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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
22 ASSIGNED NAMES AND
23 NUMBERS, a California corporation,
24 Defendant.

Case No. CV 04-1292 AHM (CTx)

**PLAINTIFF VERISIGN, INC.'S
OPPOSITION TO SECOND
SUPPLEMENTAL REQUEST FOR
JUDICIAL NOTICE FILED BY
DEFENDANT ICANN IN SUPPORT
OF MOTION TO DISMISS
PLAINTIFF'S FIRST THROUGH
SIXTH CLAIMS FOR RELIEF**

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

1 Plaintiff VERISIGN, INC. (“VeriSign”) submits this Opposition to the Second
2 Supplemental Request for Judicial Notice filed by Defendant Internet Corporation for
3 Assigned Names and Numbers (“ICANN”) in support of its Motion To Dismiss the
4 Plaintiff’s First through Sixth Claims for Relief in the First Amended Complaint
5 (“Amended Complaint”) pursuant to Federal Rule of Civil Procedure 12(b)(6). In
6 addition to this Opposition to ICANN’s request for judicial notice of its proposed
7 Exhibits K through N, VeriSign also hereby renews the written objections that it filed
8 with the Court on April 22, 2004 and on May 13, 2004, to ICANN’s prior requests
9 for judicial notice of proposed Exhibits A through J.

10 **I. INTRODUCTION**

11 In a Rule 12(b)(6) motion the relevant inquiry is restricted to whether the
12 allegations in the complaint, taken as true, state a legally cognizable claim upon
13 which relief may be granted. ICANN’s Second Supplemental Request for Judicial
14 Notice ignores this standard, and constitutes an impermissible attempt to obtain
15 dismissal of various claims in this action under Rule 12(b)(6), based on ICANN’s
16 unilateral and disputed interpretation of source materials *outside* of the pleadings.
17 ICANN’s efforts to obtain judicial notice of extrinsic evidence – none of which is
18 appropriate for judicial notice or relevant to a Rule 12(b)(6) motion – reflect
19 ICANN’s recognition that VeriSign has met its Rule 12(b)(6) *pleading* burden and
20 that ICANN’s motion to dismiss should be denied. Accordingly, ICANN’s Second
21 Supplemental Request for Judicial Notice, like its previous requests for judicial
22 notice, also should be denied.

23 **II. ARGUMENT**

24 **A. Legal Standard**

25 A district court generally may not consider any material beyond the pleadings
26 in ruling on a Rule 12(b)(6) motion. *Gumataotao v. Dir. of Dep’t of Revenue &*
27 *Taxation*, 236 F.3d 1077, 1083 (9th Cir. 2001). One exception to this general rule is
28 for documents that are “necessarily relie[d]” on in the complaint, provided that their

1 authenticity “is not contested.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th
2 Cir. 2001) (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998)). A
3 second exception is for “matters of public record,” pursuant to Federal Rule of
4 Evidence 201. *Id.* at 688-89. However, a court may only take judicial notice of the
5 fact of the existence of a matter of public record, and may not take judicial notice of
6 the truth of the facts recited in the public record. *Id.* at 690.

7 **B. ICANN’s Exhibits Are Not the Proper Subject of Judicial Notice**
8 **and Are Irrelevant to VeriSign’s Claims**

9 **1. Exhibits K and M**

10 ICANN requests that this Court take judicial notice of two different court
11 filings from *unrelated* litigation. Specifically, ICANN requests judicial notice of
12 (1) a Statement of Claim that Pool.com filed against ICANN in unrelated litigation, to
13 which VeriSign is not even a party, pending in the Superior Court of Justice in
14 Ontario, Canada (“Exhibit K”), and (2) VeriSign’s Motion to Dismiss the First
15 Amended Complaint in litigation brought by Registersite.com (and other registrars)
16 against VeriSign, ICANN, and others in the United States District Court for the
17 Central District of California (“Exhibit M”). Neither of these documents is a proper
18 subject of judicial notice within the context of the instant proceedings.

19 First, judicial notice of pleadings from the *Registersite.com* and *Pool.com*
20 litigation is improper because such documents are plainly irrelevant to adjudication of
21 the instant motion. Neither document is mentioned *anywhere* in VeriSign’s Amended
22 Complaint against ICANN and arguments made in these unrelated disputes – based
23 on wholly distinct sets of facts, allegations, and pleadings – are not instructive in
24 determining whether VeriSign has stated a claim against ICANN. ICANN has failed
25 to provide any support or context for its implicit assertion that arguments made in
26 addressing whether the *Registersite.com* plaintiffs stated a claim against VeriSign are
27 relevant to these proceedings. Similarly, ICANN has failed to articulate any reason
28 why claims presented by Pool.com against ICANN in a Canadian court, in a

1 proceeding in which VeriSign is not a party, could possibly be relevant (and they are
2 not relevant) to a determination herein of whether factual allegations made by
3 VeriSign against ICANN state a viable legal claim for relief, especially in a context
4 in which VeriSign's allegations must be accepted as true for purposes of the pending
5 Rule 12(b)(6) motion.

