

1 RONALD L. JOHNSTON (State Bar No. 057418)
LAURENCE J. HUTT (State Bar No. 066269)
2 SUZANNE V. WILSON (State Bar No. 152399)
JAMES S. BLACKBURN (State Bar No. 169134)
3 ARNOLD & PORTER LLP
1900 Avenue of the Stars, 17th Floor
4 Los Angeles, California 90067-4408
Telephone:(310) 552-2500
5 Facsimile:(310) 552-1191

6 Of Counsel:
RICHARD L. ROSEN (Admitted *pro hac vice*)
7 ARNOLD & PORTER LLP
555 Twelfth Street NW
8 Washington, D.C. 20004-1206
Telephone:(202) 942-5000
9 Facsimile:(202) 942-5999

10 BRIAN A. DAVIS (Admitted *pro hac vice*)
VERISIGN, INC.
11 21355 Ridgetop Circle
Dulles, Virginia 20166
12 Telephone:(703) 948-2300
Facsimile:(703) 450-7326

13 Attorneys for Plaintiff
14 VERISIGN, INC.

15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 VERISIGN, INC., a Delaware
corporation,
18
Plaintiff,
19
v.
20
INTERNET CORPORATION FOR
21 ASSIGNED NAMES AND
NUMBERS, a California corporation;
22 DOES 1-50,

23 Defendants.

) Case No. CV 04-1292 AHM (CTx)

) **PLAINTIFF VERISIGN, INC.'S**
) **RESPONSE TO DEFENDANT ICANN'S**
) **EVIDENTIARY OBJECTIONS TO**
) **EXHIBITS AND DECLARATIONS**
) **FILED BY VERISIGN IN**
) **OPPOSITION TO ICANN'S SPECIAL**
) **MOTION TO STRIKE**

) Date: May 18, 2004
) Time: 10:00 a.m.
) Courtroom: 14 – Spring Street Bldg.
) Hon. A. Howard Matz

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1 ICANN concedes that VeriSign has produced substantial evidence to
2 demonstrate that it will succeed on its underlying claims against ICANN, self-styling
3 it a “mountain of evidence,” but fails even to attempt to assert specific objections to
4 the vast majority of this “mountain.” (See ICANN’s Reply at 1:19 (admitting that
5 VeriSign has submitted a “mountain of evidence”); ICANN’s Evid. Obj. at 4
6 (“ICANN provides only a handful of specific objections”).) ICANN’s failure to
7 object effectively concedes the admissibility of the evidence and, thus, that VeriSign
8 has made a prima facie showing that its claims have merit.

9 ICANN attempts to avoid the consequences of its failure specifically to object
10 to most of VeriSign’s evidence by generally and conclusorily asserting that “most” of
11 VeriSign’s evidence is “truly not relevant” to ICANN’s motion, without identifying
12 which exhibits and portions of declarations supposedly are “not relevant.” (ICANN’s
13 Evid. Obj. at 2:12-14.) Such a generalized “objection” to VeriSign’s evidence is
14 procedurally improper. Accordingly, all of VeriSign’s evidence for which ICANN
15 has not provided any specific objection should be deemed admitted without the need
16 for any further analysis by the Court. See Fed. R. Evid. 103(a)(1) (a party
17 challenging the admission of evidence must timely object and “stat[e] the specific
18 ground of objection”); *United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir.
19 1990) (“[A] party fails to preserve an evidentiary issue for appeal . . . by failing to
20 make a specific objection.”).

21 Moreover, ICANN’s boilerplate relevancy objection is interposed only after it
22 mischaracterizes the applicable burdens at issue in this motion. Specifically, ICANN
23 misstates and narrowly defines what type of evidence is relevant to its motion,
24 claiming that VeriSign’s evidence is inadmissible if it does not directly refute “that
25 ICANN has made a prima facie showing that” the anti-SLAPP statute applies.
26 (ICANN’s Evid. Obj. at 2:21-23; see also *id.* at 4:11-14 (claiming evidence is not
27 admissible because it does not “address[] whether ICANN has established that the
28

1 anti-SLAPP statute applies”). ICANN’s argument, however, misstates the scope of
2 evidence that is relevant to an anti-SLAPP motion.

