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INTERNET CORPORATION FOR
10 ASSIGNED NAMES AND NUMBERS

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13
14 VERISIGN, INC., a Delaware
15 corporation,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
19 ASSIGNED NAMES AND NUMBERS, a
California corporation; DOES 1-50,

20 Defendants.

Case No. 04 CV 1292 AHM (CTx)

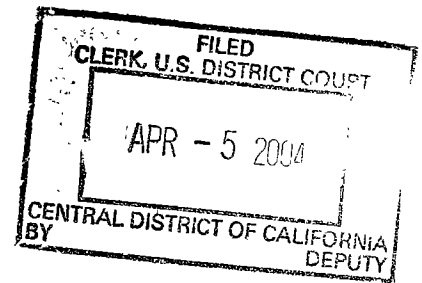
**DEFENDANT INTERNET
CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS' REQUEST FOR
JUDICIAL NOTICE**

[Filed concurrently with Notice of
Motion and Motion to Dismiss
Plaintiff's First, Second, Third,
Fourth, Fifth, and Sixth Claims for
Relief Pursuant to Rule 12(B)(6) of
the Federal Rules of Civil
Procedure; and Memorandum of
Points and Authorities]

Date: May 17, 2004

Time: 10:00 a.m.

Honorable A. Howard Matz



1 PLEASE TAKE NOTICE that, pursuant to Federal Rule of Evidence 201,
2 defendant Internet Corporation for Assigned Names and Numbers ("ICANN")
3 hereby respectfully requests that, in considering its concurrently-filed motion to
4 dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court take
5 judicial notice of the following documents:

6 (A) **Order Denying Plaintiffs' Motion for**
7 **Preliminary Injunction in *Dotster, Inc., etc. v. Internet***
8 ***Corporation for Assigned Names and Numbers*, Case No.**
9 **03 CV 5045 JFW (MANx) (C.D. Cal. Nov. 10, 2003), a**
10 **true and correct copy of which is attached hereto as**
11 **Exhibit A;**

12 (B) **Bylaws for Internet Corporation for Assigned**
13 **Names and Numbers**, as amended effective October 13,
14 2003, a true and correct copy of which is attached hereto
15 as Exhibit B;

16 (C) **Memorandum of Understanding** between U.S.
17 Department of Commerce and Internet Corporation for
18 Assigned Names and Numbers, dated November 25, 1998
19 (hereinafter "MOU"), a true and correct copy of which is
20 attached hereto as Exhibit C;

21 (D) **Amendment 6 to the MOU**, dated September 17,
22 2003, a true and correct copy of which is attached hereto
23 as Exhibit D;

24 (E) **2001 .com Registry Agreement entered into**
25 **between ICANN and plaintiff VeriSign, Inc.**
26 **("VeriSign")**, dated May 25, 2001 (hereinafter "Registry
27 Agreement"), a true and correct copy of which is attached
28 hereto (without its voluminous appendices) as Exhibit E;

(F) **October 3, 2003 Letter from Paul Twomey**,
President and CEO, ICANN, to Russell Lewis, Exec. Vice
President and General Manager, VeriSign Naming and
Directory Services, (hereinafter "October 3 Letter"), a true
and correct copy of which is attached hereto as Exhibit F.

These documents constitute facts not reasonably subject to dispute.
Accordingly, they may be properly considered in connection with the Court's
consideration of ICANN's Rule 12(b)(6) Motion to Dismiss.

LEGAL STANDARD

"[A] district court ruling on a motion to dismiss may consider a document the
authenticity of which is not contested, and upon which the plaintiff's complaint

1 necessarily relies." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998); *see*
2 *Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002) (under the Ninth Circuit's
3 "incorporation by reference" rule, a court may look beyond the pleadings without
4 converting the Rule 12(b)(6) motion into one for summary judgment).

