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14 UNITED STATES DISTRICT COURT

15 CENTRAL DISTRICT OF CALIFORNIA

16 VERISIGN, INC., a Delaware  
corporation,

17 Plaintiff,

18 v.

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

22 Defendants.

Case No. CV 04-1292 AHM (CTx)

**PLAINTIFF VERISIGN, INC.'S  
EVIDENTIARY OBJECTIONS TO  
SUPPLEMENTAL DECLARATION  
FILED BY DEFENDANT ICANN IN  
SUPPORT OF SPECIAL MOTION  
TO STRIKE VERISIGN'S SECOND,  
THIRD, FOURTH, FIFTH, AND  
SIXTH CLAIMS AS STRATEGIC  
LAWSUITS AGAINST PUBLIC  
PARTICIPATION**

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

1 Plaintiff VeriSign, Inc. ("VeriSign") respectfully submits the following  
2 objections to the Supplemental Declaration of John O. Jeffrey filed by Defendant  
3 Internet Corporation for Assigned Names and Numbers ("ICANN") in support of its  
4 Special Motion to Strike Verisign's Second, Third, Fourth, Fifth, and Sixth Claims as  
5 Strategic Lawsuits Against Public Participation (the "Motion"). VeriSign reserves its  
6 right to make additional objections to the evidence referenced herein if offered by the  
7 Defendant for any other purpose at a later date.

8 The Supplemental Jeffrey Declaration is an improper and untimely attempt by  
9 ICANN to submit supplemental evidence in its reply papers that should have been  
10 submitted with ICANN's moving papers. As set forth in VeriSign's opposition to  
11 ICANN's anti-SLAPP motion, ICANN bears the burden of establishing that the  
12 October 3 letter is within the scope of the litigation privilege and, thus, constitutes  
13 protected activity under the anti-SLAPP statute. ICANN failed to meet its burden,  
14 submitting no admissible evidence in support of its contention that the October 3  
15 letter was a protected pre-litigation demand letter. The Supplemental Jeffrey  
16 Declaration is an attempt to correct this deficiency in ICANN's showing, by  
17 submitting for the first time purported evidence of ICANN's good faith and serious  
18 contemplation of a legally viable claim against VeriSign.<sup>1</sup> (Supp. Jeffrey Decl. ¶ 4.)  
19 ICANN's attempt to bolster its prima facie case at this late date essentially amounts  
20 to an admission that it has failed to meet its initial burden of showing that the anti-  
21 SLAPP statute applies, and should be stricken.<sup>2</sup> See *Golden West Fin. v. WMA*

22 <sup>1</sup> ICANN's late submission of supplemental evidence in support of its initial burden  
23 regarding the applicability of the anti-SLAPP statute further demonstrates the need  
24 for discovery on this issue. Such discovery is particularly appropriate where, as here,  
25 evidence needed to support or refute claims made by ICANN is in the sole control of  
the moving party. VeriSign is entitled to cross-examine Mr. Jeffrey regarding  
ICANN's purported belief that it had a legally viable claim against VeriSign based on  
the launch of Site Finder.

26 <sup>2</sup> The introduction of new evidence in ICANN's reply brief is particularly  
objectionable given that this Court has already made clear that "VeriSign's opposing  
27 brief should address the sufficiency of ICANN's prima facie showing . . . [and] [i]f  
ICANN's showing is deficient, that ends the analysis and moots the need for relief."  
28 *VeriSign v. ICANN*, CV 04-1292 AHM (CTx), slip op. at 2 (C.D. Cal. April 23,  
2004).

1 *Mortgage Servs., Inc.*, No. C 02-05727 CRB, 2003 WL 1343019, at \*4 (N.D. Cal.  
2 Mar. 13, 2003) (striking evidence submitted for first time in reply brief; “Plaintiffs  
3 have offered no justification for their failure to submit their survey evidence in  
4 connection with their initial moving papers; instead, it appears that after defendants  
5 filed their opposition plaintiffs realized their moving papers were insufficient and  
6 therefore hastily commissioned [additional evidence] to bolster their motion.”).

