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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 REGISTERSITE.COM, an Assumed
Name of ABR PRODUCTS INC., a
12 New York Corporation, et al.,

13 Plaintiffs,

14 v.

15 INTERNET CORPORATION FOR
ASSIGNED NAMES AND
16 NUMBERS, a California corporation;
VERISIGN, INC., a Delaware
17 Corporation; NETWORK
SOLUTIONS, INC., a Delaware
18 Corporation; ENOM, INC., a
Washington Corporation; ENOM
19 FOREIGN HOLDINGS
CORPORATION, a Washington
20 Corporation; and DOES 1-10,
inclusive,

21 Defendants.
22

Case No. CV 04-1368 ABC (CWx)

**REPLY MEMORANDUM IN
SUPPORT OF MOTION BY
DEFENDANT VERISIGN, INC.
TO DISMISS PLAINTIFFS'
ELEVENTH CLAIM FOR
RELIEF FOR IMPROPER
VENUE**

Date: July 12, 2004
Time: 10:00 a.m.
Courtroom: 680 – Roybal Fed. Bldg.
Hon. Audrey B. Collins

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RULES

Fed. R. Civ. P. 12(b)(3).....2

Fed. R. Civ. P. 12(b)(6).....2

1 Defendant VERISIGN, INC. (“VeriSign”) submits this Reply Memorandum in
2 support of its Motion To Dismiss Plaintiffs’ Eleventh Claim for Relief for Improper
3 Venue (the “Motion”).

4 **I. INTRODUCTION**

5 In their Opposition, Plaintiffs attempt to complicate VeriSign’s legally and
6 factually straightforward Motion by focusing on *ICANN*’s agreements with various
7 registrars and on *ICANN*’s contract with VeriSign, which have absolutely no bearing on
8 the Eleventh Claim for Relief. Plaintiffs’ Eleventh Claim concerns a *single* contract —
9 the Registry-Registrar Agreement (the “RRA”) between Plaintiffs and *VeriSign* —
10 containing a *single* forum selection clause.

11 By inappropriately focusing on ICANN’s multiple, irrelevant agreements,
12 Plaintiffs attempt to cloud the only issues that are relevant to the determination of
13 VeriSign’s Motion, almost none of which Plaintiffs have actually addressed, much less
14 disputed. For example, Plaintiffs do not dispute, and therefore *concede*, the following
15 dispositive legal and factual issues:

- 16 • Plaintiffs freely entered into and are bound by the RRA. (Mot. at 2;
17 FAC ¶ 15.3, Ex. A.)
- 18 • Plaintiffs were aware of and agreed to the Virginia forum selection
19 clause in the RRA. (FAC ¶ 15.3, Ex. A.)
- 20 • The Eleventh Claim for Relief is subject to the Virginia forum selection
21 clause. (Mot. at 4-6.)
- 22 • Forum selection clauses are *prima facie valid* and Plaintiffs bear a
23 “heavy burden of proof” to show why the RRA’s forum selection
24 clause should not apply. (*Id.*)
- 25 • The RRA was *not* procured by fraud or overreaching. (*Id.* at 6-8.)
- 26 • The RRA did *not* result from “overweening bargaining power” on the
27 part of VeriSign. (*Id.* at 7-8.)
- 28 • Subjecting all disputes relating to the standardized RRA to a single
forum applying a single body of law promotes consistency and
predictability in the interpretation and enforcement of the Agreement,
to the benefit of *all* registrars and VeriSign. (*Id.* at 3, 11-12.)

- 1 • Neither Plaintiffs nor their counsel reside in California; therefore,
2 litigating the Eleventh Claim in Virginia is no less convenient than
3 litigating it in California. (*Id.* at 8-9.)
- 4 • The RRA’s forum selection clause is reasonable and comports with
5 public policy. (*Id.* at 9-12.)

