NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
Derek A. Newman (190467)
S. Christopher Winter (190474)
Venkat Balasubramani (189192)
505 Fifth Avenue South, Suite 610
Seattle, WA 98104
Telephone: (206) 274-2800
Facsimile: (206) 274-2801

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation, *et al.*,

Defendants.

Case No. CV 04-1368 ABC (CWx)

Hon. Audrey B. Collins

PLAINTIFFS' OPPOSITION TO DEFENDANT VERISIGN'S MOTION TO DISMISS PLAINTIFFS' ELEVENTH CLAIM FOR RELIEF FOR IMPROPER VENUE

DATE: July 12, 2004
TIME: 10:00 a.m.
COURTROOM: Room 680 – Roybal Bldg.

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Plaintiffs respectfully submit this joint memorandum in opposition to Verisign's Motion to Dismiss Plaintiffs' Eleventh Claim for Relief for Improper Venue.

I. INTRODUCTION

All parties to this action, including Verisign, agreed in separate contracts with defendant Internet Corporation for Assigned Names and Numbers ("ICANN") that "[i]n all litigation involving ICANN concerning [those agreements] . . . jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California". However, Verisign moves to dismiss one of ten causes of action against it based upon a forum selection clause in another contract providing for Virginia venue in cases to interpret Verisign's contract with registrars. This Court is now asked to resolve these conflicting venue clauses.

All claims alleged in this case, including the single cause of action Verisign seeks to have dismissed or transferred to Virginia, involve ICANN. This lawsuit arises out of defendants' implementation of the Wait Listing Service ("WLS"), which Verisign oversees and ICANN approved. Ironically, Verisign argues that to conserve judicial resources and promote efficiency, this Court should require Plaintiffs to bring claims for the same acts in two different federal courts. Consequently, under Verisign's theory of judicial economy, there would be two lawsuits arising out of the same nucleus of operative facts, dependent upon the same factual findings, with the same witnesses and the same parties.

This case involves technical and complex issues pertaining to expired domain names, the role of an Internet registry, and the rights of Internet registrars. A finding on the single claim Verisign moves to dismiss or transfer would impact this Court's findings on the unfair competition claims that must remain here. Likewise, this Court's factual findings will involve the same analysis as a Virginia court's review of the single claim Verisign would like transferred.

Splitting this litigation between two courts would jeopardize the policy

favoring judicial economy, uniformity, and consistency. Verisign cannot cite to a case where a court divided a litigation between two venues based upon conflicting forum selection clauses. Rather, whenever possible, courts apply (or reject) forum selection clauses to consolidate the claims in a single venue. In this case, Verisign will have to litigate in California regardless of the outcome of the current motion because of the Los Angeles forum selection to which it agreed in a contract with ICANN. Two separate courts should not have to absorb all these facts and then issue separate rulings on claims involving nearly identical issues. Accordingly, judicial economy and consistency favor keeping the single claim Verisign seeks to transfer in this action.

II. FACTS

A. THE CONTRACTS BETWEEN THE PARTIES REQUIRE CLAIMS RELATING TO ICANN TO BE BROUGHT IN LOS ANGELES

This case involves three sets of contracts – between (i) Verisign and ICANN, (ii) ICANN and Plaintiffs, and (iii) Verisign and Plaintiffs. The agreements between each party and ICANN require venue exclusively in Los Angeles. The Los Angeles venue clauses apply to all parties.

1. ICANN's Contracts with Verisign Require California Venue for Lawsuits Concerning the WLS.

Plaintiffs are Internet registrars. Verisign, the moving party, provides the Internet registry for <.com> and <.net> domain names. ICANN is responsible for accrediting plaintiffs as registrars, and for empowering Verisign to operate the registry.