7 In addition, under established Ninth Circuit precedent, a court should decline to  
8 consider evidence that is submitted at the end of a briefing schedule when the non-  
9 moving party no longer has an opportunity to respond. *See Provenz v. Miller*, 102  
10 F.3d 1478, 1483 (9th Cir. 1996) (“Where new evidence is presented in a reply to a  
11 motion for summary judgment, the district court should not consider the new  
12 evidence without giving the [non-]movant an opportunity to respond.”) (citation  
13 omitted); *accord Green v. Baca*, 306 F. Supp. 2d 903, 914 n.45 (C.D. Cal. 2004)  
14 (agreeing with the Ninth Circuit decision in *Provenz* that a district court should not  
15 consider new evidence presented in a reply without giving the adverse party an  
16 opportunity to respond). ICANN chose to withhold its purported evidence of good  
17 faith until reply, thereby denying VeriSign the opportunity to respond to that  
18 evidence in its opposition. ICANN’s tactical maneuver is improper, and should be  
19 rejected.

20 The Supplemental Jeffrey Declaration also is objectionable because, in part, it  
21 seeks to introduce evidence in support of arguments made for the first time in  
22 ICANN’s reply brief. For example, ICANN argues in its reply – but not in its  
23 opening brief – that the October 3 letter was sent “in furtherance of its right to free  
24 speech . . . in connection with a public issue.” (Reply at 3:15-16.) ICANN never  
25 made this argument in its moving papers. On the contrary, ICANN’s opening brief  
26 only argued that the October 3 letter constituted a protected petitioning act. (*See Mot.*  
27 *to Strike* at 7-9 and cases cited therein.) ICANN never once attempted to argue, as it  
28 does now, that the October 3 letter constitutes free speech on a matter of “public

1 interest.” ICANN also attempts to argue for the first time that it need not prove that  
2 the alleged statements were made in a public forum. (Reply at 5, n.5; 6-7.) Such an  
3 argument directly conflicts with the argument made in its opening brief that such  
4 statements meet the standard under section 425(e)(3) because they constitute “public  
5 speech.” (Mot. to Strike at 10:16-21.) Evidence improperly submitted in support of  
6 arguments made for the first time in ICANN’s reply papers should be stricken. *See*  
7 *generally* Judge A. Howard Matz’ Scheduling Case and Management Order, § III.A  
8 at 4 (“Reply papers shall be limited to argument and/or authorities responsive to the  
9 opposition papers. The Court will ignore new matter that was improperly  
10 introduced.”).

11 Finally, the Supplemental Jeffrey Declaration also is deficient under the  
12 Federal Rules of Evidence for the reasons set forth *infra*.

13 VeriSign respectfully requests that the Court sustain its evidentiary objections  
14 and strike the Supplemental Jeffrey Declaration in its entirety.

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16 **OBJECTIONS TO SUPPLEMENTAL**  
17 **JOHN O. JEFFREY DECLARATION**

18 ¶ 2

19 Improper legal conclusion (FRE<sup>3</sup> 701) (as to whether the  
20 DOC has a continuing interest in ensuring proper  
operation of the .com registry)

21 Lack of personal knowledge (as to whether the DOC has  
22 a continuing interest in ensuring proper operation of the  
.com registry and whether DOC has issued press  
23 releases) (*See* FRE 602 (“A witness may not testify to a  
matter unless evidence is introduced sufficient to  
24 support a finding that the witness has personal  
knowledge of the matter.”))