6 These concessions alone warrant the granting of VeriSign’s Motion.

7 Plaintiffs’ diversionary tactic of focusing on ICANN’s agreements, which are not
8 at issue in the Eleventh Claim, should not deter the Court from ruling in VeriSign’s
9 favor on the clear-cut issue presented by this Motion. Nor do Plaintiffs’ arguments
10 under the aegis of “judicial economy” alter this outcome because, as a matter of law,
11 they are not a proper basis for ignoring a contractually agreed upon forum selection
12 clause. Moreover, enforcement of the RRA’s forum selection clause will not
13 improperly undermine judicial economy.

14 Consequently, if the Eleventh Claim is not dismissed pursuant to VeriSign’s
15 accompanying motion under Federal Rule 12(b)(6), it should be either dismissed under
16 Rule 12(b)(3) for improper venue or severed and transferred to the Eastern District of
17 Virginia.

18 **II. ARGUMENT**

19 **A. Plaintiffs’ Generalized Discussion Of “Judicial Economy”** 20 **Is Irrelevant In The Face Of A Valid Forum Selection Clause**

21 Plaintiffs do not dispute that the *Bremen* standard for enforcing forum selection
22 clauses, which has been uniformly followed by California federal and state courts, is the
23 controlling legal standard for this Motion. Under the *Bremen* standard, forum selection
24 clauses are *prima facie valid* and *should be enforced* unless the resisting party meets its
25 heavy burden of showing that “enforcement would be unreasonable and unjust, or that
26 the clause was invalid for such reasons as fraud or overreaching.” *M/S Bremen v.*
27 *Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

28 The Ninth Circuit, applying the *Bremen* standard, has held that a forum selection
clause is unenforceable only where “(1) its incorporation into the contract was the result

1 of fraud, undue influence, or overweening bargaining power; (2) the selected forum is
2 so ‘gravely difficult and inconvenient’ that the complaining party will ‘for all practical
3 purposes be deprived of its day in court’; or (3) enforcement of the clause would
4 contravene a strong public policy of the forum in which the suit is brought.” *R.A.*
5 *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (internal citations
6 omitted). (*See generally* Mot. at 5-6.)

7 In their Opposition, Plaintiffs do *not* dispute, and thereby concede, that (1) the
8 Virginia forum selection clause was *not* fraudulently included in the RRA due to
9 concealment or other wrongdoing by VeriSign (Mot. at 6-7); (2) VeriSign did *not*
10 exercise “overweening bargaining power” by including the forum selection clause in its
11 form agreement with all registrars (*id.* at 7-8); and (3) Plaintiffs and their counsel, none
12 of whom resides in California, will not be “gravely” inconvenienced by adjudicating
13 their Eleventh Claim for Relief in Virginia as they had contractually agreed to do in the
14 RRA (*id.* at 8-9). Indeed, Plaintiffs totally ignore these dispositive *Bremen* factors and,
15 instead, base their Opposition solely on a misguided “judicial economy” argument that
16 they “support” by misapplying the governing case law and by failing to acknowledge
17 the different subject matter and the separate issues raised by their Eleventh Claim.

18 Specifically, Plaintiffs postulate that their Eleventh Claim for Relief arises from
19 the same nucleus of operative facts as their other claims (Opp’n at 1, 6, 15-16), and
20 from that supposed premise, they argue that it would “thwart the policy of judicial
21 economy and consistency” (*id.* at 9) to litigate their Eleventh Claim in Virginia.
22 However, Plaintiffs’ simple-sounding syllogism is both legally and factually flawed. It
23 is legally flawed because controlling legal authority *directly contradicts* Plaintiffs’
24 argument, which rests on case law that is inapposite and easily distinguished. It is
25 factually flawed because, contrary to their assertion, Plaintiffs’ Eleventh Claim raises
26 issues that are separate and distinct from their other claims, and, accordingly, that claim
27 could be dismissed, or severed and transferred, without “thwarting” judicial economy
28 or raising the specter of inconsistency or substantial duplication between the two courts.