3 VeriSign can defeat ICANN’s motion by demonstrating, among other things,
4 that its claims are meritorious. Accordingly, evidence going to the elements of
5 VeriSign’s claims is relevant. *See generally Navellier v. Sletten*, 29 Cal. 4th 82, 89,
6 124 Cal. Rptr. 2d 530 (2002) (a plaintiff may defeat an anti-SLAPP motion by
7 demonstrating that its underlying claims have “minimal merit”). In addition to
8 refuting ICANN’s purported prima facie showing regarding the application of the
9 anti-SLAPP statute in this case, VeriSign’s “mountain of evidence” shows the
10 strength of VeriSign’s underlying claims and is therefore relevant and admissible.¹
11 Specifically, VeriSign’s evidence is relevant to demonstrating the validity of its
12 breach of contract and tortious interference claims.

13 The few examples of purported “irrelevant” evidence that ICANN provides
14 illustrate that VeriSign’s evidence is, in fact, relevant. For example, ICANN asserts
15 that the “Green Paper” (*see* VeriSign’s Ex. 8) is “irrelevant.” (ICANN’s Evid. Obj. at
16 3.) However, the Green Paper (like the “White Paper” that came after it) provides
17 evidence regarding the limited purposes for which ICANN was created, and thus
18 demonstrates the proper, narrow interpretation of terms within the .com Registry
19 Agreement. The interpretation of the .com Registry Agreement is plainly relevant to
20 VeriSign’s breach of contract claims.

21 ICANN also complains that the declaration of Benjamin Desjardins is
22 “irrelevant” because “it contains only a description of the ‘Marketing Program’
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24 ¹ ICANN’s relevance objection also ignores the well-established principle that
25 evidence should only be excluded if it does not have “*any* tendency to make the
26 existence of *any* fact that is of consequence to the determination of the action” more
27 or less probable. Fed. R. Evid. 401 (emphasis added); *see also Daubert v. Merrell*
28 *Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587, 113 S. Ct. 2786, 125 L. Ed. 2d 469
(1993) (“The Rule’s basic standard of relevance thus is a liberal one.”).

VeriSign launched.” (*Id.* at 4.) As described in VeriSign’s Complaint and opposition papers, ICANN’s conduct with respect to the Marketing Program constituted a specific breach of its contractual obligations. As such, the Desjardins declaration, which concerns the very Marketing Program that is the subject of VeriSign’s claims, is clearly relevant.

Finally, as discussed, *infra*, the specific objections that ICANN has raised are also without merit:

Ex. No.	Description	Evidentiary Objections	Response
4	Cooperative Agreement Between NSF and NSI: http://www.icann.org/nsi/coopagmt-01jan93.htm (Sbarbaro)	Objections: Incomplete; Irrelevant. This document is inadmissible for incompleteness because the agreement is not submitted with amendments. Irrelevant to the question before the Court on ICANN’s Special Motion to Strike. [FRE 106, 401, 402] ²	This document is relevant to VeriSign’s prima facie showing; the document bears on, among other things, the meaning and interpretation of terms in the .com Registry Agreement, the background of the parties’ relationship, and ICANN’s breach of this Agreement. (FRE 401, 402) The amendments are not necessary to a fair understanding of the proffered document. (FRE 106 & advisory committee’s note)
5	Amendment 19 to the Cooperative Agreement Between NSF and NSI: http://www.icann.org/nsi/coopagmt-01jan93.htm	Objections: Incomplete; Irrelevant. This document is	This document is relevant to VeriSign’s prima facie showing; the document is pertinent to, among other

² The Federal Rules of Evidence are referred to throughout as “FRE.”