5 This includes documents that are integral to plaintiff's claim but not explicitly
6 incorporated in the complaint. *Id. See also Neilson v. Union Bank of Cal., N.A.*,
7 290 F. Supp. 2d 1101, 1114 (C.D. Cal. 2003) (taking judicial notice of signed
8 contracts relied upon in the complaint but not incorporated); *In re Northpoint*
9 *Communs. Group, Inc., Sec. Litig.*, 221 F. Supp. 2d 1090, 1095 (N.D. Cal. 2002)
10 ("In ruling on a motion to dismiss, a court may take judicial notice of a document if
11 it is relied on in the complaint (regardless of whether it is expressly incorporated
12 therein) and its authenticity is not disputed.")

13 A court may also properly take notice of "matters of public record" pursuant
14 to Federal Rule of Evidence section 201, to the extent they are not subject to
15 reasonable dispute. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).
16 Judicial notice of matters of public record will not convert "a Rule 12(b)(6) motion
17 to a summary judgment motion." *Id.* at 688; *Mir v. Little Co. of Mary Hospital*, 844
18 F.2d 646, 649 (9th Cir. 1988) (same); *Neilson*, 290 F. Supp. 2d at 1112 n. 37 (C.D.
19 Cal. 2003) (same).

20 ARGUMENT

21 The allegations in VeriSign's complaint are inextricably intertwined with six
22 documents that this Court may judicially notice. Judicial notice of these documents
23 is necessary to give the Court a more complete understanding of the facts upon
24 which VeriSign's entire complaint rests. VeriSign expressly (or in one case
25 impliedly) refers to all six of these documents in its complaint.

26 2001 .com Registry Agreement

27 The Registry Agreement entered into between ICANN and VeriSign is at the
28 center of VeriSign's dispute. Several of VeriSign's claims for relief assert that

1 ICANN has breached the Registry Agreement, and VeriSign's seventh claim for
2 relief seeks a declaration as to the meaning of the agreement. Further, the
3 complaint heavily references the agreement and also quotes the agreement. *See*,
4 *e.g.*, Compl. ¶¶ 21-31.

5 Where, as here, the "plaintiff fails to introduce a pertinent document as part
6 of his pleading, [the] defendant may introduce the exhibit as part of his motion
7 attacking the pleading." *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994),
8 *overruled on other grounds*, (citing 5 Charles Alan Wright & Arthur R. Miller,
9 *Federal Practice and Procedure* § 1327, at 762-63 (2d ed. 1990)). The Registry
10 Agreement is a fact not subject to reasonable dispute. Indeed, ICANN posts a copy
11 of the agreement on ICANN's web site. *See*
12 <http://www.icann.org/tlds/agreements/verisign/registry-agmt-com-25may01.htm>;
13 <http://www.icann.org/tlds/agreements/verisign/com-index.htm>.

14 **October 3 Letter**

15 The October 3 Letter is, according to VeriSign's complaint, ICANN's formal
16 "demand" that unless VeriSign "suspended [Site Finder] forthwith, ICANN would
17 initiate legal proceedings against VeriSign." Compl. ¶ 37. VeriSign references the
18 October 3 Letter on numerous occasions throughout its complaint. (*See, e.g.*,
19 Compl. ¶¶ 37, 70, 71, 94, 97, 101, 107, 129.) In fact, the October 3 Letter is the
20 essential fact with respect to three of VeriSign's causes of action (*See* Compl.
21 ¶¶ 92-98, 99-104, 105-110), and the letter also is the subject of each of VeriSign's
22 other claims.

23 VeriSign presumably elected not to attach the October 3 Letter to its
24 complaint because the letter simply does not support VeriSign's allegations about it.
25 Yet, deliberately failing to attach a document referenced and relied upon in a
26 complaint will not escape consideration on a Rule 12(b)(6) motion. *Parrino*, 146
27 F.3d at 706; *Neilson*, 290 F. Supp. 2d at 1114. The letter is not a fact subject to
28

1 reasonable dispute, and it is publicly available on ICANN's web site. *See*
2 <http://www.icann.org/correspondence/twomey-to-lewis-03oct03.htm>.