1 **1. The Court Should Apply *Tokio Marine* and *Vogt-Nem***
2 **in Deciding this Motion**

3 In their Opposition, Plaintiffs argue that enforcement of the RRA's forum
4 selection clause would result in two lawsuits relating to the same facts and possibly to
5 inconsistent findings. (Opp'n at 1, 9, 11.) However, as discussed in VeriSign's Motion
6 (at 9), and ignored by Plaintiffs, the courts in *Tokio Marine* and *Vogt-Nem* flatly
7 rejected the *exact* arguments Plaintiffs assert here. *Tokio Marine & Fire Ins. Co. v.*
8 *Nippon Express U.S.A. (Ill.), Inc.*, 118 F. Supp. 2d 997, 1000 (C.D. Cal. 2000); *see also*
9 *Vogt-Nem, Inc. v. M/V Tramper*, 263 F. Supp. 2d 1226, 1232-33 (N.D. Cal. 2002)
10 (enforcing forum selection clause even though doing so could result in litigation of the
11 issues in three different fora).¹

12 In *Tokio Marine*, for example, the court *specifically* considered the impact on
13 judicial economy of enforcing the forum selection clause. Even though the court
14 expressly recognized that enforcement of the forum selection clause "would result in
15 two trials, in different districts, of the same operative facts, resulting in increased cost
16 and risk of inconsistent factual findings," *Tokio Marine*, 118 F. Supp. 2d at 1000, the
17 court nonetheless concluded that "while the potential for duplicative litigation is a real
18 one, that fact does not outweigh the strong policy favoring enforcement of forum
19 selection clauses," *id.*² *Vogt-Nem* is to the identical effect. *Tokio Marine* and *Vogt-Nem*

20
21 ¹ Contrary to Plaintiffs' assertion (Opp'n at 14), the court's comment about
22 "litigation . . . in three fora" was not dicta but, in fact, part of its holding. The court
23 rejected the plaintiff's argument that litigating in multiple fora was inconvenient and
deprived it of its day in court, in favor of enforcing the forum selection clause agreed
upon by the parties. *Vogt-Nem*, 263 F. Supp. 2d at 1232-33.

24 ² In attempting to distinguish *Tokio Marine* and *Vogt-Nem* (Opp'n at 13-14), Plaintiffs
25 sidestep the holdings in those cases. The courts in *Tokio Marine* and *Vogt-Nem* did not,
26 as Plaintiffs assert (*id.* at 14), "order[] that a single court would resolve the entire action
27 in one forum." To the contrary, the *Tokio Marine* court transferred all the claims
28 governed by the forum selection clause to New York and retained jurisdiction over
related claims against another defendant that was not bound by the clause. *Tokio*
Marine, 118 F. Supp. 2d at 1001. Similarly, the *Vogt-Nem* court dismissed the case on
forum non conveniens grounds so that the action could be resolved in the Netherlands
(potentially in *both* Rotterdam and Amsterdam), which was consistent with the parties'
contractual forum selection clauses. *Vogt-Nem*, 263 F. Supp. 2d at 1234.

1 illustrate the overwhelming strength of the presumption in favor of enforcing forum
2 selection clauses. Plaintiffs' argument regarding judicial economy fails to accord
3 proper weight and deference to the admittedly applicable and valid forum selection
4 clause in the RRA and, therefore, flies in the face of *Tokio Marine* and *Vogt-Nem*.

5 **2. The Cases Plaintiffs Cite in Support of Their Judicial**
6 **Economy Argument Are Clearly Distinguishable**

7 **a. Forum selection clause cases**

8 Plaintiffs' citation to four irrelevant, out-of-state cases (Opp'n at 9-12) does not
9 alter the controlling law in the Ninth Circuit as reflected in *Tokio Marine* and *Vogt-*
10 *Nem*. Two of Plaintiffs' cases — *Stotler* and *Ex Parte Leasecomm* — are out-of-state
11 (and out of circuit) *state court* cases, which are hardly binding on this Court, and they
12 are factually distinguishable from this case in any event.