This case involves several technical and contractual issues relating to defendants' WLS, which "purports to give consumers, for an annual fee, the right to be 'first in line' on the 'waiting list' for currently-registered <.com> and <.net>

domain names.[1]" (First Amended Complaint (hereinafter referred to as "FAC") ¶ 1.1.) Verisign offers the WLS to consumers only because defendant ICANN granted Verisign the authority to do so. ICANN approved Verisign's WLS pursuant to two Registry Agreements dated May 25, 2001 (together, the "ICANN-Verisign Agreements"). On March 6, 2004, ICANN's Board of Directors approved amendments to the ICANN-Verisign Agreements necessary for Verisign to offer the WLS.[2]

The ICANN-Verisign Agreements provide Los Angeles as the exclusive forum for any litigation involving ICANN:

> In all litigation involving ICANN concerning this Agreement . . . jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California

This language appears in ¶15 of the Registry Agreement for <.com> and ¶ 5.9 of the Registry Agreement for <.net>.[3] The ICANN-Verisign Agreements also require ICANN to indemnify Verisign concerning all claims arising out of Verisign's compliance with ICANN policies.[4]

2. ICANN's Contracts with Plaintiffs Require California Venue.

Each Plaintiff also executed an agreement with ICANN, called the Registrar Accreditation Agreement (the "ICANN-Registrar Agreement"). It includes the identical forum selection clause as the ICANN-Verisign Agreements:

> In all litigation involving ICANN concerning this Agreement... jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California, USA..." (FAC Ex. B, ¶ 5.6)

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[1] Domain names are surrounded by caret symbols (*i.e.*, "<>") herein for the purpose of distinguishing them. However, the caret symbols are not a part of the domain name itself.

[2] Resolutions Adopted at Rome ICANN Board Meeting (March 6, 2004) <http://www.icann.org/minutes/rome-resolutions-06mar04.htm>.

[3] Defendants Network Solutions, Inc. and eNom, Inc. have also agreed to exclusive venue in Los Angeles. (FAC ¶ 3.3)

[4] Registry Agreement for <.com>, ¶6; Registry Agreement for <.net>, ¶4.6.

3. Verisign's Breach of Contract and its Forum Selection Clause

Verisign required each plaintiff to execute its standard non-negotiable Registry-Registrar Agreement (the "Verisign-Registrar Agreement") in order to become a registrar. A copy of the standard Verisign-Registrar Agreement is attached as Exhibit A to Plaintiffs' FAC. Plaintiffs' Eleventh cause of action seeks to hold Verisign liable for breaching the Verisign-Registrar Agreement. This is the only claim under the Verisign-Registrar Agreement.

Specifically, the Verisign-Registrar Agreement guarantees Plaintiffs the right to delete domain names from the registry. The WLS scheme at issue, however, cannot operate unless Verisign refuses Plaintiffs' requests to delete certain domain names from the registry. Accordingly, Verisign's unilateral recision of the Plaintiffs' rights under the Verisign-Registrar Agreement is fundamental to the operation of the WLS scheme underlying this lawsuit.

The forum selection clause in ¶ 6.7 of each Verisign-Registrar Agreement provides for a Virginia forum in "[a]ny legal action or other legal proceeding relating to this Agreement or the enforcement of any provision of this Agreement." The Verisign-Registrar Agreement contradicts both the ICANN-Verisign Agreements and the ICANN-Registrar Agreement. Indeed, this lawsuit would not exist but for Verisign's actions under the ICANN-Verisign Agreements, and Plaintiffs' rights under the ICANN-Registrar Agreement. Those agreements with ICANN require this controversy to be resolved in Los Angeles.

B. VERISIGN MUST LITIGATE THE THREE CLAIMS AGAINST BOTH IT AND ICANN IN THIS FORUM

Plaintiffs must litigate in Los Angeles their First, Fifth, and Seventh Causes of Action against both Verisign and ICANN. Indeed, Verisign has admitted as much by not requesting to dismiss those causes of action under FED. R. CIV. P. 12(b)(3). The forum selection clause in the ICANN-Verisign Agreements prevents Verisign from litigating them outside of this forum.

The First Cause of Action alleges the WLS is an illegal lottery for which Verisign and ICANN are responsible. (FAC ¶¶ 5.1 - 5.20.) Pursuant to the ICANN-Verisign Agreements, ICANN authorized Verisign to sell rights to purchase a chance to a win domain name. (FAC ¶¶ 1.5 and 4.65.) Verisign can only offer these chances by refusing Plaintiffs' requests to **delete** the "prize" domain names from the registry.

Plaintiffs' Fifth Cause of Action alleges that Verisign and ICANN have engaged in deceptive sales practices by offering the WLS. (FAC ¶¶ 9.1 - 9.10.) These deceptive practices stem from Verisign's failure to inform consumers that domain names subject to WLS subscriptions not on "pending delete" status may not be available for registration within the subscription period. ICANN approved the WLS pursuant to the ICANN-Verisign Agreements (which provide for a Los Angeles venue) without requiring Verisign to make such disclosures. (FAC ¶ 9.6.)