Ex. No.	Description	Evidentiary Objections	Response
	<i>org/nsi/amendment19.htm</i> (Sbarbaro)	<p>inadmissible for incompleteness because VeriSign does not submit all the relevant amendments to the Cooperative Agreement.</p> <p>Irrelevant to the question before the Court on ICANN's Special Motion to Strike.</p> <p>[FRE 106, 401, 402]</p>	<p>things, the meaning and interpretation of terms in the .com Registry Agreement, the background of the parties' relationship, and ICANN's breach of this Agreement. (FRE 401, 402)</p> <p>The amendments are not necessary to a fair understanding of the proffered document. (FRE 106 & advisory committee's note)</p>
6	1999 Registry Agreement Between ICANN and NSI: <i>http://www.icann.org/nsi/nsi-registry-agreement-04nov99.htm</i> (Sbarbaro)	<p>Objection: Irrelevant.</p> <p>The relevant .com Registry Agreement is the 2001 agreement between ICANN and VeriSign. The 2001 agreement is the agreement VeriSign alleges to have been breached.</p> <p>Irrelevant to the question before the Court on ICANN's Special Motion to Strike.</p> <p>[FRE 401, 402]</p>	<p>This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, the background of the parties' relationship, and ICANN's breach of this Agreement. (FRE 401, 402)</p>
27	10/16/02 Letter from Philip L. Sbarbaro to Joe Sims Requesting Reconsideration of	<p>Objections: Lack of authentication; Irrelevant (Sbarbaro should have authenticated this</p>	<p>This document is properly authenticated and relevant. ICANN submitted the same letter as Exhibit 12 to the Supplemental</p>

Ex. No.	Description	Evidentiary Objections	Response
	Resolution 02.100	<p>document in his declaration, not Turner).</p> <p>Irrelevant to the question before the Court on ICANN's Special Motion to Strike.</p> <p>[FRE 401, 402, 901]</p>	<p>Declaration of John O. Jeffrey, filed in conjunction with ICANN's reply papers.</p> <p>Evidence sufficient to support a finding of personal knowledge has been laid. (See Turner Decl. ¶¶ 2, 3, 57; FRE 602)</p> <p>This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, and ICANN's breach of this Agreement. (FRE 401, 402)</p>
28	05/20/03 Reconsideration Request 02-6, Recommendation of the Committee	<p>Objection: Irrelevant.</p> <p>Irrelevant to the question before the Court on ICANN's Special Motion to Strike.</p> <p>[FRE 401, 402]</p>	<p>This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, and ICANN's breach of this Agreement. (FRE 401, 402)</p>

Ex. No.	Description	Evidentiary Objections	Response
29	09/04/03 Letter from Paul Twomey to Chuck Gomes	<p>Objection: Irrelevant.</p> <p>Irrelevant to the question before the Court on ICANN's Special Motion to Strike.</p> <p>[FRE 401, 402]</p>	<p>This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, and ICANN's breach of this Agreement. (FRE 401, 402)</p>
30	09/16/03 VeriSign's Response to ICANN	<p>Objection: Irrelevant; Prejudicial.</p> <p>Irrelevant to the question before the Court on ICANN's Special Motion to Strike. Reflects the subjective intent of the author, not admissible evidence.</p> <p>[FRE 401, 402, 403]</p>	<p>This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, and ICANN's breach of this Agreement. (FRE 401, 402)</p> <p>This evidence has strong probative value because it is relevant to proving ICANN's breach of the .com Registry Agreement and, on the Court's review of an anti-SLAPP motion, there is clearly no danger of misleading a jury. (FRE 403) Moreover, the probative value clearly outweighs any "undue prejudice" given that a court's decision on an anti-SLAPP motion is not admissible for any other purpose. (See Cal. Civ. Proc. Code § 425.16(b)(3) ("If the court determines that the plaintiff has</p>

