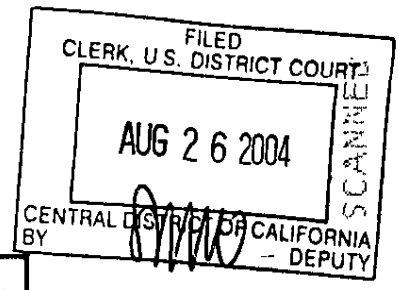

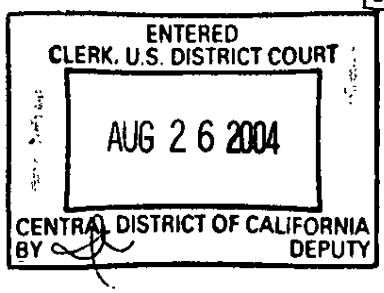

Priority ✓
Send ✓
Enter ✓
Closed ✓
JS-5/JS-6 ✓
JS-2/JS-3 —
Scan Only —

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VERISIGN, INC.,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

CASE NO. CV 04-1292 AHM (CTx)

ORDER DISMISSING ANTITRUST CLAIM WITH PREJUDICE AND DECLINING TO EXERCISE SUPPLEMENTAL JURISDICTION OVER REMAINING STATE LAW CLAIMS

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

INTRODUCTION AND PROCEDURAL HISTORY

On February 26, 2004, VeriSign filed a complaint against Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") alleging causes of action for: (1) violation of Section 1 of the Sherman Act, (2) injunctive relief for breach of contract, (3) damages for breach of contract, (4) interference with contractual relations, (5) specific performance of contract and injunctive relief, (6) damages for breach of contract, and (7) declaratory judgment. Subject matter jurisdiction was premised on federal questions arising under the Sherman Act and the Declaratory Judgment Act. Compl. ¶ 8.

82

On May 18, 2004, the Court granted ICANN's motion to dismiss the Complaint. The Court held that VeriSign had failed to sufficiently allege an antitrust conspiracy and an injury of the type the antitrust laws were designed to protect. The Court stated that if VeriSign failed to plead a viable antitrust claim in any First Amended Complaint ("FAC") or chose not to file an FAC, the Court would dismiss the Sherman Act claim with prejudice and decline to exercise supplemental jurisdiction over the state law claims. The Court also vacated ICANN's special motion to strike the state law claims as strategic lawsuits against public participation, pursuant to Cal. Civ. Proc. Code Section 425.15, subject to renewal at a later date if VeriSign did file a FAC alleging a viable federal claim.

On June 14, 2004, VeriSign filed a FAC, adding nearly 30 pages of allegations to its Sherman Act claim, *see* ¶¶ 85-182. Now ICANN moves to dismiss claims one through six of the FAC pursuant to Fed. R. Civ. P. 12(b)(6), and also renews its motion to strike the second through sixth claims. The Court GRANTS ICANN's motion to dismiss the antitrust claim, this time with prejudice, and declines to exercise supplemental jurisdiction over the remaining state law claims.

FACTUAL ALLEGATIONS

ICANN is a non-profit corporation that was organized in 1998 "in response to a plan by the [Department of Commerce] to introduce competition into the field of domain name registration, among other objectives." FAC ¶ 17. The Internet is comprised of numerous top level domains ("TLDs"). Some are generic TLDs ("gTLDs") like .com, .net, .gov, and .biz, while others are country code TLDs ("ccTLDs") such as .uk and .ca.[1] *Id.* ¶ 11. Each TLD has a "registry"

[1] ICANN does not claim to have any power to regulate ccTLDs. *Id.* ¶ 78. Nonetheless, 11 of the approximately 240 ccTLDs have entered into registry

or operator, a single entity responsible for keeping the records and a directory of all the domain names registered within that TLD. *Id.* ¶ 14. A person seeking to register a domain name within any given TLD must do so through a "registrar" for that TLD. *Id.* ¶ 15. There are approximately 250 TLDs throughout the world that compete with each other, through their respective registries, to attract registrars and registrants. *Id.* ¶¶ 11, 31.

One of ICANN's functions is to enter into registry agreements that authorize an entity to act as the registry for a particular gTLD. *Id.* ¶ 19. The FAC describes how ICANN functions:

> ICANN is governed by and acts through an international Board of Directors that is elected by members of various constituent groups and supporting organizations within ICANN. As more specifically alleged below, among the members of these groups are operators of gTLDs that compete with each other and with VeriSign; domain name registrars that are present or potential competitors of each other and of VeriSign for certain services; and foreign governments and foreign registries that have ccTLDs that compete with the gTLD registries operated by VeriSign. ICANN frequently carries out its activities, including the conduct alleged herein, through the collective action of its supporting organizations (which, in turn, are comprised of various constituent groups). In fact, in certain circumstances, ICANN was bound by its By-Laws to follow the actions of its supporting organizations.