The Seventh Cause of Action concerns Verisign's misleading offer to sell consumers property rights Verisign does not own. (FAC ¶¶ 11.1 - 11.12.) In reliance upon the Verisign-Registrar Agreement, this claim alleges Verisign "has no authority to refuse to delete any expired domain name from the registry". (FAC ¶ 11.9.) ICANN approved of this scheme pursuant to the ICANN-Verisign Agreements, which require a Los Angeles venue. ICANN is liable under this cause of action because it did not have the authority to grant Verisign such right. (FAC ¶ 11.10.) Plaintiffs must sue ICANN in Los Angeles for this violation consistent with the ICANN-Registrar Agreement.

These three claims cannot be transferred to the Eastern District of Virginia because both ICANN Agreements require any litigation "involving ICANN concerning" those agreements to be brought in Los Angeles, California. Both Verisign and Plaintiffs have agreed to be bound by ICANN's forum selection clause. Moreover, Verisign and ICANN may raise cross-claims against one another. The agreements between those defendants provide for indemnification

which must be litigated in Los Angeles. ICANN may sue Verisign for its liability arising out of the WLS; and Verisign may sue ICANN for damages it suffered by complying with ICANN policies. ICANN and Verisign may only bring those claims in this forum pursuant to their agreement, but those claims relate directly to the claim Verisign would like transferred to Virginia.

C. THE REMAINING CAUSES OF ACTION REQUIRE THE SAME FACTUAL DETERMINATION AS THE CLAIM VERISIGN SEEKS TO TRANSFER

1. The Eleventh Cause of Action Relates to Verisign's Right to Ignore Plaintiffs' Requests to Delete Domain Names

Verisign asks this Court to transfer the Eleventh Cause of Action because only that claim may fall within the scope of the Verisign-Registrar Agreement's forum selection clause. However, the remaining eleven claims turn on the same factual questions as the one Verisign would like to dismiss or transfer. The Eleventh cause of action requests a declaratory judgment that Verisign's implementation of the WLS breaches the Verisign-Registrar Agreement. The principal cause of the breach is Verisign's refusal to allow the deletion of domain names as required under the both the ICANN-Verisign Agreement and the Verisign-Registrar Agreement. (FAC ¶¶ 15.1 - 15.16.) All of Plaintiffs' claims require the Court to determine whether the defendants violate Plaintiffs' rights by refusing to delete domain names.

2. All Other Claims Against Verisign Similarly Relate to Verisign's Right to Ignore Plaintiffs' Requests to Delete Domain Names

Plaintiffs assert their Second Cause of Action under California's Unfair Trade Practices Act, CAL. BUS. & PROF. §17200 *et seq.*, which prohibits business practices that are forbidden by law. (FAC ¶¶ 6.1 - 6.11.) Plaintiffs allege that Verisign has engaged in unfair trade practices by violating California's Consumers Legal Redress Act ("CLRA"), CAL. CIV. CODE § 1750 *et seq.* The CLRA, at CAL. CIV. CODE § 1770, prohibits any representation to consumers that they will receive an economic benefit whose earning is "contingent on an event to occur subsequent

to the consummation of the transaction." Plaintiffs further allege Verisign has assisted in advertising a contingent future benefit (*i.e.*, WLS subscriptions) in a manner unfair to consumers. Under the CLRA, it is unfair to sell consumers the right to purchase a domain name that is not on "pending delete" status, because only a "pending delete" status guarantees that a party other than the current owner will be able to register the name.

Plaintiffs' Fourth and Sixth Causes of Action[5] allege Verisign engaged in deceptive advertising and false representations to consumers. (FAC ¶¶ 8.1 - 8.17 and 10.1 - 10.14.) These deceptive practices all originate with Verisign's failure to inform consumers that domain names subject to WLS subscriptions that are not on "pending delete" status may not be available for registration within the subscription period.

The Eighth Cause of Action alleges a violation of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, based on Verisign's failure to disclose the likelihood that a WLS subscription will be successful. (FAC ¶¶ 12.1 - 12.10.) As discussed above in reference to the Fourth through Sixth Causes of Action, Verisign's deception of consumers stems largely from its offers to sell domain names that are not subject to "pending delete" status.

