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ASSIGNED NAMES AND NUMBERS

11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14
15 VERISIGN, INC., a Delaware
corporation,

16 Plaintiff,

17 v.

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

20 Defendant.
21

Case No. CV 04-1292 AHM (CTx)

**REPLY IN SUPPORT OF
DEFENDANT INTERNET
CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS' SECOND
SUPPLEMENTAL REQUEST
FOR JUDICIAL NOTICE**

[Concurrently filed with Reply in
Support of ICANN's Motion to
Dismiss]

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

1 **INTRODUCTION**

2 VeriSign contends that ICANN's request for judicial notice is "entirely
3 improper on a motion to dismiss, where the factual allegations contained in the
4 complaint must be accepted as true." Opp. to Second Supp. RJN at 3:20-24. That
5 is not the law. As this Court noted in its May 18, 2004 order ("Order") dismissing
6 VeriSign's original complaint, a "court will not accept as true allegations that are
7 contradicted by facts that can be judicially noticed or by other allegations or
8 exhibits attached to or incorporated in the pleading." Order at 5:9-12 (*quoting* 5A
9 Wright & Miller, *Fed. Prac. and Proc.* § 1363 (2d ed. 1990)).

10 VeriSign makes several allegations that are directly contradicted by
11 documents referenced in the First Amended Complaint ("FAC"). A plaintiff cannot
12 avoid dismissal by making false allegations about a relevant document and then
13 failing to attach the document as an exhibit. Hence, a court may, on a motion to
14 dismiss, consider documents referenced in a complaint whether or not those
15 documents are attached as exhibits to the complaint. The ICANN Bylaws (Exhibit
16 L) and the September 22, 2003 message from the Security and Stability Advisory
17 Committee to the ICANN Board ("SSAC message") (Exhibit N) are both
18 referenced in the FAC and, therefore, can be judicially noticed.

19 The *Pool.com* Statement of Claim (Exhibit K) and VeriSign's Motion to
20 Dismiss in the *RegisterSite* case (Exhibit M) are relevant to ICANN's motion and
21 can be judicially noticed because they are public records.

22 **ARGUMENT**

23 **The Court Can Take Judicial Notice Of Exhibits L, and N**
24 **Because They Are Referenced In The Complaint.**

25 VeriSign seems to think that just because it has made an allegation, the court
26 must accept it as true for purposes of deciding ICANN's motion to dismiss. That is
27 not correct. A Court is not required to accept allegations that are directly
28 contradicted by documents referenced in the pleading. *See e.g. Steckman v. Hart*

1 *Brewing, Inc.*, 143 F.3d 1293, 1295-96 (1998); *See also* Order at 5:9-12. Indeed, if
2 the law were otherwise, a plaintiff could avoid dismissal of an otherwise deficient
3 claim simply by failing to attach relevant documents. Thus, on a motion to dismiss,
4 a court can consider documents referenced in the complaint whether or not they are
5 attached as exhibits so long as the authenticity of the documents is not contested.¹
6 *See e.g. Parrino v. FHP, Inc.*, 146 F.3d 699, 706 n.4 th(9th Cir. 1998); *In re*
7 *Northpoint Communs. Group Inc., Secs. Litig. & Consol. Cases*, 221 F. Supp. 2d
8 1090, 1994 (N.D. Cal. 2002).

9 Both the ICANN Bylaws and the SSAC message are referenced in the FAC
10 and relied on by VeriSign to support its claim. For example, VeriSign alleges that
11 "[d]ue to the requirements of the then existing Bylaws, the Board of ICANN had to
12 adopt and approve the substance of the DNSO's position..." FAC ¶ 102. But, the
13 Bylaws do not contain any such requirement. Indeed they provide just the opposite:
14 "No recommendation of a Supporting Organization shall be adopted unless the
15 votes in favor of adoption [are] sufficient." RJN Ex. L (Feb. 12, 2002 Bylaws) at
16 Art. VI § 2(e); *see also id.* at §§ 2(b), 2(g) and 2(f)." This provision is not subject
17 to differing interpretations, as VeriSign contends; Its meaning is obvious.

