.

Indeed, 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 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* ICANN's MTD FAC at 8:9-19 and RJN Ex. M (VeriSign's *RegisterSite* Motion to Dismiss) at 21:10-17. And during the July 12, 2004 oral

[5] 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." FAC ¶ 111. With respect to SiteFinder, VeriSign compares its service to services provided by search engines (presumably including Yahoo, Google, and countless others) as well as services provided by internet service providers *and* certain web browsers. FAC ¶ 142-44. Finally, in the alleged IDN market, VeriSign alleges "competition among TLD registries" (presumably all 250). FAC ¶ 172.

[6] *Oltz* involved the termination of a single nurse anesthetist from a local hospital. The Court held that the termination had an effect on competition because the hospital and its other anesthesia service providers "faced no appreciable competition in serving the surgical and anesthesiological needs of the Helena area." *Oltz,* 861 F.2d at 1448. Similarly, *Pinhas v. Summit Health, Ltd.* and *Angelico v. Lehigh Valley Hosp., Inc.* involved doctors who were precluded from practicing at their local hospitals. 894 F.2d 1024 (9th Cir. 1990); 184 F.3d 268, 276 (3rd Cir. 1999).

argument before Judge Collins, VeriSign again argued that the larger market for all domain names is a single market. *See* ICANN's Third Supplemental Request for Judicial Notice filed concurrently herewith, Ex. O (Transcript) at 9:7-23.[7] VeriSign's flexible market definition practices should be treated with the judicial respect they deserve.

III. NONE OF VERISIGN'S CONTRACT CLAIMS STATES A CLAIM.

A. No Express Breaches Are Alleged.

VeriSign's opposition, like its original opposition, lumps its four contract claims together and characterizes them as arising out of "years of dealing between the parties. . . ." Opp. at 15 n.20. But VeriSign's second and third claims only relate to ICANN's sending of the October 3 letter. That letter, which related to VeriSign's unannounced implementation of the wildcard only two weeks earlier, obviously does not involve "years" of activity. And VeriSign's opposition still does not explain how ICANN breached an obligation by merely asserting that *VeriSign* breached the contract.

As to the fifth and sixth claims, VeriSign argues that it has alleged that it was subject to years-long "disparate treatment," and that ICANN failed to act in an "open and transparent manner" with respect to VeriSign's ability to introduce new services. Opp. at 17:24-18:16. But VeriSign's position is that the Registry Agreement does not cover those "services" (FAC ¶ 73), and thus allegations pertaining to VeriSign's "new services" cannot form the basis of breach of contract claims. *See, e.g.*, MTD at 21:14-22:2; *Eichman v. Fotomat Corp.*, 880 F.2d 149, 164 (9th Cir. 1989). Further, most of VeriSign's claims are based on mere

[7] VeriSign's willingness to tell two different judges in the same district exactly opposite stories is expressly prohibited by the doctrine of judicial estoppel. That doctrine is invoked "not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.'" *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (*quoting Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

statements of position by ICANN, and thus cannot as a matter of law support an argument of breach.

Even though the terms of the Registry Agreement that VeriSign references are quite clear, VeriSign argues that any interpretation disputes must be "resolved in favor of VeriSign's allegation[s]" at this stage of the pleadings. *See* Opp. 18 n.14; Opp. 19 n.15. This is *not* the law (Cal. Civ. Code § 1638 (express terms of contract govern)), and *Wyler Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 663 n.10 (9th Cir. 1998),[8] does not hold otherwise. A party to a contract cannot create a viable claim by simply making up contract interpretations that are, on the face of the contract, implausible.

B. VeriSign Has Not Alleged A Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

VeriSign argues that the FAC "alleges unequivocally that ICANN has acted unfairly and arbitrarily toward VeriSign in specific areas where the contract invests ICANN with discretion that it is bound to exercise in good faith." Opp. at 19:12-19:15. But the implied covenant *does not apply* to discretionary acts expressly granted to a party under an agreement. *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 808 (1995) ("courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would . . . result in an unenforceable, illusory agreement"). This is true even where a party's discretion affects the rights of others. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342 (1992). "The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably. It is not enough to say that without the proposed implied covenant, the contract would be improvident or unwise or would

[8] *See also General Star Indem. Co. v. Schools Excess Liab. Fund*, 888 F. Supp. 1022, 1028 (N.D. Cal. 1995) (dismissing complaint with prejudice because allegations contrary to clear and explicit language of contract).

operate unjustly. Parties have the right to make such agreements." *Third Story Music*, 41 Cal. App. 4th at 809.

C. VeriSign's Complaint Does Not State A Claim for Repudiation.

To state a claim for express repudiation of the contract, VeriSign must allege a repudiation of *ICANN's* obligations.[9] *See Salot v. Wershow*, 157 Cal. App. 2d 352, 357 (1958) (repudiation is a clear, unequivocal refusal *to perform*). VeriSign must also allege that "the refusal to perform [was] of the *whole* contract . . . and [was] distinct, unequivocal and absolute." *Id.* (emphasis added) (quoting *Atkinson v. District Bond Co.*, 5 Cal. App. 2d 738, 743 (1935); *see also Golden West Baseball Co.*, 25 Cal. App. 4th 11, 49 (1994) (express repudiation must be of the *entire* agreement). VeriSign's complaint contains no such allegations.