Id. ¶ 17.

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." ICANN is essentially comprised of a Board of Directors and three

---

agreements with ICANN. *Id.* ¶ 81. "ccTLDs" compete with other TLD registries. *Id.* ¶ 19.

advisory bodies called "supporting organizations." Each of the supporting organizations has primary responsibility for developing and recommending policy in its area of expertise. Those areas are: (1) Domain Name Supporting ("DNSO"); (2) Address Supporting ("ASO"); and (3) Protocol Supporting ("PSO"). *Id.* ¶ 91; Def.'s Supplemental Req. for Judicial Notice, Exh. L (Bylaws), Art. VI, §§ 1(a), 2(b).[2]

In 2001, VeriSign and ICANN entered into a registry agreement authorizing VeriSign to act as the sole registry for the ".com" gTLD. FAC ¶¶ 21-22. Under the agreement, VeriSign must provide certain "registry services" to accredited registrars in accordance with ICANN's specifications. *Id.* ¶ 23. The core of this dispute is that ICANN allegedly has taken actions to: (1) prohibit or otherwise restrict VeriSign from offering services valuable to Internet users,[3] (2) impose improper conditions on the offering of such services by VeriSign, (3) regulate and set the prices at which such services may be offered, and/or (4) delay the introduction of new services. *Id.* ¶ 1. Because ICANN has allegedly blocked, delayed, and restricted the "value-added" services VeriSign has sought to offer its customers, VeriSign is "at a competitive disadvantage" since other TLD registries have been able to introduce similar services without restriction or delay. *Id.* ¶¶ 77-78. VeriSign claims that ICANN's various actions have breached their 2001 registry agreement, *id.* ¶¶ 188-200, 207-222; interfered with a contract VeriSign had with an unidentified third party, *id.* ¶¶ 201-206; and violated the antitrust

---

[2] Over Plaintiff's objection, the Court takes judicial notice of Exhibit L, ICANN's bylaws. The bylaws are a proper subject of judicial notice because VeriSign references them in the FAC (*e.g.*, ¶¶ 17, 86, 95, 102) and their authenticity is not disputed. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

[3] In particular, the services to which VeriSign refers are Site Finder (described at ¶¶ 32-33 of the FAC), Wait Listing Service (¶¶ 39-40), ConsoliDate (¶¶ 47-49), Internationalized Domain Names (¶¶ 55-57), and the Incentive Marketing Program (¶ 65).

laws, *id.* ¶¶ 83-187.

APPLICABLE LEGAL STANDARD

On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. *Haddock v. Bd. of Dental Examiners*, 777 F.2d 462, 464 (9th Cir. 1985). On the other hand, dismissal is proper where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989) (employing *Conley v. Gibson* standard). Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch*, 14 F.3d at 454 (9th Cir. 1994) (*citing*

Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 n.3 (1st Cir. 1991)). If the documents are not physically attached to the complaint, they may be considered if their "authenticity ... is not contested" and "the plaintiff's complaint necessarily relies" on them. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998). "The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading." 5C Wright & Miller, *Fed. Prac. and Pro.* § 1363 (3d. ed. 2004).

DISCUSSION

I. First Cause of Action: Antitrust Violation

VeriSign's antitrust claim is brought under Section 1 of the Sherman Act, which states, in pertinent part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The elements required to allege a Section 1 violation are: "(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).[4] Although Section 1 claims are not subject to a heightened pleading standard, the plaintiff must plead facts to support each element of the claim. Von Kalinowski, Sullivan & McGuirl, *Antitrust Law and Trade Regulation* § 164.01 (Matthew Bender 2002). "The pleader may not evade

[4] The parties both treat this case under the "rule of reason" standard rather than the "per se" rule reserved for presumptively illegal practices such as price-fixing, and the Court does the same. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 n.3 (9th Cir. 1988).

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. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987).

Section 4 of the Clayton Act, pursuant to which VeriSign seeks to recover treble damages for the alleged Sherman Act violation, authorizes a private individual to bring suit under the antitrust laws if that individual has been "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. The Supreme Court has interpreted this language to mean that "Plaintiffs 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). 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). 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., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995), *cert. denied*, 516 U.S. 987 (1995) (emphasis in original).