25 Insufficient authentication of referenced exhibits

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27 <sup>3</sup> The Federal Rules of Evidence are referred to throughout as “FRE.”  
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¶ 3	<p>Irrelevant (FRE 402)</p> <p>Improper “new” evidence on reply (<i>See Provenz v. Miller</i>, 102 F.3d 1478, 1483 (9th Cir. 1996) (“Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-movant an opportunity to respond.”]) (citation omitted))</p> <p>Insufficient authentication of referenced exhibits</p>
¶ 4	<p>Improper legal conclusion (FRE 701) (as to whether Jeffrey’s acknowledgment of activities constitutes a waiver of any privilege)</p> <p>Hearsay (FRE 802) (as to what Jeffrey was informed by legal counsel)</p> <p>Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
¶ 5	<p>Hearsay (FRE 802) (as to whether VeriSign requested modification)</p> <p>Improper legal conclusion (FRE 701)</p> <p>Lack of personal knowledge (as to whether reconsideration process was offered by ICANN between October 2002 and June 2003) (<i>See</i> FRE 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”)); Mr. Jeffrey became ICANN’s General Counsel on or about September 10, 2003. (<i>See</i> Pope Decl. ¶ 7; App. Ex. 55, 56)</p> <p>Irrelevant (FRE 402) (as to ICANN’s contention that evidence submitted by VeriSign indicates that ICANN does not have a reconsideration process); (<i>See HMS Capital, Inc. v. Lawyers Title Co.</i>, --- Cal. Rptr. 3d ---, 2004 WL 915105, at *4 (Cal. Ct. App. Apr. 30, 2004) (In considering an anti-SLAPP motion the court “does not weigh credibility or compare the weight of the evidence,” but instead must “accept as true the evidence favorable to the plaintiff” and “evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.”))</p> <p>Insufficient authentication of referenced exhibits</p>

**OBJECTIONS TO EXHIBITS ATTACHED TO SUPPLEMENTAL JEFFREY  
DECLARATION**


<p>Exhibit 1, Amendment 1 to Memorandum of Understanding</p>	<p>Hearsay (FRE 802) Not authenticated (FRE 901) Incomplete document (FRE 106) (not a true and complete copy of the Memorandum of Understanding) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>Exhibit 2, Amendment 3 to Memorandum of Understanding</p>	<p>Hearsay (FRE 802) Not authenticated (FRE 901) Incomplete document (FRE 106) (not a true and complete copy of the Memorandum of Understanding) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>Exhibit 3, Amendment 19 to NSI-DOC Cooperative Agreement</p>	<p>Hearsay (FRE 802) Not authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>Exhibit 4, Amendment 24 to NSI-DOC Cooperative Agreement</p>	<p>Hearsay (FRE 802) Not authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>Exhibits 5, Commerce Ensures Competitiveness and Stability are Protected in New ICANN-Verisign Agreement, May 18, 2001</p>	<p>Irrelevant (FRE 402) Hearsay (FRE 802) Not authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>Exhibit 6, Statement by Department of Commerce General Counsel Ted Kassinger Regarding the Proposed VeriSign-ICANN Agreement, May 14, 2001</p>	<p>Irrelevant (FRE 402) Hearsay (FRE 802) Not Authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>Exhibit 7, U.S. Secretary of Commerce William M. Daley Announces Agreements on Domain Name Management, September 28, 1999</p>	<p>Irrelevant (FRE 402) Hearsay (FRE 802) Not authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>

<p>1 Exhibit 8, Remarks by U.S. Secretary of 2 Commerce William M. Daley – Domain Name 3 Press Conference, September 28, 1999</p>	<p>Irrelevant (FRE 402) Hearsay (FRE 802) Not authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>4 Exhibit 9, The New York 5 Times, October 3, 2003, VeriSign Agrees to 6 Suspend Disputed Site Finder Service</p>	<p>Irrelevant (FRE 402) Hearsay (FRE 802) Not authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>7 Exhibit 10, BizReport, 8 October 6, 2003, ICANN 9 Stands Tall</p>	<p>Irrelevant (FRE 402) Hearsay (FRE 802) Not authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>10 Exhibit 11, MSNBC.com, 11 October 3, 2003, Verisign 12 Calls Halt to .com Detours</p>	<p>Irrelevant (FRE 402) Hearsay (FRE 802) Not authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>)</p>
<p>13 Exhibit 12, VeriSign’s 14 Request for 15 Reconsideration, dated 16 October 16, 2002</p>	<p>Improper “new” evidence on reply (<i>See Provenz, supra</i>) Improper “new” evidence on reply (<i>See Provenz, supra</i>) (to the extent exhibit is offered for the improper purpose of showing that there was in fact an independent review process)</p>
<p>17 Exhibit 13, ICANN’s 18 Response, excerpt from 19 Minutes of Special 20 Meeting of ICANN’s 21 Board, June 2, 2003</p>	<p>Irrelevant (FRE 402) Hearsay (FRE 802) Not authenticated (FRE 901) Improper “new” evidence on reply (<i>See Provenz, supra</i>) Incomplete document (FRE 106) (exhibit missing relevant pages)</p>