18 With respect to the SSAC Message, VeriSign characterizes it as a final
19 "report" that, according to the FAC, should have included but "d[id] not include any
20 facts concerning the effects of SiteFinder or any analysis supporting the report's
21 opinions and recommendations that the service be immediately terminated." FAC
22 ¶ 134. This characterization is wholly inaccurate and misleading. First, the
23 message was not a final report but an announcement that an investigation was just
24 underway. RJN Ex. N. Indeed the date of the document establishes that it was
25 posted only days after VeriSign deployed its SiteFinder product. Second, the
26 message does not recommend that the service be "immediately terminated."

27 ¹ *Skinner v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 2003 WL 23174478 (N.D. Cal. Dec. 29,
28 2003), cited by VeriSign, is inapposite because the documents sought to be judicially noticed were not
referenced in the complaint.

1 Rather, it "call[ed] on VeriSign to voluntarily suspend the service and participate in
2 the various review processes now underway." *Id.* at 2.

3 Since both the Bylaws and the SSAC Message are not only referenced in the
4 FAC, but relied on by VeriSign for its claims, the Court can consider both
5 documents in evaluating the truth of VeriSign's allegations and in deciding
6 ICANN's motion.

7 **The Court Can Take Judicial Notice of Exhibits K and M**
8 **Because They Are Public Records.**

9 The Statement of Claim filed in *Pool.com Inc. v. ICANN*, Court File No. 03-
10 CV-24621 (Sup. Ct. Of Justice, Ontario, Canada Jul. 8, 2003) (Exhibit K) and
11 VeriSign's Motion to Dismiss in *RegisterSite.com v. ICANN et. al.*, Case No. CV
12 04-1368 (CWx) (C.D. Cal. July 12, 2004) (Exhibit M) can be judicially noticed
13 because they are public records. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668,
14 689-90 (9th Cir. 2001); *In re Stac Electronics Sec. Litig.*, 89 F.3d 1399, 1405 (9th
15 Cir. 1996). VeriSign argues that the documents are irrelevant and ICANN is
16 improperly offering them for the truth of the matter asserted. Neither is true.

17 The *Pool.com* Statement is relevant to ICANN's motion because the
18 existence of that lawsuit directly contradicts VeriSign's allegations that Pool.com
19 captured ICANN's decisionmaking process and persuaded ICANN to issue a
20 resolution that favored Pool.com and its "co-conspirators." Pool.com has sued
21 ICANN because it is dissatisfied with the decision that ICANN made with respect
22 to WLS. Obviously, if ICANN had in fact been captured by Pool.com, Pool.com
23 would not be unhappy with the decision that ICANN made. ICANN is not offering
24 the Statement for the truth of Pool.com's allegations, but for the mere existence of
25 the lawsuit, a fact not in dispute.

26 VeriSign's Motion to Dismiss in the *Registersite* case is relevant because it
27 proves that VeriSign is playing "fast and loose" with the courts in violation of the
28 doctrine of judicial estoppel. For purposes of *this* litigation, VeriSign has argued

1 that the market for domain names is comprised of two separate markets, the market
2 for unregistered domain names and the market for registered domain names. In the
3 *Registersite* case, however, where it behooved VeriSign to advocate as large a
4 relevant market as possible, VeriSign argued the exact opposite. RJN Ex. M
5 (VeriSign's *RegisterSite* Motion to Dismiss) at 21:10-17.

6 The doctrine of judicial estoppel prohibits this type of conduct. That doctrine
7 is invoked "not only to prevent a party from gaining an advantage by taking
8 inconsistent positions, but also because of general considerations of the orderly
9 administration of justice and regard for the dignity of judicial proceedings,' and to
10 'protect against a litigant playing fast and loose with the courts.'" *Hamilton v. State*
11 *Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (quoting *Russell v. Rolfs*,
12 893 F.2d 1033, 1037 (9th Cir. 1990)). To enforce this doctrine, a court is entitled to
13 consider -- indeed it must consider -- pleadings filed by parties in other litigation.

14 CONCLUSION

15 For all of these reasons, as well as the reasons set forth in its Request,
16 defendant ICANN respectfully requests that this Court grant its Request in full.

17
18 Dated: August 12, 2004

JONES DAY

19
20 By: _____
21 Jeffrey A. LeVee

22 Attorneys for Defendant
23 INTERNET CORPORATION FOR
24 ASSIGNED NAMES AND NUMBERS
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