3 **Dotster Order Denying Motion for Preliminary Injunction**

4 VeriSign contends that ICANN has conspired, with certain unnamed others,
5 against VeriSign to interfere with VeriSign's Wait Listing Service ("WLS"). (*See*,
6 *e.g.*, Compl. ¶¶ 47, 85.) But ICANN has been litigating, in this very judicial
7 district, VeriSign's right to offer WLS. The existence of Judge Walter's opinion in
8 the *Dotster* litigation thus provides strong reason why VeriSign's claims are false.

9 The *Dotster* plaintiffs brought a motion for preliminary injunction seeking to
10 stop ICANN from permitting VeriSign to proceed with WLS; ICANN vigorously
11 opposed the motion, and Judge Walter denied it. The *Dotster* order is a record of
12 this Court and is simply being offered for the existence of the order, the identity of
13 the named parties, and the subject of the dispute. The order is not a fact subject to
14 reasonable dispute, and it is maintained by the clerk of this Court. Therefore, the
15 *Dotster* order may be judicially noticed. *Lee*, 250 F.3d at 689.

16 **ICANN's Bylaws**

17 VeriSign's Sherman Act section 1 claim necessarily relies on ICANN's
18 Bylaws. The claim is premised on VeriSign's incorrect and misleading allegations
19 concerning ICANN's corporate structure and the composition of its Board and
20 others who are involved with ICANN. Compl. ¶ 85 ("The acts of ICANN in
21 restricting or purporting to 'regulate' the non-Registry Services offered . . . are the
22 collective and conspiratorial acts of ICANN *and its members*, including *constituent*
23 *groups within ICANN* and *the members of those groups*, and represent the collective
24 action of competitors in the relevant market and submarkets.") (Emphasis added.).
25 ICANN's Bylaws clearly demonstrate that ICANN has no "members" nor are any
26 of its Directors allowed to vote on matters where a conflict of interest exists. *See*
27 RJN, Ex. B at Art. VI, § 6, Art. XVII. Moreover, the Board of Directors is the final
28 and exclusive decision-making body for all matters involving the organization. *See*

1 *id.* at Art. II, § 1. ICANN's Bylaws are not a fact subject to reasonable dispute, and
2 they are publicly available on ICANN's web site. *See*
3 <http://www.icann.org/general/bylaws.htm>. Therefore, ICANN's Bylaws may be
4 judicially noticed. *Parrino*, 146 F.3d at 706.

5 **MOU and Amendment 6 to the MOU**

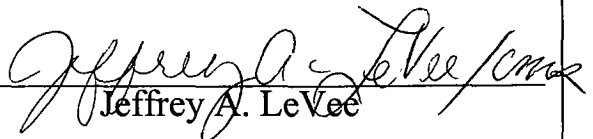
6 VeriSign alleges, accurately, that in November 1998, the United States
7 Department of Commerce ("DOC") and ICANN entered into the MOU granting
8 ICANN authority to oversee certain technical functions of the domain name system.
9 Compl. ¶ 19. The complaint then makes a number of direct references to the MOU
10 and ICANN's relationship with the DOC. *See, e.g.*, Compl. ¶¶ 19, 20, 87, 129. The
11 DOC and ICANN have amended and extended the MOU several times;
12 Amendment 6 represents the most recent extension. Both the MOU and
13 Amendment 6 to the MOU are publicly available on ICANN's web site and are not
14 facts subject to reasonable dispute. *See* [http://www.icann.org/general/icann-mou-](http://www.icann.org/general/icann-mou-25nov98.htm)
15 [25nov98.htm](http://www.icann.org/general/amend6-jpamou-17sep03.htm); <http://www.icann.org/general/amend6-jpamou-17sep03.htm>. As
16 such, the MOU and its Amendment 6 may be judicially noticed. *Parrino*, 146 F.3d
17 at 706; *Neilson*, 290 F. Supp. 2d at 1114.

18 **CONCLUSION**

19 ICANN's request that, in connection with its concurrent motion to dismiss
20 pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court take judicial notice
21 of Exhibits A through F, attached hereto, should be granted.

22 Dated: April 5, 2004

JONES DAY

23
24 By: 
25 Jeffrey A. LeVee

26 Attorneys for Defendant
27 INTERNET CORPORATION FOR
28 ASSIGNED NAMES AND NUMBERS