13 For example, *Stotler* was an unusually "procedurally complex" case involving
14 over 100 parties, more than 90 cross-claims, and multiple counterclaims. *Personalized*
15 *Mktg. Serv., Inc. v. Stotler & Co.*, 447 N.W.2d 447, 448-50 (Minn. Ct. App. 1989).
16 This case does not involve anything approaching that level of numerosity or procedural
17 complexity. In addition, unlike in this case in which the Plaintiffs are dispersed
18 throughout the country and the world, *all* of the parties in *Stotler* except one, and much
19 of the evidence, were located in the state where the suit was brought. *Id.* at 451-52.

20 Also, the forum selection clause in the *Stotler* case related only to the cross-
21 claims and the plaintiff (unlike Plaintiffs here) was not a signatory to the forum
22 selection clause. *Id.* at 449, 453. As a result, claims involving the plaintiff could not be
23 transferred. Since all or most of the cross-claims were in the nature of indemnity
24 claims that depended upon the outcome of the plaintiff's claims, enforcement of the
25 forum selection clause in *Stotler* would have raised a possibility of duplication and
26 inconsistency not present here. *Id.* at 453.

27 In the final analysis, the *Stotler* court was influenced by Minnesota state policies
28 and practices, including those articulated by the Minnesota Supreme Court in

1 *Prestressed Concrete, Inc. v. Adolfson & Peterson, Inc.*, 308 Minn. 20, 22-23, 240
2 N.W.2d 551, 553 (1976), and by the fact that resolution of the transferred claims would
3 be delayed five years due to docket conditions in the transferee forum. *Stotler*, 447
4 N.W.2d at 451, 453. No comparable concern exists in connection with a transfer of the
5 Eleventh Claim to Virginia. *Stotler* simply has no precedential value in this Court.

6 *Ex Parte Leasecomm* is similarly distinguishable. There, the plaintiffs brought
7 the relevant claims against *multiple* defendants, with whom the plaintiffs had entered
8 into separate agreements containing conflicting forum selection clauses. *Ex Parte*
9 *Leasecomm*, 2003 WL 22753454, at *1, *2, *4 (Ala. Nov. 21, 2003). The plaintiffs and
10 their material witnesses were all located, and the alleged misconduct took place, in the
11 state in which the suit was brought. *Id.* at *3. In material contrast, Plaintiffs' Eleventh
12 Claim is brought by Plaintiffs *only* against VeriSign and implicates only *one* forum
13 selection clause — the clause by which both Plaintiffs and VeriSign agreed to litigate
14 the enforcement of the RRA in Virginia. Moreover, as VeriSign discussed in its
15 Motion (at 8-10), and Plaintiffs do not dispute (because they have alleged this
16 themselves), none of the plaintiffs (nor their counsel) is located in California; the
17 material witnesses are located in Virginia; and the .com and .net Registries (the source
18 of the alleged wrongdoing) are operated out of Virginia. (Declaration of Barbara
19 Knight ("Knight Decl.") ¶ 5.)

20 The federal district court cases Plaintiffs cite are similarly out-of-circuit and
21 distinguishable. In *Serpico*, the court held that enforcing the forum selection clause
22 would "disserve judicial economy" because, unlike in this case, *four* cases involving
23 multiple claims and parties had been consolidated before the court and the forum
24 selection clause involved only one claim brought by one plaintiff. *Serpico v. Laborers'*
25 *Int'l Union of N. Am. (LIUNA)*, 1995 WL 479569, at *1, *5 (N.D. Ill. Aug. 4, 1995).
26 Likewise, in *Geldermann*, the court did not enforce the forum selection clause because
27 the FSLIC, a public agency, was "litigating claims with public resources" and was not
28 "absolutely bound by the forum selection clause." *Fed. Sav. & Loan Ins. Corp. v.*