1 Respectfully submitted,

2  
3 Dated: May 13, 2004

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JAMES S. BLACKBURN

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24 **UNITED STATES DISTRICT COURT**  
25 **CENTRAL DISTRICT OF CALIFORNIA**

26 VERISIGN, INC., a Delaware  
27 corporation,

28 Plaintiff,

v.

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

Defendants.

Case No. CV 04-1292 AHM (CTx)

**PROOF OF SERVICE**

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

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA )  
3 COUNTY OF LOS ANGELES ) ss

4 I am employed in the County of Los Angeles, State of California. I am over the  
5 age of 18 and not a party to the within action. My business address is 1533 Wilshire  
6 Blvd., Los Angeles, CA 90017.

6 On May 13, 2004, I served the foregoing document described as:

7 PLAINTIFF VERISIGN, INC.'S RESPONSE TO DEFENDANT ICANN'S  
8 EVIDENTIARY OBJECTIONS TO EXHIBITS AND DECLARATIONS  
9 FILED BY VERISIGN IN OPPOSITION TO ICANN'S SPECIAL MOTION  
10 TO STRIKE

10 PLAINTIFF VERISIGN, INC.'S EVIDENTIARY OBJECTIONS TO  
11 SUPPLEMENTAL DECLARATION FILED BY DEFENDANT ICANN IN  
12 SUPPORT OF SPECIAL MOTION TO STRIKE VERISIGN'S SECOND,  
13 THIRD, FOURTH, FIFTH, AND SIXTH CLAIMS AS STRATEGIC  
14 LAWSUITS AGAINST PUBLIC PARTICIPATION

13  by placing true copies thereof enclosed in sealed envelopes addressed as stated  
14 on the attached mailing list.

14  by placing  the original and  a true copy thereof enclosed in sealed  
15 envelope(s) addressed as follows:

16  **BY MAIL** I placed such envelope with postage thereon prepaid in the United  
17 States Mail at 777 South Figueroa Street, 44th Floor, Los Angeles, California  
18 90017-5844. Executed on \_\_\_\_ at Los Angeles, California.

18  **BY PERSONAL SERVICE** I caused such envelope to be delivered by hand  
19 to the office of the addressee. Executed on May 13, 2004 at Los Angeles,  
20 California.

20  **BY FACSIMILE** The above-referenced document (together with all exhibits  
21 and attachments thereto) was transmitted via facsimile transmission to the  
22 addressee(s) as indicated on the attached mailing list on the date thereof. The  
23 transmission was reported as completed and without error. Executed on  
24 at Los Angeles, California.

23  **STATE** I declare under penalty of perjury under the laws of the State of  
24 California that the foregoing is true and correct.

24  **FEDERAL** I declare that I am employed in the office of a member of the bar  
25 of this court at whose direction the service was made.

26 WORLDWIDE ATTORNEY  
27 SERVICE

28 Jesus Alvarez  
TYPE OR PRINT NAME

[Signature]  
SIGNATURE  
- 2 -

1 Service List  
2 *Verisign Inc. v. Internet Corporation For Assigned Names And Numbers*  
3 Case No. CV 04-1292 AHM (CTx)

4 **Attorneys for Defendant**

5 Jeffrey A. LeVee

BY PERSONAL DELIVERY

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