Instead, VeriSign argues that, by threatening to declare VeriSign in breach, ICANN repudiated the agreement by "effectively" conditioning performance of a contractual duty -- the duty to recognize VeriSign as the sole operator for the Registry -- on VeriSign's surrendering to ICANN's demands. Opp. at 21:11-19. But VeriSign would have to allege that ICANN *expressly* conditioned its performance, not *argue* that one possible outcome of the threat was *effectively* to condition performance. VeriSign's argument that a threat to invoke remedies constitutes a repudiation would turn all alleged breaches into alleged repudiations. *Golden West Baseball Co.*, 25 Cal. App. 4th at 49 n.43 ("a good faith dispute [as to] some of the contract terms [is] a far cry from repudiation.").[10]

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[9] VeriSign has not alleged that ICANN rendered its performance of the Registry Agreement impossible, so there is no implied repudiation. *Taylor v. Johnston*, 15 Cal. 3d 130, 137 (1975) ("An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible") (internal citations omitted).

[10] A plain reading of the Registry Agreement demonstrates how silly this argument is. ICANN contending that VeriSign has breached the agreement could not result in an "imminent" threat to VeriSign's operation of the .com Registry since ICANN cannot remove VeriSign as registry operator until a number of events have occurred, the first (and hardly the least) of which is to initiate litigation or arbitration *and prevail*. *See* RJN Ex. E, § II.16.A.; MTD at 18 n.9.

IV. VERISIGN HAS NOT ALLEGED A VALID CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACT.

VeriSign cannot prevail on its fourth claim for interference with contract because the claim is barred by the litigation privilege.[11] The claim is based entirely on ICANN's sending of the October 3 demand letter, which is a privileged communication. A communication is privileged under California Civil Code Section 47(b) if made in, or in anticipation of, litigation by litigants or authorized participants. *Rothman v. Jackson*, 49 Cal. App. 4th 1134, 1145 (1996). Pre-litigation demand letters fall within the protection of the privilege. *See Knoell v. Petrovich*, 76 Cal. App. 4th 164, 166 (1999).

VeriSign argues that application of the litigation privilege is a fact question dependent on whether ICANN sent the October 3 letter in "good faith contemplation of going to court." Opp. at 24:14-18. But courts apply the litigation privilege as a matter of law where the operative facts are clear. *Kashian v. Harriman*, 98 Cal. App. 4th 892, 913 (2002) (citing *Rothman*, 49 Cal. App. 4th at 1139-40). Several courts have held that application of the privilege to pre-litigation demand letters is properly decided on the pleadings.[12] "Any doubt about whether

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[11] VeriSign erroneously suggests that the litigation privilege cannot bar VeriSign's breach of contract claims, but its reliance on *Olszewski* and *Navellie* reveals the correctness of ICANN's argument. Opp. at 24 n.22. *Olszewski v. Scripps Health*, 30 Cal. 4th 798, 830 (2003) (claims did not include breach of contract); *Navellier v. Sletten*, 106 Cal. App. 4th 763, 773-74 (2003) (acknowledging that *Laborde* and *Pollock* "applied the litigation privilege to bar breach of contract as well as tort claims" but distinguishing both cases on the facts).

[12] *See, e.g.*, *eCash Technologies, Inc. v. Guagliardo*, 210 F. Supp. 2d 1138, 1154 (C.D. Cal. 2001); *Knoell*, 76 Cal. App. 4th at 166; *Dove Audio, Inc. v. Rosenfeld*, 47 Cal. App. 4th 777 (1996); *Larmour v. Campanale*, 96 Cal. App. 3d 566 (1979); *Lerette v. Dean Witter Org., Inc.*, 60 Cal. App. 3d 573, 577-78 (1976). The cases VeriSign cites involve serious doubts (not present here) as to whether the pre-litigation communication was in good faith and made in serious contemplation of litigation. *See Shropshire v. Fred Rappoport Co.*, 294 F. Supp. 2d 1085 (N.D. Cal. 2003) (factual dispute as to whether defendant's threat to sue a third party, not plaintiff, in separate action was in good faith and serious consideration of litigation); *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15 (1997) (communications occurred more than five years before action was filed and never stated an intent to sue).

the privilege applies is resolved in favor of applying it." *Kashian*, 98 Cal. App. 4th at 913 (citing *Adams v. Superior Court*, 2 Cal. App. 4th 521, 529 (1992)).

VeriSign's FAC and the documents presented for judicial notice make clear that ICANN *was* seriously and in good faith contemplating its legally viable claims against VeriSign when it sent the letter. MTD at 23:7-21. And in any case, a party's motives for threatening litigation are irrelevant to whether the privilege applies. *See Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990); *Kashian*, 98 Cal. App. 4th at 913 ("application of the privilege does not depend on the publisher's 'motives, morals, ethics or intent.'" (quoting *Silberg*, 50 Cal. 3d at 220)).[13]

CONCLUSION

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

Dated: August 12, 2004 JONES DAY

By: _____
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

[13] VeriSign does not respond to ICANN's argument that VeriSign's claim for interference with contract must fail because ICANN's assertion of its contract interpretation cannot constitute a tort. VeriSign's citation to *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 56 (1998), is consistent with ICANN's position that, if the October 3 letter constituted an interference with a subsequent third-party contract at all, the interference was "such a minor and incidental consequence and so far removed from defendant's objective that as against the plaintiff the interference may be found not to be improper.'" *See* MTD at 22 n.14.

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