

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
18 corporation,

19 Plaintiff,

20 v.

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

23 Defendants.
24

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

) **DECLARATION OF MARK
MANDOLIA IN OPPOSITION TO
SPECIAL MOTION TO STRIKE OF
DEFENDANT INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS**

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

) [Memorandum of Points and Authorities;
Evidentiary Objections; Appendix of
Exhibits; Declarations; and [Proposed] Order
concurrently filed and lodged herewith]

27
28

1 I, Mark Mandolia, declare:
2

3 1. I know all of the following facts of my own personal knowledge and, if
4 called and sworn as a witness, would competently testify thereto.

5 2. I am a paralegal employed in the Legal Department of plaintiff VeriSign,
6 Inc. ("VeriSign").

7 3. On or about October 9, 2003, acting at the direction of James Ulam, Senior
8 Vice President, General Counsel of VeriSign, I transmitted by e-mail and facsimile to
9 John Jeffrey, General Counsel of the Internet Corporation for Assigned Names and
10 Numbers, the letter attached as Exhibit A to this declaration. In addition, on the same
11 date I transmitted Exhibit A by e-mail to the members of the ICANN Board copied
12 on the letter.
13

14 I declare under penalty of perjury under the laws of the United States that the
15 foregoing is true and correct. Executed this 27th day of April 2004, at Dulles,
16 Virginia.
17

18 
19 MARK MANDOLIA
20
21
22
23
24
25
26
27
28

EXHIBIT A

PDF ~~Scan~~, but
don't ~~scan~~
OCR Exh's

-----Original Message-----

From: Mandolia, Mark

Sent: Thursday, October 09, 2003 10:12 AM

To: 'John Jeffrey Esq. (jeffrey@icann.org)'

Cc: 'ivanmc@akwan.com.br'; 'vcerf@mci.net'; 'lyman@acm.org'; 'mouhamet@next.sn';
'tricia.drakes@parvil.demon.co.uk'; 'mkatoh@jp.fujitsu.com'; 'veni@veni.com'; 'tniles@uscib.org';
'mike@palage.com'; 'apisan@servidor.unam.mx'; 'hlqian@mimi.cnc.ac.cn'; 'njeri@wananchi.com';
'twomey@icann.org'; 'steve@shinkuro.com'; 'alac_liaison@hotmail.com'; 'francisco-a-silva@telecom.pt';
'klensin@jck.com'; 'sharil@cmc.gov.my'

Subject: Letter to John Jeffrey

[sent by paralegal]

Please see attached letter. Copy follows via facsimile to (310) 823-8649.

4/26/2004

EXHIBIT A PAGE 3



October 9, 2003

**VIA ELECTRONIC MAIL AND
FACSIMILE**

John Jeffrey, General Counsel
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way #330
Marina del Rey, CA 90292

Re: VeriSign Wildcard Implementation

Dear Mr. Jeffrey:

I write to express our objection to ICANN's groundless interference with VeriSign, Inc.'s ("VeriSign") business. In order to force VeriSign to shut down its Site Finder service, ICANN has threatened termination of our registry agreements without any sufficient legal or factual basis -- while at the same time improperly excluding VeriSign from all of ICANN's deliberations. Representatives of ICANN also have made false public statements that VeriSign is violating the registry agreements and interfering with the stability of the Internet. Despite the fact that Site Finder is fully compliant with all applicable standards and the Registry Agreement, ICANN's wrongful conduct has left VeriSign with no practical alternative but to suspend temporarily the Site Finder service. ICANN's actions, however, constitute a clear breach of the Registry Agreement and unprecedented interference with VeriSign's existing contractual and other business relationships, for which ICANN and those acting in concert with it will be held fully responsible.

From the beginning, ICANN's proceedings in this matter have failed to comport with basic principles of fairness, openness or transparency, and have represented arbitrary action beyond any contractual or other jurisdiction ICANN might claim to possess. Through the date of ICANN's demand that the service be shut down, ICANN completely shut VeriSign out of ICANN's deliberations on Site Finder. Rather than consider the hard data and facts VeriSign tried to present, ICANN chose to conduct its affairs secretly and without the facts, relying instead on unsupported complaints of VeriSign's competitors and others in the community. For reasons discussed more fully below, it has become apparent to us that the desired outcome for VeriSign's wildcard initiative has been preordained from the beginning, driven in substantial part by the personal agendas of VeriSign's competitors and a few ICANN representatives.



