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VERISIGN, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VERISIGN, INC., a Delaware corporation,

Plaintiff,

v.

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

Defendants.

Case No. CV 04-1292 AHM (CTx)

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

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

ICANN concedes that VeriSign has produced substantial evidence to demonstrate that it will succeed on its underlying claims against ICANN, self-styling it a "mountain of evidence," but fails even to attempt to assert specific objections to the vast majority of this "mountain." (*See* ICANN's Reply at 1:19 (admitting that VeriSign has submitted a "mountain of evidence"); ICANN's Evid. Obj. at 4 ("ICANN provides only a handful of specific objections").) ICANN's failure to object effectively concedes the admissibility of the evidence and, thus, that VeriSign has made a prima facie showing that its claims have merit.

ICANN attempts to avoid the consequences of its failure specifically to object to most of VeriSign's evidence by generally and conclusorily asserting that "most" of VeriSign's evidence is "truly not relevant" to ICANN's motion, without identifying which exhibits and portions of declarations supposedly are "not relevant." (ICANN's Evid. Obj. at 2:12-14.) Such a generalized "objection" to VeriSign's evidence is procedurally improper. Accordingly, all of VeriSign's evidence for which ICANN has not provided any specific objection should be deemed admitted without the need for any further analysis by the Court. *See* Fed. R. Evid. 103(a)(1) (a party challenging the admission of evidence must timely object and "stat[e] the specific ground of objection"); *United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990) ("[A] party fails to preserve an evidentiary issue for appeal . . . by failing to make a specific objection.").

Moreover, ICANN's boilerplate relevancy objection is interposed only after it mischaracterizes the applicable burdens at issue in this motion. Specifically, ICANN misstates and narrowly defines what type of evidence is relevant to its motion, claiming that VeriSign's evidence is inadmissible if it does not directly refute "that ICANN has made a prima facie showing that" the anti-SLAPP statute applies. (ICANN's Evid. Obj. at 2:21-23; *see also id.* at 4:11-14 (claiming evidence is not admissible because it does not "address[] whether ICANN has established that the

anti-SLAPP statute applies").) ICANN's argument, however, misstates the scope of evidence that is relevant to an anti-SLAPP motion.

VeriSign can defeat ICANN's motion by demonstrating, among other things, that its claims are meritorious. Accordingly, evidence going to the elements of VeriSign's claims is relevant. *See generally Navellier v. Sletten*, 29 Cal. 4th 82, 89, 124 Cal. Rptr. 2d 530 (2002) (a plaintiff may defeat an anti-SLAPP motion by demonstrating that its underlying claims have "minimal merit"). In addition to refuting ICANN's purported prima facie showing regarding the application of the anti-SLAPP statute in this case, VeriSign's "mountain of evidence" shows the strength of VeriSign's underlying claims and is therefore relevant and admissible.[1] Specifically, VeriSign's evidence is relevant to demonstrating the validity of its breach of contract and tortious interference claims.

The few examples of purported "irrelevant" evidence that ICANN provides illustrate that VeriSign's evidence is, in fact, relevant. For example, ICANN asserts that the "Green Paper" (*see* VeriSign's Ex. 8) is "irrelevant." (ICANN's Evid. Obj. at 3.) However, the Green Paper (like the "White Paper" that came after it) provides evidence regarding the limited purposes for which ICANN was created, and thus demonstrates the proper, narrow interpretation of terms within the .com Registry Agreement. The interpretation of the .com Registry Agreement is plainly relevant to VeriSign's breach of contract claims.

ICANN also complains that the declaration of Benjamin Desjardins is "irrelevant" because "it contains only a description of the 'Marketing Program'

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[1] ICANN's relevance objection also ignores the well-established principle that evidence should only be excluded if it does not have "*any* tendency to make the existence of *any* fact that is of consequence to the determination of the action" more or less probable. Fed. R. Evid. 401 (emphasis added); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) ("The Rule's basic standard of relevance thus is a liberal one.").