The Ninth Cause of Action falls under the Sherman Act, 15 U.S.C. §1 *et seq.*, and involves Verisign's unreasonable tying agreement between WLS subscriptions and domain name registrations. (FAC ¶¶ 13.1 - 13.22.) The tying agreement depends on Verisign's refusal to delete expired domain names and its consequent assertion of property rights in those names, which allows Verisign to dominate the market for registration of the domain names it refuses to delete.

The Tenth Cause of Action involves Verisign's interference with Plaintiffs' prospective economic advantage by making false and defamatory statements about

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[5] The Third Cause of Action is not asserted against Verisign.

Plaintiffs' services. (FAC ¶¶ 14.1 - 14.8.) The defamatory statements were false because they represented to consumers that Verisign's WLS offers consumers a "guarantee" that Plaintiffs cannot deliver, a guarantee that is based on Verisign's false claim of property rights in expired domain names it refuses to delete. (FAC ¶ 14.3.)

Plaintiffs' Twelfth Cause of Action is against defendant ICANN, for breach of the ICANN-Registrar Agreement. (FAC ¶¶ 16.1 - 16.28.) The ICANN-Registrar Agreement "grants each registrar [including Plaintiffs] the right to register domain names in accordance with procedures established by ICANN and Verisign in consultation with the Department of Commerce." (FAC ¶16.2) Plaintiffs allege "the WLS will impact registrars' right to delete domain names . . . by eliminating that right altogether as to domain names on which WLS subscriptions have been placed." (FAC ¶ 16.7.) Although Verisign is not required to defend this claim, its involvement in the creation and operation of the WLS system, including its refusal to delete domain names, is fundamental to the question of whether or not ICANN breached its contracts with Plaintiffs. By permitting Verisign to refuse to delete domain names, ICANN violates the ICANN-Registrar Agreement. (FAC ¶ 16.6.)

III. ARGUMENT

The ICANN-Registrar Agreement and ICANN-Verisign Agreements govern the gravamen of claims in this case. Those contracts provide exclusively for a Los Angeles forum selection. For that reason, there is no dispute that eleven of the twelve causes of action alleged must be adjudicated in this Court. The only question is whether one claim should be transferred pursuant to a conflicting forum selection clause, even though that claim arises out of the same facts as the other eleven causes of action.

ICANN's forum selection clause should govern this case. All parties, not just some, have agreed to be bound by ICANN's clause, which applies to "all litigation

involving ICANN concerning [the ICANN-Verisign Agreements]". The ICANN-Verisign Agreements, which require California venue, control Verisign's operation of the WLS that is the subject of all claims against Verisign and the other defendants.

All of Plaintiffs' claims involve common issues of law and fact, which would be resolved consistently and more efficiently by a single court. As Verisign has implicitly acknowledged, the Eastern District of Virginia can be the venue for only one of Plaintiffs' claims, at most. Enforcement of Verisign's forum selection clause would lead to inconsistent decisions and thwart the policy of judicial economy and consistency which all courts favor. Accordingly, this Court should decline Verisign's invitation to split the claims in this action.

A. PUBLIC POLICY STRONGLY FAVORS CALIFORNIA VENUE FOR ALL CLAIMS.

This case involves two inconsistent forum selection clauses. ICANN's Los Angeles forum selection clause applies to all parties, including Verisign, and to "all litigation involving ICANN concerning" the ICANN-Verisign Agreements and ICANN-Registrar Agreement. Verisign's Virginia forum selection clause applies only to some of the parties, and to only one of the twelve claims alleged in this case.

As Verisign concedes, a forum selection clause is unenforceable when "enforcement of the clause...contravene[s] a strong public policy of the forum in which the suit is brought." Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 325 (9th Cir. 1996). In this case, enforcement of Verisign's forum selection clause would contradict the strong policy of judicial economy favored in all courts.

1. In Order to Maintain a Single Venue for Related Claims, Courts Regularly Decline to Enforce Forum Selection Clauses

Courts regularly decline to enforce forum selection clauses that impair judicial economy. The case of Ex parte Leasecomm Corp., 2003 Ala. Lexis 356, *12 (Ala. 2003) involved two forum selection clauses, "each purporting to establish venue for the trial of a portion of the plaintiff's case in a different forum." Citing

United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), the court noted that "the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time." Id. at *12-13. The court did not enforce the forum selection clauses, holding that

> Enforcement of the forum-selection clauses . . . would result in splitting the claims for trial in two foreign, remote states, contrary to the policy of this State in favor of liberal joinder of parties and claims for resolution in one action.