ICANN's conduct constitutes a naked attempt to create "regulatory" jurisdiction for itself in violation of the Registry Agreements, the MOU, ICANN's bylaws, and applicable federal and state law. VeriSign calls on the ICANN Board of Directors immediately to convene a meeting with VeriSign to attempt to limit the ongoing and serious injury to VeriSign that ICANN has caused. We believe that an immediate and proper assessment of the true facts about Site Finder may allow this matter to be resolved now, before it escalates further beyond the control of the parties. Absent such a resolution, VeriSign will hold ICANN, and those acting in concert with it, fully responsible for damages incurred as a result of their actions.

VeriSign's Wildcard Implementation

Applicable DNS standards have long recognized the existence and legitimacy of wildcard functionality. *See, e.g.*, RFC 1034 (1987). Wildcards are a well established feature of the DNS landscape, as demonstrated by the fact that the following top-level domains had supported wildcard functionality in their zones prior to VeriSign's introduction of Site Finder: .cx, .io, .mp, .cc, .museum, .nu, .ph, .td, .tk, .tv, and .ws. In its agreement with the registry operator for the .museum TLD, ICANN specifically permits the implementation of a wildcard. We are not aware of any significant concerns raised by ICANN or the Internet community with respect to the wildcard implementations within these TLDs. As operator of the registries for the .cc and .tv TLDs, we have not received significant expressions of concern or criticism in connection with supporting the wildcard functionality.

Through similar implementation of a standards-compliant "wildcard", as that term is defined in the applicable specifications, VeriSign's Site Finder service assisted millions of Internet users who appreciated receiving navigation tools and a clear message that what was entered could not be found, as opposed to the 'dead end' of an error message. Indeed, up until ICANN's demand that the service be shut down, large and growing numbers of Internet users were utilizing the navigation tools available through the service.

Moreover, the operational stability and security of the DNS and the Internet are of paramount concern to VeriSign, as clearly demonstrated by our longstanding record of operating the largest registries in the world. We have taken great care to ensure that our deployment of a wildcard within the .com and .net zones is fully compliant with applicable standards. By definition, therefore, such a deployment should not be the cause of any operational instability. Indeed, our wildcard implementation has had no adverse impact on the critical elements of the DNS infrastructure. Domain name registration and resolution services across all TLDs were occurring without any effect, the root server system continued to operate as usual, and there were no indications that the Internet's backbone was being affected in any way.



The IAB Commentary

On September 19, 2003, the Internet Architecture Board ("IAB"), apparently acting in its capacity as a member of ICANN's Technical Liaison Group, issued a Commentary entitled, *Architectural Concerns on the use of DNS Wildcards* (the "IAB Commentary"). The IAB Commentary addresses what the IAB believes are various possible implications of implementing standards-compliant wildcards in a zone, with particular emphasis on the IAB's understanding of VeriSign's wildcard implementation.

It is first worth noting what the IAB Commentary did not say. The IAB found no inherent weaknesses in any components of the Internet's infrastructure, including the DNS or the presence of a wildcard in DNS standards. The Commentary explicitly acknowledges and recognizes the legitimacy of a wildcard within relevant DNS protocols. Further, the IAB did not find that the introduction of a wildcard within a zone necessarily has any significant adverse effects on the Internet infrastructure, or that the VeriSign wildcard failed to conform to applicable standards. In fact, the IAB emphasized that "technically, this was a legitimate use of wildcard records that did not in any way violate the DNS specifications themselves." Finally, the IAB did not suggest that VeriSign should change its implementation in any way or that ICANN should consider adopting any policies concerning the use of wildcards.

Further, the IAB commentary did not appear based on data relevant to the subject it was considering. Accordingly, the concerns expressed in the IAB Commentary, like those appearing in the SECSAC Report, would appear to be founded more on abstract theories and possibilities than on hard data.

The primary focus of the IAB Commentary is on a narrow range of applications and protocols that are not themselves a part of the Internet infrastructure, but which in some way interact with that infrastructure. More specifically, the IAB focused on potential implications for certain non-standards-compliant applications when a standards-compliant wildcard is deployed. On October 6, 2003, we submitted a technical response to the IAB Commentary that addresses the IAB's limited technical concerns.

While we felt the need to provide a technical response to the IAB Commentary, we question the appropriateness of the Internet Architecture Board assessing the implications of what is concededly a standards compliant wildcard implementation on protocols and applications that are not part of the Internet's architecture. We do not believe the IAB is the appropriate body to address these issues. Moreover, the very purpose of having standards would be undermined if those who are implementing the standards must yield to and accommodate those who choose to deviate from them. Yet this is precisely what the IAB seems to be suggesting in its Commentary. We therefore have reservations about the IAB's assessment of these applications issues.



The IAB, like SECSAC, has not disclosed the data on which its analysis rests, the methods by which the IAB collected such data, or the sources of the data. To the extent that ICANN has relied on the IAB, we request a copy of all information on which the IAB based its analysis and conclusions.