VeriSign alleges that "[t]he conduct of ICANN in restricting and purporting to 'regulate' non-Registry Services offered or proposed to be offered by VeriSign, and in delaying the introduction and setting the prices or terms of those services, represents the collective and conspiratorial acts of ICANN and existing and potential competitors of VeriSign, including competitors who are members of the constituent groups and supporting organizations of ICANN, in

the relevant markets and submarkets as defined below." FAC ¶ 84. The specific services to which VeriSign refers in its antitrust claim are the Wait Listing Service ("WLS"), the Site Finder Service ("SFS"), and Internationalized Domain Names ("IDN"). *Id.* ¶ 88. VeriSign alleges that ICANN's conduct "has deprived consumers of a beneficial new service and VeriSign of revenues and profits it would generate..." *Id.* ¶ 38; *see also* ¶¶ 46, 54, 64, 67. By making "the registration of domain names within the .com gTLD more desirable and attractive," these new services are alleged to be important to enable "VeriSign to compete more effectively with operators of competitive gTLD and ccTLD registries that are offering or intend to offer a similar service." *Id.* ¶ 67; *see also* ¶ 31. While VeriSign has been blocked, delayed, or restricted from offering these new services, other gTLD registries regulated by ICANN "have been allowed to offer and market similar, competitive services..." *Id.* ¶ 77; *see also* ¶¶ 34, 44, 64, 67. In particular, VeriSign alleges that ICANN has facilitated ".museum," one of its gTLD competitors, in offering a service similar to VeriSign's Site Finder. *Id.* ¶ 34. In addition, most ccTLD registries, which constitute some 240 out of 250 of all TLDs, are not regulated by ICANN and "are free to offer, and are offering, new and improved services to registrars and registrants..." *Id.* ¶¶ 11, 19, 78.

A. Conspiracy Allegations

ICANN argues that VeriSign has not properly pled a conspiracy because it has not alleged that its competitors controlled the relevant ICANN decision-makers: the Board of Directors and ICANN's President.

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.

Paragraph 85 of the FAC alleges that "[t]he constituent groups and supporting organizations of ICANN...are substantially controlled by existing and potential competitors of VeriSign..." *See, e.g., id.* ¶¶ 92-102 (Domain Name Supporting Organization ("DNSO") controlled by competitors and issued policy paper and report to Board regarding WLS), ¶¶ 130-135 (Security and Stability Advisory Committee ("SECSAC") controlled by competitors and issued recommendation to Board regarding regulation of SFS); ¶¶ 158-161 (Registry Implementation Committee ("RIC") controlled by competitors and proposed guidelines to Board for IDN).

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. *See, e.g., id.* ¶¶ 98, 102 (Board adopted DNSO proposals to regulate WLS); ¶ 138 (Board "never adopted a lawful resolution regulating Site Finder");[5] ¶ 163 (Board adopted IDN guidelines proposed by RIC).

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. VeriSign alleges that Board approval was a foregone conclusion because of:

- ICANN's unique bottom-up policy development process by constituency groups of competitors (¶ 86);...
- ...the requirement of ICANN's Bylaws that the constituency groups' policy decisions be followed by the Board of Directors of ICANN (¶¶ 86, 95, 102);

---

[5] ICANN's President, rather than the Board, sent VeriSign a letter requiring it to close its Site Finder Service ("SFS"). FAC ¶ 36. The Court takes judicial notice of this October 3, 2003 letter, which VeriSign refers to as the "Suspension Ultimatum." Def.'s Req. for Judicial Notice, Exh. F. The letter is a proper subject of judicial notice because it is referenced in the FAC and its authenticity is not disputed. *Branch, supra.* Since the Board never took action regarding SFS, the allegation that one of the SFS "co-conspirators" held a seat on the Board is irrelevant. *Id.* ¶ 138.

- ...ICANN's dependence on VeriSign's competitors for its funding (¶ 93)...
- [and] specific admissions by ICANN's President that the policy development process at ICANN was subject to capture for precisely the reasons stated above and that competitors working through ICANN used its processes to "hamstring their competitors." (¶¶ 86, 90, 95).

Pl.'s Opp'n, 2:7-19.

VeriSign's contentions are deficient. First, there is nothing inherently conspiratorial about a "bottom-up" policy development process that considers or even solicits input from advisory groups. *See 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, 868-69 (9th Cir. 1986) (advisory committee's comments and suggestions did not establish requisite control over Board's decisions). "Participation" is not enough to give rise to antitrust liability; *control* is required.