Id. at *22.

Similarly, in Serpico v. Laborers' Int'l Union of North America, 1995 U.S. Dist. LEXIS 11237, *14-15 (N.D.Ill. 1995), another United States District Court refused to enforce a mandatory forum selection clause, holding that to do so would "disserve judicial economy".

In a thoughtful analysis of similar facts, a district court set aside a forum selection clause for policy reasons related to judicial economy, explaining:

> But before thus putting asunder what the plaintiff has joined, the court must weigh carefully whether the inconvenience of splitting the suit outweighs the advantages to be gained from the partial transfer. **It should not sever if the defendant over whom jurisdiction is retained is so involved in the controversy to be transferred that partial transfer would require the same issues to be litigated in two places.** That being the situation here, the district court should not have served [sic] the claims if there were any alternative. Manifestly, the plaintiffs will suffer some inconvenience if they are forced to litigate their claims in two courts, half the work apart from each other, with not only the consequent added expense and inconvenience but also the possible detriment of inconsistent results. A single forum is also most suitable for determining possible counter- and cross-claims. The public also has an interest in facilitating a speedy and less-expensive determination in one forum of all the issues arising out of one episode.

Federal Savings & Loan Insurance Corp. v. Geldermann, Inc., 1989 U.S. Dist. LEXIS 16395, *7 (W.D.Okla. 1989) (emphasis added). The Federal Savings court's analysis applies with equal force to this case – this Court alone has jurisdiction over ICANN and all claims relating to ICANN. Moreover, ICANN's contractual relationship with Verisign is very much at issue with respect to Plaintiffs' Eleventh Cause of Action. It is also intertwined with the three claims

brought jointly against ICANN and Verisign. ICANN is "so involved in the controversy to be transferred that partial transfer would require the same issues to be litigated in two places." *See* Id. Splitting this case would waste the time and energy of the courts and parties, and would potentially lead to inconsistent results in California and Virginia federal courts.

Still another court refused to enforce a mandatory forum selection clause similar to that in Verisign's contract. In Personalized Marketing Service, Inc. v. Stotler & Co., 447 N.W.2d 447, 449 (Minn.Ct.App. 1989), the court reviewed a clause providing that "[a]ll actions or proceedings arising directly or indirectly in connection with, out of, related to or from the Agreement or any transaction covered thereby" would be litigated exclusively in Illinois at one party's discretion. As mentioned above, Verisign's forum selection clause applies to any legal action "relating to this Agreement or the enforcement of any provision of this Agreement".

The Stotler court refused to enforce the Illinois forum selection clause because the party with the right to enforce it was already required to defend the action in Minnesota. Id. at 451. Similarly, in this case, Verisign has agreed to California venue for all claims "involving ICANN concerning [the ICANN-Verisign Agreements]". Thus, Verisign is required to defend at least part of this lawsuit in California. The Stotler court's reasoned that enforcement of a contrary forum selection clause in these circumstances would be a clear abuse of discretion. Id. at 454. As in Stotler, enforcement of Verisign's clause would require "two separate lawsuits based upon similar claims and common questions of law." Id. at 452. "[T]he policy of judicial economy and the prevention of multiple actions on similar issues... renders the forum selection clause patently unreasonable." Id. at 453.

In the foregoing cases, courts repeatedly declined to enforce forum selection clauses when doing so would violate the principle of judicial economy. If Plaintiffs' Eleventh Cause of Action is transferred to Virginia, there will be duplicative litigation and enormous waste of resources. There would be substantial risk of

inconsistent rulings and findings of fact. Further, the Eleventh Cause of Action involves Verisign's compliance with ICANN policies under the ICANN-Verisign Agreements. Accordingly, Verisign may seek indemnification from ICANN under the ICANN-Verisign Agreements, which require Verisign to return to Los Angeles to bring this claim. Resolution of the entire case would obviously be faster and less expensive in California.