The SECSAC Report

One week after VeriSign launched Site Finder, ICANN's Security and Stability Advisory Committee ("SECSAC") on September 22, 2003, submitted a report to the ICANN Board of Directors entitled, *Recommendations Regarding VeriSign's Introduction of Wild Card Response to Uninstantiated Domains within COM and NET* ("SECSAC Report").

In light of circumstances leading to the publication of this report, it would appear that SECSAC's conclusions and recommendations were prejudged from the outset. The committee's Chairman, Mr. Steve Crocker, supplied the most persuasive evidence of this when he circulated to committee members a draft report that already included the committee's opinions and recommendations. Mr. Crocker circulated this draft on September 19, 2003, just four days after VeriSign launched its wildcard initiative.

The analysis of the report, consisting of the facts and analysis section, did not exist, except for a bracketed comment that reads:

This is where we need to include the factual information to support the opinions and recommendations that follow. PAUL VIXE [sic] and SUZANNE, AMONG OTEHRS [sic], please dump stuff into this section.

SECSAC committee members apparently were unwilling or unable to supply any backfill to prop up the committee's opinions and recommendations prior to publication of its report. As a result, the final version of the report does not include any facts concerning the effects of VeriSign's wildcard implementation or any analysis to support the report's opinions and recommendations. Unable to provide any supporting "factual information," SECSAC was forced to abandon most of its pre-formed opinions and recommendations. The final report, nevertheless, states that there is evidence to support its recommendation to suspend Site Finder. To date, no such evidence has been produced.

SECSAC apparently was determined to publish its report without the benefit of VeriSign's input. Hours before the report was to be published, Mr. Crocker solicited VeriSign's feedback on a draft, but only concerning "small factual nits." In an affront to ICANN's stated core values and its commitment to operating in a fair and transparent fashion, Mr. Crocker stated that he had made this meaningless gesture in the "spirit of operating in an open, surprise-free mode."



In addition to limiting VeriSign's feedback to "small factual nits," SECSAC had previously declined VeriSign's offer to provide relevant data before the report was published, including: (1) a description of the methods and technologies used by VeriSign to implement its wildcard initiative; (2) the extensive body of data that VeriSign had developed in the course of researching and testing its wildcard implementation; (3) the views of VeriSign's senior DNS engineers on the subject; (4) the operational data that VeriSign collected since launching the initiative; and (5) the feedback that VeriSign had received from the Internet community since the launch.

Similarly, ICANN declined to consider this data when both SECSAC's Chairman and the Chairman of ICANN's Board abruptly cancelled scheduled meetings with VeriSign representatives to discuss the service prior to the SECSAC Report's publication.

Because SECSAC had not tested for any effects of VeriSign's wildcard implementation, had not collected a full set of relevant data, and had not analyzed such data, it could not make the statement that it wanted to make -- that the Internet's stability had been weakened. Instead, the final report concludes that VeriSign's wildcard implementation "appears to have considerably weakened the stability of the Internet" and "introduced ambiguous and inaccurate responses in the DNS." Not a single fact or piece of technical data was cited in support of these statements. Nonetheless, the report went on to call on VeriSign to suspend Site Finder.

ICANN adopted SECSAC's drastic recommendation to require a shut down of the Site Finder service, despite the fact that the committee itself was forced to acknowledge that it lacked any factual basis for believing that the Internet's stability had been weakened and when all of the data we have reviewed indicates that VeriSign's wildcard implementation has had no significant adverse operational impact on the DNS or the Internet. The opinions and recommendations contained in the SECSAC Report, and ICANN's subsequent actions based on the Report, are arbitrary and capricious, were not produced in an open and transparent manner, and unfairly and unjustifiably single VeriSign out for disparate treatment.

Further evidencing the unreliability of the SECSAC report and the unfairness of the committee's work were the lack of documented mechanisms to ensure that the committee's decision making was fair, reasonable, open, and transparent. Indeed, the manner in which SECSAC operated itself should have raised questions for the ICANN Board as to whether the SECSAC Report fairly represented the views of the committee or resulted from a fair and impartial consideration of VeriSign's wildcard implementation.

Based on the lack of evidence supporting the conclusions of SECSAC and the inherently unreliable and unfair processes followed by the committee, ICANN immediately should rescind its demand that Site Finder be shut down based on the SECSAC Report and direct SECSAC to retract the Report and conduct an objective,



independent review of VeriSign's wildcard initiative. The report certainly cannot form the basis for proper action by ICANN to shut down VeriSign's Site Finder service.

