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15  
16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA  
18

19 VERISIGN, INC., a Delaware  
corporation,

20 Plaintiff,

21 v.

22  
23 INTERNET CORPORATION FOR  
ASSIGNED NAMES AND  
24 NUMBERS, a California corporation;  
DOES 1-50,

25 Defendants.  
26

Case No. CV 04-1292 AHM (CTx)

**PLAINTIFF VERISIGN, INC.'S  
OPPOSITION TO DEFENDANT'S  
SUPPLEMENTAL REQUEST  
FOR JUDICIAL NOTICE**

Date: May 17, 2004  
Time: 10:00 a.m.  
Courtroom: 14 – Spring Street Bldg.  
Hon. A. Howard Matz

1 Plaintiff VeriSign, Inc. (hereinafter “VeriSign”) submits this Opposition to the  
2 Supplemental Request for Judicial Notice filed by Defendant Internet Corporation for  
3 Assigned Names and Numbers (hereinafter “ICANN”) in support of its Motion to  
4 Dismiss the First through Sixth Claims for Relief pursuant to Federal Rule of Civil  
5 Procedure 12(b)(6).

6 A Rule 12(b)(6) motion is generally limited to alleged defects appearing on the  
7 face of the complaint. The relevant inquiry is whether the allegations in the  
8 complaint, taken as true, state a claim the law recognizes and upon which relief may  
9 be granted. ICANN’s Supplemental Request for Judicial Notice ignores this  
10 standard, and is an attempt to obtain dismissal of this action on a 12(b)(6) motion  
11 based on ICANN’s interpretation of sources outside the pleadings. ICANN’s efforts  
12 to obtain judicial notice of extrinsic evidence – none of which is appropriate for  
13 judicial notice or relevant to a Rule 12(b)(6) motion – is effectively an admission that  
14 VeriSign has met its Rule 12(b)(6) burden and that ICANN’s motion should be  
15 denied. Accordingly, ICANN’s Supplemental Request for Judicial Notice should be  
16 denied.

17 **I. LEGAL STANDARD**

18 A district court generally may not consider any material beyond the pleadings  
19 in ruling on a Rule 12(b)(6) motion. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.  
20 1994). One exception to this general rule is for documents that are “necessarily  
21 relie[d]” on in the complaint, provided that their authenticity “is not contested.” *Lee*  
22 *v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citing *Parrino v. FHP,*  
23 *Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998)). A second exception is for “matters of  
24 public record,” pursuant to Federal Rule of Evidence 201. *Lee*, 250 F.3d at 689. It is,  
25 however, only proper for a court to take judicial notice of the fact of the existence of  
26 a matter of public record, rather than the truth of the facts recited therein. *Id.* at 690.

27 Parties are entitled to an opportunity to be heard as to the propriety of taking  
28 judicial notice and the tenor of the matters noticed. Fed. R. Evid. 201(e).

1 Furthermore, under Federal Rule of Civil Procedure 12(b)(6), if “matters outside the  
2 pleadings are presented to and not excluded by the court, the motion shall be treated  
3 as one for summary judgment.” Fed. R. Civ. P. 12(b)(6).

## 4 **II. ARGUMENT**

### 5 **A. ICANN’s Exhibit G Is Not Properly Subject to Judicial Notice and** 6 **Is Irrelevant to VeriSign’s Claims**

7 ICANN requests that this Court take judicial notice of a memorandum of points  
8 and authorities filed by VeriSign in an unrelated case in the Northern District of  
9 California (hereinafter “Syncalot brief”). *See Syncalot v. VeriSign*, Case No. C03  
10 04373 MJJ (N.D. Cal., filed Sept. 25, 2003). However, the *Syncalot* brief is not  
11 appropriate for judicial notice. First, the brief is not incorporated by reference in  
12 VeriSign’s Complaint and is not integral to VeriSign’s claims. In fact, contrary to  
13 ICANN’s contention that the document is “inextricably intertwined” with the  
14 “allegations in VeriSign’s complaint,” (Supp’l Req. at 3:22-23), the *Syncalot* brief is  
15 not mentioned *anywhere* in VeriSign’s Complaint against ICANN. Nor is it  
16 mentioned in VeriSign’s Opposition filed in the instant matter. *See generally Van*  
17 *Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (finding that,  
18 in order to judicially notice a document on a motion to dismiss under the  
19 “incorporation by reference” doctrine, the document must be “referenced  
20 extensively” in the complaint).