This Court should enforce ICANN's forum selection clause which allows all parties and claims to remain in California, and decline to enforce Verisign's clause. The claims and parties in this case are closely related. The dismissal (or severance) and transfer of a single claim to Virginia would be pointless, and would violate the strong policy of this Court to promote judicial economy and consistency.[6]

2. The Supreme Court, Ninth Circuit, and Central District of California Encourage a Single Forum for a Single Controversy to Promote Judicial Economy

This court has the power to hear all claims alleged in this case and should do so for judicial economy and convenience. In United Mine Workers of America, 383 U.S. 715, the Supreme Court addressed the question of whether to exercise pendent jurisdiction over state law claims related to a federal claim. The Court decided in favor of pendent jurisdiction, explaining that "[i]ts justification lies in considerations of judicial economy, convenience and fairness to litigants." Id., 383 U.S. at 726. The Court held that

> . . . if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

Id. at 725 (emphasis original).

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[6] Verisign argued that Plaintiffs anticipated litigating in two separate courts when they signed contracts with different forum selection clauses. However, 1) ICANN's clause applies to all claims Plaintiffs have brought against Verisign, 2) Verisign has anticipated for over three years that any lawsuit "involving ICANN concerning" the ICANN-Verisign Agreements, such as this one, would be brought in Los Angeles, and 3) regardless of what the parties anticipated, the cases cited above strongly disfavor the rote application of forum selection clauses enforcement of which would thwart judicial economy.

The Ninth Circuit also prefers all claims in a single case to remain in a single forum to further judicial economy. For example, the Ninth Circuit asserted pendent jurisdiction over a matter that a district court had remanded, holding that "the policy of judicial economy, which militates in favor of our asserting jurisdiction, strongly outweighs the need to avoid piecemeal appeals." In re Bonner Mall Partnership, 2 F.3d 899, 905 (9th Cir. 1993). On another occasion, the Ninth Circuit declined to force a primary insurance carrier to bring a separate subrogation action against the excess carrier, on the ground that "[r]equiring it to do so... would serve no useful purpose and would offend the policies of judicial economy which play so important a role in our judicial system." Sequoia Insurance Co. v. Royal Insurance Co. of America, 971 F.2d 1385, 1392 (9th Cir. 1992).

The Central District of California emphasized the importance of judicial economy in Lopez v. Martin Luther King Jr. Hospital, 97 F.R.D. 24 (C.D.Cal. 1983). In Lopez, Judge Rafeedie dismissed a case for failure to join a necessary party whose joinder would defeat federal jurisdiction. The court emphasized the plaintiffs had an "adequate" forum in which to litigate the entire controversy, and added that:

> [T]here is an obvious interest in adjudicating all of the issues in these cases in one single forum. Public policy dictates that in these times of crowded dockets and limited judicial resources, litigants should avoid, if possible, the maintenance of two identical lawsuits in separate forums. The policy interest in avoiding piecemeal litigation is especially strong where, as here, it is evident that the ongoing... action can adjudicate the entire controversy.

Id. at 32-33. *See also* Ciolino v. Ryan, 2003 U.S. Dist. LEXIS 11639, *19 (N.D.Cal. 2003) (approving a policy that "furthers the interests of judicial economy . . . by requiring all closely related actions to be tried in the same court"); Lundy v. Morgan Stanley & Co., 1991 U.S. Dist. LEXIS 18207 (N.D.Cal. 1991) (granting plaintiff leave to amend a class action complaint due to the "important policy consideration of judicial economy").

Verisign cites Vogt-Nem, Inc. v. M/V Tramper, 263 F.Supp.2d 1226

(N.D.Cal. 2002) and Tokio Marine & Fire Ins. Co. v. Nippon Express U.S.A. (Illinois), Inc., 118 F.Supp.2d 997 (C.D.Cal. 2000) in support of its motion. Both of those cases ordered that a single court would resolve the entire action in one forum. In this case, Verisign proposes that Plaintiffs litigate their dispute in two different venues contrary to the results in Vogt-Nem and Tokio Marine.

The Vogt-Nem court's comments about "litigation...in three fora" constitute dicta. In fact, the court dismissed all claims before it, and only one of the two remaining courts had authority to decide the plaintiff's claims under the forum selection clause. Vogt-Nem, 263 F. Supp.2d at 1233-34. The Tokio Marine court also transferred all claims between the parties bound by the forum selection clause. It refused to transfer only those claims involving a defendant not a party to the forum selection clause. Tokio Marine, 118 F.Supp.2d at 1001. Vogt-Nem and Tokio Marine support Plaintiffs' contention that all claims between Plaintiffs and Verisign should remain in a single forum.