Second, the Bylaws in effect at the time of these events, which the Court judicially notices, do *not* require the Board to accept the advisory bodies' policy recommendations. Rather, the Bylaws provide that:

> 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 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.*[6]

Exh. L, Art. VI, § 2(e) (emphasis added). If the Board rejects a policy

---

[6] According to these Bylaws, each of the three Supporting Organizations selects three Directors. Exh. L, Art. 5, § 4.

recommendation, Section 2(f) provides the procedure for returning it to the Supporting Organization for further consideration. If after reconsideration, the Supporting Organization still does not provide an acceptable recommendation, "the Board may initiate, amend or modify and then approve a specific policy recommendation" if prompt action is necessary. *Id.* § 2(f). Article VI, Section 2 of the bylaws does not "require" the Board to approve the proposals and "[t]he district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed..." 5C Wright & Miller, *Fed. Prac. and Pro.* § 1363 (3d. ed. 2004).

Third, VeriSign alleges in Paragraph 93 that ICANN "has been seriously underfunded," that members of the Registrar Constituency "have provided the single largest source of ICANN's funding," and that "one or more of the WLS co-conspirators have offered to fund expenses of ICANN in defense of the claims made in this litigation." VeriSign alleges that the "WLS co-conspirators" are part of the Registrar Constituency, which provides the majority of ICANN funding. FAC ¶ 93. There are approximately 175 registrars in the United States, *id.* ¶ 15, yet only six are alleged to be "WLS co-conspirators." *Id.* ¶ 90. Nowhere does VeriSign allege that these six conspirators provide the majority of ICANN's funding. Nor has VeriSign alleged that ICANN accepted the alleged offer to defray the cost of this litigation.

Fourth, VeriSign makes too much of the fact that the President of ICANN stated in his February 2002 report that ICANN's consensus decision-making process was "too exposed to capture by special interests" and that the supporting organizations pushed ICANN "to perform only those policy functions that hamstring their competitors." *Id.* ¶ 86; *see also* ¶ 95. That statement did not refer to any of the particular competitors or registry services at issue in this lawsuit. In addition, it was made several months before VeriSign was prepared to offer WLS, in August 2002 (*id.* ¶ 44), well before VeriSign received the Suspension

Ultimatum regarding SFS, in October 2003 (*id.* ¶ 36), and before the Board enacted IDN regulations harming VeriSign, in June 2003 (*id.* ¶ 164). However applicable the President's concerns still may have been at those later times, what is most deficient about these allegations is that the President's statements were about lower-level processes. *Nowhere does the FAC allege that he admitted that the Board itself had been captured.* Moreover, 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. *See County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1156-57 (9th Cir. 2001) ("As the Eleventh Circuit has noted, simply because the 'board is likely to follow the recommendations of the medical staff does not establish, or even reasonably suggest, the existence of a conspiracy.' . . . Even though the Board has never disagreed with [the competitors'] recommendation . . . the Board did not merely 'rubber stamp' [the competitor's] recommendation.") (citation deleted; emphasis added).

In an attempt to overcome the foregoing defects in the FAC's factual allegations, VeriSign cites language from several cases that are either distinguishable or inapposite. The case VeriSign relies on most is *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). There, plaintiff was one of more than 90,000 members of defendant, a non-profit membership corporation that promulgated codes for engineering and manufacturing standards. Defendant

sent a letter to a competitor of plaintiff. The letter was on the association's stationery and was signed by one of its employees. It basically declared plaintiff's product to be unsafe. The competitor then used the letter to dissuade third parties from buying plaintiff's product. The association's subcommittee that approved the letter had as its vice-chairman someone who just happened to be the vice-president of the competitor; indeed, that person orchestrated the preparation and mailing of the letter by the association. Plaintiff's Sherman Act Section 1 case against the association-defendant went to trial. Plaintiff requested that the jury be instructed that defendant could be liable for its agents' conduct if they acted within the scope of their apparent authority. The court rejected plaintiff's request. Nevertheless, the jury returned a verdict for plaintiff and on appeal, the Supreme Court held that plaintiff's proffered instruction was sound.

VeriSign cites *Hydrolevel* for the propositions that "an organization could be liable for conspiring with plaintiff's competitor, notwithstanding that the organization itself did not compete with plaintiff" and that "[i]t did not matter that the decision-maker was not the Board of the association..." Pl.'s Opp'n, 13:10-25. *Hydrolevel* is really about the appropriate instruction for the derivative liability of an employer for antitrust violations committed by its employees. Moreover, *Hydrolevel* is distinguishable on its facts. First, unlike what is alleged here, the defendant-association's subcommittee was clearly "captured" by the plaintiff's competitor whose vice-president manipulated the association into approving and circulating the terribly injurious attack on plaintiff's product. Second, it is not correct that *Hydrolevel* holds that Board action is irrelevant. Indeed, if the association had not expressly delegated final decision-making authority to the subcommittee, the letter would not have been issued. In short, the association's conduct was a *sine qua non* to the case and the Supreme Court's opinion. Third, *Hydrolevel* went to trial; standards for pleading a conspiracy claim were not at issue.