The October 7 SECSAC Meeting

On September 30, 2003, SECSAC published an announcement on the ICANN web site that it would hold a special meeting on October 7, 2003, for the ostensible purpose of gathering input regarding VeriSign's wildcard implementation. We suspect, however, that the real purpose of this special meeting was to obtain the backfill needed to support the conclusions that Mr. Crocker had wanted to make in SECSAC's initial report. As with the formulation of the SECSAC response, Mr. Crocker's conclusions for the October 7, 2003 meeting also appear predetermined. In fact, in an email discussing the SECSAC meeting topics, Mr. Crocker listed the following items, among others, as "the main point of what we have to do:"

- RFCs are important but not definitive. (This needs to be expanded and supported.)
- Although other registries (museum, cc, tv and a few others) use this scheme, the magnitude of the change in this case makes it qualitatively different.... This matter should have been reviewed, and there have been discussions about limiting the use of wildcards in TLDs.
- All of the technical details are important, but so is the broader notion of trust. To what extent has this episode changed the expectations and level of trust in the Internet?

These statements do not represent an open, transparent, and objective consideration of VeriSign's Site Finder service. Rather, they demonstrate an arbitrary singling out of VeriSign for disparate treatment and, again, we are concerned, a preordained conclusion. Further, as addressed separately, we request that you adopt fair procedures for these and any other meetings, as distinct from the kind of staging demonstrated by Mr. Crocker's "agenda."

Although we participated in this meeting, we did so with reservations, as addressed in separate correspondence. Regardless, as a result of that meeting no hard data was presented in support of SECSAC's position.

In response to our criticism of the SECSAC process, ICANN on October 6, 2003, for the first time, offered to allow VeriSign to present information concerning Site Finder. VeriSign appreciates ICANN's belated recognition of VeriSign's concerns regarding the decision-making process with respect to Site Finder, and has responded separately.



Consequences for Improperly Interfering With Site Finder

In the event that ICANN does not immediately rescind its direction to shut down the Site Finder service, VeriSign will suffer serious injury in the form of lost revenues and costs, and an interference with VeriSign's contractual relationships and prospective business advantage associated with the service. Furthermore, ICANN will have liability to VeriSign for these losses under explicit terms of the Registry Agreement as well as applicable federal and state laws.

For example, Section II.6 of the .com Registry Agreement, titled "Protections from Burdens of Compliance with ICANN Policies", provides:

ICANN shall indemnify ... and hold harmless Registry Operator ... from and against any and all claims, damages, liabilities, costs, and expenses ... arising solely from Registry Operator's compliance as required by this Agreement with an ICANN specification or policy ... established after the Effective Date....

The provisions of Section 6 are not subject to damage limitation provisions in the Registry Agreements.

Furthermore, under Section II.4 of the Agreement, as well as federal antitrust laws, ICANN is precluded from undertaking acts or policies that unreasonably restrain competition, from acting other than in an "open and transparent manner," or acting arbitrarily or inequitably against VeriSign, among other applicable legal obligations of ICANN. VeriSign believes that ICANN's actions violate each of these principals.

Finally, ICANN has used its actions with respect to VeriSign's Site Finder service to further delay other VeriSign services, including VeriSign's Wait List Service and Internationalized Domain Names service. These services already have been held up by ICANN for two years, at significant expense and injury to VeriSign, its partners, and to users. Nevertheless, ICANN informed us that it would make no progress on these services until the Site Finder service was taken down. Such arbitrary and cavalier interference in VeriSign's business, and disregard of ICANN's obligations under the Registry Agreement, only exacerbates the injury to VeriSign and raises additional questions as to whether ICANN sees its role as fostering innovation or stifling it.

Continued interference with VeriSign's business shall subject ICANN, and those individuals and companies who act in concert with it, to liability for the serious and continuing injuries resulting to VeriSign. In order to limit such ongoing injury to VeriSign, and in an attempt to resolve these important issues, we request an immediate negotiation of our differences. Absent a prompt resolution of these disputes, VeriSign



will be forced to seek other appropriate redress for ICANN's baseless interference with our business.

VeriSign does not waive, and hereby expressly reserves, any and all rights, claims and defenses that are in any way related to VeriSign's wildcard implementation.

Sincerely,

A handwritten signature in black ink that reads "James M. Ulam". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

James M. Ulam
Senior Vice President, General Counsel
VeriSign, Inc.

cc: Ivan Moura Campos
Vinton G. Cerf
Lyman Chapin
Mouhamet Diop
Tricia Drakes
Masanobu Katoh
Veni Markovski
Thomas Niles
Michael D. Palage
Alejandro Pisanty
Hualin Qian
Njeri Rionge
Paul Twomey
Steve Crocker
Roberto Gaetano
Francisco A. Jesus Silva
John Klensin
Mohamed Sharil Tarmizi