Ex. No.	Description	Evidentiary Objections	Response
			established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.”))
39	Sept.-Oct. 2003 E-mails from gnso.icann.org regarding VeriSign and third party provider	Objection: Irrelevant. Irrelevant to the question before the Court on ICANN’s Special Motion to Strike. [FRE 401, 402]	This document is relevant to VeriSign’s prima facie showing; the document evidences, among other things, the existence of a third-party relationship upon which VeriSign’s tortious interference claim is based, and ICANN’s knowledge of that relationship. (FRE 401, 402)

Declaration of Benjamin R. Turner

Para. No.	Description	Evidentiary Objections	Response
18	Pursuant to the 2001 .com Registry Agreement, ICANN recognized VeriSign as the “sole operator” of the .com gTLD registry, and VeriSign undertook to operate the .com gTLD registry in accordance with	Objection: The document speaks for itself; improper lay opinion (draws a legal conclusion) re: VeriSign’s compliance with agreement obligations.	Evidence sufficient to support a finding of personal knowledge has been laid. (See Turner Decl. ¶¶ 2, 3; FRE 602) This is permissible opinion from a lay witness because it is rationally based on the perception of the witness

Declaration of Benjamin R. Turner

Para. No.	Description	Evidentiary Objections	Response
	<p>the terms of the 2001 Registry Agreement and to pay certain registry-level fees to ICANN. Since a registry maintains the authoritative database of second level domain names and IP addresses within a TLD, there necessarily can be only one registry for each TLD. VeriSign is that sole registry for the .com gTLD. Based on my job responsibilities, I am in a position to know of VeriSign's performance of its obligations under the 2001 .com Registry Agreement. To the best of my knowledge VeriSign has fully performed and continues to perform all of its obligation under that agreement.</p>	<p>[FRE 701, FRE 704]</p>	<p>and would help the Court (1) have a clear understanding of Turner's testimony and (2) determine whether VeriSign has satisfied its obligations under the .com Registry Agreement. (FRE 701)</p>
84	<p>On or about September 12, 2003, I was present when a VeriSign colleague briefed ICANN President Paul Twomey about ICANN's intended launch of Site Finder. Mr. Twomey stated that it was not an issue and raised no objections to deployment of a wildcard either on that occasion or immediately</p>	<p>Objections: Subjective intent; Hearsay; Lacks personal knowledge.</p> <p>This statement is inadmissible hearsay. It reflects the subjective intent of the declarant, not admissible evidence.</p> <p>Lacks personal knowledge (of what</p>	<p>The statement of Paul Twomey is admissible nonhearsay because it is an admission of a party opponent. (FRE 801(d)(2))</p> <p>Evidence sufficient to support a finding of personal knowledge has been laid. (See Turner Decl. ¶¶ 2, 3, 84; FRE 602)</p>

Declaration of Benjamin R. Turner

Para. No.	Description	Evidentiary Objections	Response
	after the launch. He evidently did not consider Site Finder to be a "registry service" under the 2001 .com Registry Agreement.	Twomey considered Site Finder to be). [FRE 602, FRE 802]	Statement is admissible as a present sense impression and state of mind. (FRE 803(1), (3))
85	VeriSign launched Site Finder in the .com TLD on September 15, 2003. The clear market demand for Site Finder was demonstrated by the extent, to which users immediately utilized the navigation tools of the Site Finder service. During its first week of operation, between September 15, 2003, and September 21, 2003, Internet users visited the Site Finder page more than 62 million times. Users used the "Did you mean" tool 1.5 million times, and they used the search tool more than 13 million times.	Objections: Subjective intent; Lack of foundation; Irrelevant. This statement reflects the subjective intent of the declarant, not admissible evidence. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 401, 402, 602]	This paragraph is relevant to VeriSign's prima facie showing; the paragraph is pertinent to, among other things, elements of VeriSign's breach of contract and tortious interference claims. (FRE 401, 402) Evidence sufficient to support a finding of personal knowledge has been laid. (See Turner Decl. ¶¶ 2, 3; FRE 602)