In *Hahn*, *supra*, the district court granted summary judgment to defendant, an association of physicians. The issue on appeal was whether those members of the association's board who were physicians and who did not compete directly with the podiatrist-plaintiffs nevertheless "shared similar economic interests with [other] board members and . . . physicians who did compete directly," so as to permit the trier of fact to conclude that the "board as a whole may have acted in the anticompetitive interests of . . . [the] member physicians. . . ." *Hahn*, 868 F.2d at 1030. To answer that question the Ninth Circuit articulated this test: "[T]he proper inquiry is whether [decision-makers] sharing substantially similar economic interests collectively exercised control of [the organization] under whose auspices they have reached agreements which work to the detriment of competitors." *Id.* at 1029. The court found that plaintiff had adduced enough such evidence. I apply the *Hahn* test here, yet reach the opposite conclusion, because *Hahn* is factually distinguishable in a critical respect. In *Hahn*, the plaintiff adduced evidence which established that physicians, many of whom competed with podiatrists, "formed a majority of the [defendant's] board." *Id.* at 1029. There is no such allegation here. *See Podiatrist Ass'n v. La Cruz Azul De Puerto Rico, Inc.*, 332 F.3d 6, 14 (1st Cir. 2003) (upholding summary judgment for defendant in a Sherman Act Section 1 case where plaintiffs could not establish that their competitors controlled the defendant's board and noting "The corporate bylaws make manifest that board action requires a majority vote and the . . . [competitors, who held eight out of nineteen seats on the board] simply do not constitute a majority.")

Finally, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), the trade association involved in the underlying facts was not a party and the opinion does not even deal with the elements of a Sherman Act Section 1 claim; the issue and the holding concern the scope of the *Noerr* doctrine. *Allied Tube* has no bearing here.

To summarize, 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. *See Barry, supra.* Nor has VeriSign pled with requisite specificity facts that, even circumstantially, establish that ICANN's Board was a "rubber stamp." *County of Tuolumne, supra.* For all these reasons, VeriSign has not sufficiently alleged a Section 1 conspiracy.

B. Antitrust Standing

Given the foregoing conclusion, which requires dismissal of the antitrust claim, I need not analyze whether VeriSign has pled facts establishing "antitrust injury" and standing, and I choose not to.

II. Second Through Seventh Causes of Action: Breach of Contract, Interference With Contractual Relations, and Declaratory Judgment

Because the Court dismisses Plaintiff's antitrust claim, the only cause of action arising under federal law, the Court declines to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3). Thus, the breach of contract causes of action (claims 2, 3, 5, and 6), the interference with contractual relations cause of action (claim 4), and the request for a declaratory judgment (claim 7)[7] are DISMISSED without prejudice to being filed

---

[7] VeriSign also asserts that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 2201 (the Declaratory Judgment Act). FAC ¶ 7. The Declaratory Judgment Act "merely creates a remedy in cases otherwise within federal jurisdiction," and "is not an independent basis of federal question jurisdiction." *See* Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* § 2:132 (The Rutter Group 2004); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983). The test is whether the underlying claim that the defendant has threatened to pursue in litigation and that plaintiff seeks to avoid

in state court. Judicial resources will not be wasted as the case is in its early stages and the Court has not had occasion to address any of the state law claims. Plaintiff will not be prejudiced since the statute of limitations is tolled during the time the state law claims were pending in federal court and for an additional period of at least 30 days. 28 U.S.C. § 1367(d); Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* § 2:161 (The Rutter Group 2004).

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Defendant's motion to dismiss claim one of the FAC, with prejudice.[8] The Court declines to exercise supplemental jurisdiction and DISMISSES the second through seventh claims, without prejudice to their being filed in state court. The Court VACATES Defendant's renewed motion to strike claims two through six.[9]

In light of this ruling, the Court need not rule on the parties' various remaining requests for judicial notice and related disputes.

Within seven calendar days of this Order, Defendant shall serve and lodge a proposed judgment.

IT IS SO ORDERED.

DATE: August 26, 2004

A. Howard Matz
United States District Judge

---

through a declaratory judgment arises under federal law. *Id.* Here, it does not. VeriSign merely seeks the Court's interpretation of certain key provisions of the parties' 2001 registry agreement, presumably to avoid a breach of contract claim from ICANN.

[8] Docket No. 70.

[9] Docket No. 69.