6 Second, ICANN is improperly attempting to offer both of these documents for
7 the truth of the matters asserted therein, rather than for the mere recognition of the
8 fact that they exist and were filed. *Lee*, 250 F.3d at 690. With respect to Exhibit K,
9 ICANN specifically attempts to have this Court judicially notice the truth of the
10 allegation by Pool.com that ICANN "has taken [steps] toward *approving* VeriSign's
11 implementation of WLS [the Wait Listing Service]" in order to "prove[] the lie" to
12 *VeriSign's* allegations here that ICANN has, among other conduct, improperly
13 delayed approval of the WLS and improperly imposed conditions on any offering of
14 WLS by VeriSign. (2d Supp'l Req. at 4:8-9; *see also* Am. Compl. ¶¶ 43-46.)
15 Conversely, through Exhibit M, ICANN seeks to have the Court take judicial notice
16 of a statement VeriSign made in a motion in the *Registersite.com* case, in a different
17 context relating to different market allegations (or the lack thereof) by the
18 *Registersite.com* plaintiffs and, on the basis of that statement viewed in isolation, to
19 assume express allegations made in VeriSign's Amended Complaint herein have been
20 refuted. (2d Supp'l Req. at 5:19-27.) ICANN's use of judicial notice – to attack the
21 merits of contested allegations in VeriSign's Amended Complaint – in addition to
22 being incorrect, is entirely improper on a motion to dismiss, where the factual
23 allegations contained in the complaint must be accepted as true, and the parties
24 cannot introduce evidence to support their respective positions. *See Balistreri v.*
25 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Judicial notice of Exhibits
26 K and M is therefore not appropriate.

1 **2. Exhibit L**

2 ICANN also asks the Court to take judicial notice of its February 12, 2002
3 bylaws for the improper purpose of “proving” that ICANN’s structure and processes
4 contradict VeriSign’s conspiracy allegations. In particular, ICANN offers its bylaws
5 in an attempt to prove that it (1) “had the final authority to accept or reject a
6 recommendation from its supporting organizations and advisory committees” (2d
7 Supp’l Req. at 5:2-3), and (2) had “the ability to reject a recommendation of a
8 supporting organization” (*id.* at 5:11-12). ICANN is thus offering its bylaws not
9 merely for the fact of their existence or “for the purpose of determining what
10 statements are contained therein” but, rather, “to prove the truth of the contents” of
11 the bylaws as interpreted by ICANN – *i.e.*, that ICANN *in fact* is organized and
12 actually operates in strict conformity with the bylaws.

13 That is not the function of judicial notice, and the Court should decline this
14 request as improper. *See Skinner v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 2003
15 WL 23174478, at *3 (N.D. Cal. Dec. 29, 2003) (declining judicial notice of
16 “documents relating to the structure of NASD and its bylaws” as “not appropriate”
17 for judicial notice). Indeed, the factual conclusion ICANN would have the Court
18 draw from the bylaws is directly antithetical to express allegations of the Amended
19 Complaint, which must be accepted as true. (*See, e.g.*, Am. Compl. ¶¶ 85-87, 93-95.)
20 In this instance, the bylaws, far from contradicting VeriSign’s allegations of control
21 and conspiracy, demonstrate that the restraints of trade alleged by VeriSign *could* be
22 and, as alleged by VeriSign were, effectuated by ICANN’s board of directors *and* by
23 VeriSign’s competitors acting through ICANN’s Supporting Organizations.
24 Resolution of this issue depends upon disputed facts, and ICANN cannot short-circuit
25 the litigation process through judicial notice, before VeriSign has had an opportunity
26 to conduct discovery and to present its evidence. Of course, were ICANN to offer its
27 bylaws not for the truth of their contents, but merely to show “what statements are
28 contained therein,” the bylaws would be irrelevant to any issue presented by

1 ICANN's motion to dismiss. *See, e.g., Pac. Gas & Elec. Co. v. Lynch*, 216 F. Supp.
2 2d 1016, 1025-26 (N.D. Cal. 2002) (declining to take judicial notice of documents in
3 related action on relevancy grounds).

4 **3. Exhibit N**

5 Finally, ICANN's request for judicial notice of a September 22, 2003 Message
6 to ICANN's Board from the Security and Stability Advisory Committee ("Message")
7 is equally improper. Again, ICANN seeks to introduce the Message not for the fact
8 of its existence, but rather for the truth of its contents. ICANN specifically argues
9 that the text of the Message "in no way supports VeriSign's conspiracy theory" (2d
10 Supp'l Req. at 6:22-23), and it seeks to characterize and interpret what the Message
11 "contains," whether the Message is "a final report," and what the purpose and effect
12 of the Message are, all in aid of its purported facial attack on the pleading (*id.* at 6:17-
13 22). Clearly, what ICANN hopes to prove with Exhibit N goes far beyond the simple
14 fact of the existence of the document and encompasses instead the "merits" of
15 ICANN's own factual assertions regarding the *meaning* of the document. *See U.S. v.*
16 *S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 975 (E.D. Cal. 2004) ("[D]ocuments are
17 judicially noticeable only for the purpose of determining what statements are
18 contained therein, not to prove the truth of the contents or any party's assertion of
19 what the contents mean.").

20 It is an entirely impermissible use of judicial notice for ICANN to seek to rely
21 on factual and evidentiary disputes to support its Rule 12(b)(6) motion to dismiss. In
22 raising such extrinsic matters, ICANN all but concedes it has no basis for a facial
23 attack on the Amended Complaint. Contrary to ICANN's urging, the Court cannot
24 use or rely on Exhibit N to determine the merits of VeriSign's conspiracy theory. (2d
25 Supp'l Req. at 6:22-23.) Therefore, the exhibit has no relevance for present purposes
26 and should not be judicially noticed. *See, e.g., Pac. Gas & Elec. Co.*, 216 F. Supp. 2d
27 at 1025-26.


1 **III. CONCLUSION**

2 For all of the reasons stated, the Court should decline to take judicial notice of
3 ICANN Exhibits K, L, M, and N, as well as of ICANN's previously submitted
4 Exhibits A through J.

5
6 Dated: July 28, 2004.

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9 By:


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