21 Second, ICANN has improperly attempted to offer the *Syncalot* brief “for the  
22 truth of the matters asserted in the other litigation,” rather than for recognition of the  
23 fact or subject matter of the *Syncalot* litigation. *Liberty Mut. Ins. Co. v. Rotches Park*  
24 *Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992); *accord United States v. Jones*, 29  
25 F.3d 1549, 1553 (11th Cir. 1994) (concluding that a court “may take notice of another  
26 court’s order only for the limited purpose of recognizing the ‘judicial act’ that the  
27 order represents or the subject matter of the litigation”); *In re Infonet Services Corp.*  
28 *Securities Litigation*, --- F. Supp. 2d ---, 2003 WL 23354464, at \*12, n.10 (C.D. Cal.

1 Aug. 12, 2003) (noting that public documents may not be considered in a motion to  
2 dismiss if offered for the truth of the matter). ICANN has only cited to the *Syncalot*  
3 brief twice—and neither time for the simple recognition of the subject matter of that  
4 litigation. Under these circumstances, admission of the pleading on a motion to  
5 dismiss would be reversible error. *See Mantin v. Broadcast Music, Inc.*, 248 F.2d  
6 530, 532 (9th Cir. 1957) (reversing district court decision granting motion to dismiss  
7 after considering documents which included pleadings from another case).

8 Third, the *Syncalot* brief has no relevance to the instant proceeding. ICANN  
9 attempts to argue that it is offering the *Syncalot* brief “for the existence of the  
10 arguments VeriSign made to the *Syncalot* court.” (Mot. at 4: 1-6.) ICANN is thus  
11 apparently attempting to impeach VeriSign with legal arguments it made in another  
12 case. However, there is no inconsistency between VeriSign’s arguments in that case  
13 and in this one. As is evident from the *Syncalot* brief itself, in contrast to the instant  
14 action, *Syncalot* had no relationship, commercial or otherwise, with VeriSign upon  
15 which to premise an antitrust claim.<sup>1</sup> Given the completely different context, any  
16 statements made by VeriSign in the *Syncalot* action simply have no relevance in this  
17 action.

18 Moreover, if ICANN is indeed only submitting the brief “for the existence of  
19 the arguments VeriSign made to the *Syncalot* court,” (*id.*), such evidence is plainly  
20 irrelevant to adjudication of the instant matter. ICANN has failed to provide any  
21 support for the proposition that arguments made in addressing whether *Syncalot* had  
22 stated a claim against VeriSign on an unrelated matter – based on wholly different  
23 pleadings – is relevant to the adjudication of whether VeriSign has stated a claim for  
24 relief against ICANN in this action. Notably, ICANN has not sought judicial notice  
25 of the complaint in the *Syncalot* matter so that this Court could “gain an appreciation”  
26

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27 <sup>1</sup> The *Syncalot* brief was in support of a motion by VeriSign to dismiss an amended  
28 pleading in the *Syncalot* case. The motion was never ruled upon because, shortly  
after its filing, the plaintiffs elected to dismiss that action.

1 of the material differences between the claims, the pleadings, the allegations, and the  
2 level of detail furnished in the complaints in the two cases and, therefore, be in a  
3 position to determine the relevance of the Syncalot brief to this case. ICANN, as the  
4 party seeking judicial notice, bears the burden of showing judicial notice would be  
5 proper. *See In re Tyrone F. Conner Corp., Inc.*, 140 B.R. 771, 781 (Bkrtcy. E.D. Cal.  
6 1992) (“While the Court may take judicial notice of its own records, a party  
7 requesting judicial notice bears the burden of persuading the trial judge that the fact is  
8 a proper matter for judicial notice.”) (citation omitted). ICANN has not, and cannot,  
9 do so with respect to the *Syncalot* brief. Accordingly, in addition to finding that the  
10 *Syncalot* brief is not a proper subject of judicial notice, this Court should also exclude  
11 the brief as irrelevant to the issues under review. *See, e.g., Pac. Gas & Elec. Co. v.*  
12 *Lynch*, 216 F. Supp. 2d 1016, 1025-26 (N.D. Cal. 2002) (declining to take judicial  
13 notice of stipulated judgment and settlement documents in related action on relevancy  
14 grounds).