The controversy before this Court should not be severed. Like the Supreme Court's United Mine Workers of America decision, the claims raised here are such that Plaintiffs would ordinarily be expected to try them all in one judicial proceeding "if considered without regard to their [conflicting forum selection clauses]". Consequently, "considerations of judicial economy, convenience and fairness to litigants" favor hearing the entire matter in this court. The parties in this action should not have to undertake piecemeal litigation with two identical lawsuits in separate forums. Rather, judicial economy is only served by maintaining a single litigation for all claims based upon the same facts.

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3. The Claims in this Case Should Be Considered a Single Cause of Action for Venue Purposes

In this case, judicial economy is served only by maintaining California venue for all claims. "[W]hen a plaintiff brings multiple claims, all of the claims that arise out of the same nucleus of operative facts should be considered one cause of action for venue purposes." Pacer Global Logistics, Inc. v. Nat'l Passenger Railroad Corp., 272 F.Supp.2d 784, 790 (E.D.Wisc. 2003) (citing Gibbs, *supra*).

All of Plaintiffs' claims against Verisign involve the WLS system, which depends completely on the ICANN-Verisign Agreements between ICANN and Verisign. All claims against Verisign "arise out of the same nucleus of operative facts". The contractual relationship between ICANN and Verisign is fundamental to Plaintiffs' claims against Verisign. Verisign agreed to California venue for "all litigation involving ICANN concerning" the ICANN-Verisign Agreements. Moreover, all of Plaintiffs' claims against Verisign involve Verisign's refusal to delete expired domain names. Requiring a separate action in Virginia on a single claim relating to the same factual issue would waste significant time and energy, and would violate the universally favored policy of judicial economy.[7]

B. ALL FACTUAL DISPUTES MUST BE RESOLVED IN PLAINTIFFS' FAVOR.

"[I]n the context of a Rule 12(b)(3) motion based upon a forum selection clause, the trial court must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party." Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1138 (9th Cir. 2003). This case involves a number of factual issues which must be resolved in Plaintiffs' favor at this stage. The central issue at this time is whether the parties and claims in

[7] Interestingly, Verisign cites Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) to support its argument that "VeriSign has a legitimate interest in narrowing its obligation to defend itself to a single forum", which is of course impossible here given ICANN's forum selection clause.

Plaintiffs' FAC are related. If they are, then public policy strongly disfavors dismissal of Plaintiffs' Eleventh Cause of Action, as discussed above.

Plaintiffs bring ten claims against Verisign. As indicated above, these claims arise from a common set of facts, involve common issues of proof, and will involve the testimony of a common set of witnesses. Common issues of fact include the following, among others: Does Verisign have authority to refuse to delete an expired domain name from the registry, pursuant to its agreements with ICANN and with Plaintiffs? Does Verisign acquire property rights in a domain name by refusing to delete it? If so, does Verisign's assertion of property rights thwart Plaintiffs' ability to assert their own rights under the Verisign-Registrar Agreement? Common witnesses will include the parties' experts on the domain name registration system, as well as fact witnesses testifying about the contracts between and relationships among the parties.

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IV. CONCLUSION

Plaintiffs have already brought this action in the Central District of California, in compliance with ICANN's forum selection clause. That clause applies to Verisign as well as to Plaintiffs. Thus, Verisign will remain a party to the above captioned lawsuit regardless of whether this Court decides to require transfer of Plaintiffs' Eleventh Cause of Action. The policy of judicial economy strongly opposes breaking up Plaintiffs' claims against Verisign into two separate cases on opposite ends of the country, and Verisign's claims to the contrary are disingenuous. Courts routinely decline to permit such a senseless waste of judicial resources.

Therefore, Plaintiffs respectfully request that this Court promote judicial economy by enforcing ICANN's forum selection clause, setting aside Verisign's contradictory forum selection clause, and allowing all of Plaintiffs' claims to remain before this Court.

Dated this 17th day of June,

Respectfully Submitted,

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP

By: _____

Derek A. Newman (190467)
S. Christopher Winter (190474)
Venkat Balasubramani (189192)

Attorneys for Plaintiffs