15 **B. ICANN’s Exhibits H, I, and J Do Not Cure VeriSign’s Objections to**  
16 **ICANN’s Request for Judicial Notice of the Memorandum of**  
17 **Understanding**

18 ICANN also requests that this Court take judicial notice of three attachments to  
19 the Memorandum of Understanding (hereinafter “MOU”) between ICANN and the  
20 United States Department of Commerce. ICANN previously requested that this  
21 Court take judicial notice of the MOU, but failed to submit a complete version of that  
22 agreement to the Court. ICANN now claims that it is offering Exhibits H, I, and J,  
23 which purport to be attachments to the MOU, as a result of VeriSign’s objection that  
24 the MOU presented in ICANN’s Exhibit C lacks authenticity. (*See VeriSign’s Opp’n*  
25 *at 4:16-17.*) However, ICANN *still* has failed to present this Court with the complete  
26 and operative MOU. In fact, ICANN’s own web site indicates that the MOU has  
27 been amended at least six times, and several other attachments have been  
28 incorporated. *See ICANN’s Major Agreements and Related Reports, available at*

1 <http://www.icann.org/general/agreements.htm> (last visited May 5, 2004). However,  
2 ICANN has not presented this Court with any of the amendments, or with a full set of  
3 attachments. Accordingly, ICANN's attempt to cure VeriSign's authenticity  
4 objection should be rejected.

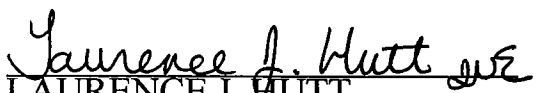
5 Moreover, ICANN's Supplemental Request mischaracterizes VeriSign's  
6 arguments regarding the appropriateness of taking judicial notice of the MOU. In  
7 particular, ICANN's brief does not acknowledge that, in addition to questioning the  
8 authenticity of the document submitted by ICANN, VeriSign argues that (1) the  
9 MOU is not relevant to any issue presented by ICANN's motion to dismiss, and (2)  
10 the MOU is not a proper subject of judicial notice because it is neither referred to  
11 extensively in the Complaint nor forms the basis of VeriSign's claim. (VeriSign's  
12 Opp'n at 5-6.) ICANN's offer of a sampling of the attachments to the MOU, and  
13 none of the amendments, does nothing to enhance the MOU's relevance – nor does it  
14 change the fact that the MOU does not form the basis of VeriSign's Complaint.  
15 Accordingly, for the same reasons that this Court should deny ICANN's Request for  
16 Judicial Notice of the MOU, (*see id.*), it should also reject the ICANN's  
17 Supplemental Request for Judicial Notice of these attachments to the MOU.

18 **III. CONCLUSION**

19 For the reasons stated herein, the Court should decline to take judicial notice of  
20 ICANN Exhibits G, H, I, and J.

21  
22 Dated: May 7, 2004

ARNOLD & PORTER LLP

23  
24  
25 By:   
26 LAURENCE J. MUTT  
Attorneys for VeriSign, Inc.

**PROOF OF SERVICE**

STATE OF CALIFORNIA        )  
  )        ss  
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844.

On **May 7, 2004**, I served the foregoing document described as: **PLAINTIFF VERISIGN, INC.'S OPPOSITION TO DEFENDANT'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE**

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

Jeffrey A. LeVee  
JONES DAY  
555 West Fifth Street Suite 4600  
Los Angeles, California 90013-1025

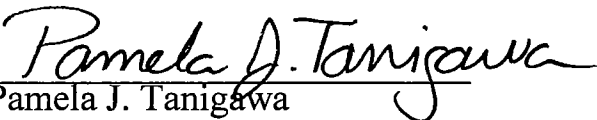
**BY MAIL** I placed such envelope with postage thereon prepaid in the United States Mail at 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. Executed on **May 7, 2004** at Los Angeles, California.

**BY PERSONAL SERVICE** I caused such envelope to be delivered by hand to the office of the addressee. Executed on \_\_\_\_\_ at Los Angeles, California.

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

**BY FEDERAL EXPRESS** I am readily familiar with Arnold & Porter LLP's business practices of collecting and processing items for pickup and next business day delivery by Federal Express. Under said practices, items to be delivered the next business day are either picked up by Federal Express or deposited in a box or other facility regularly maintained by Federal Express in the ordinary course of business on that same day with the cost thereof billed to Arnold & Porter LLP's account. I placed such sealed envelope for delivery by Federal Express to the offices of the addressee(s) as indicated on the attached mailing list on the date hereof following ordinary business practices. Executed on \_\_\_\_\_ at Los Angeles, California.

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

  
Pamela J. Tanigawa