VeriSign launched." (*Id.* at 4.) As described in VeriSign's Complaint and opposition papers, ICANN's conduct with respect to the Marketing Program constituted a specific breach of its contractual obligations. As such, the Desjardins declaration, which concerns the very Marketing Program that is the subject of VeriSign's claims, is clearly relevant.

Finally, as discussed, *infra*, the specific objections that ICANN has raised are also without merit:

Ex. No.	Description	Evidentiary Objections	Response
4	Cooperative Agreement Between NSF and NSI: *http://www.icann.org/nsi/coopagmt-01jan93.htm* (Sbarbaro)	Objections: Incomplete; Irrelevant. This document is inadmissible for incompleteness because the agreement is not submitted with amendments. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 106, 401, 402][2]	This document is relevant to VeriSign's prima facie showing; the document bears on, among other things, the meaning and interpretation of terms in the .com Registry Agreement, the background of the parties' relationship, and ICANN's breach of this Agreement. (FRE 401, 402) The amendments are not necessary to a fair understanding of the proffered document. (FRE 106 & advisory committee's note)
5	Amendment 19 to the Cooperative Agreement Between NSF and NSI: *http://www.icann.*	Objections: Incomplete; Irrelevant. This document is	This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other

[2] The Federal Rules of Evidence are referred to throughout as "FRE."

Ex. No.	Description	Evidentiary Objections	Response
	org/nsi/amendment19.htm (Sbarbaro)	inadmissible for incompleteness because VeriSign does not submit all the relevant amendments to the Cooperative Agreement. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 106, 401, 402]	things, the meaning and interpretation of terms in the .com Registry Agreement, the background of the parties' relationship, and ICANN's breach of this Agreement. (FRE 401, 402) The amendments are not necessary to a fair understanding of the proffered document. (FRE 106 & advisory committee's note)
6	1999 Registry Agreement Between ICANN and NSI: *http:www.icann.org/nsi/nsi-registry-agreement-04nov99.htm* (Sbarbaro)	Objection: Irrelevant. The relevant .com Registry Agreement is the 2001 agreement between ICANN and VeriSign. The 2001 agreement is the agreement VeriSign alleges to have been breached. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 401, 402]	This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, the background of the parties' relationship, and ICANN's breach of this Agreement. (FRE 401, 402)
27	10/16/02 Letter from Philip L. Sbarbaro to Joe Sims Requesting Reconsideration of	Objections: Lack of authentication; Irrelevant (Sbarbaro should have authenticated this	This document is properly authenticated and relevant. ICANN submitted the same letter as Exhibit 12 to the Supplemental

Ex. No.	Description	Evidentiary Objections	Response
	Resolution 02.100	document in his declaration, not Turner). Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 401, 402, 901]	Declaration of John O. Jeffrey, filed in conjunction with ICANN's reply papers. Evidence sufficient to support a finding of personal knowledge has been laid. (*See* Turner Decl. ¶¶ 2, 3, 57; FRE 602) This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, and ICANN's breach of this Agreement. (FRE 401, 402)
28	05/20/03 Reconsideration Request 02-6, Recommendation of the Committee	Objection: Irrelevant. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 401, 402]	This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, and ICANN's breach of this Agreement. (FRE 401, 402)

Ex. No.	Description	Evidentiary Objections	Response
29	09/04/03 Letter from Paul Twomey to Chuck Gomes	Objection: Irrelevant. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 401, 402]	This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, and ICANN's breach of this Agreement. (FRE 401, 402)
30	09/16/03 VeriSign's Response to ICANN	Objection: Irrelevant; Prejudicial. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. Reflects the subjective intent of the author, not admissible evidence. [FRE 401, 402, 403]	This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, the meaning and interpretation of terms in the .com Registry Agreement, and ICANN's breach of this Agreement. (FRE 401, 402) This evidence has strong probative value because it is relevant to proving ICANN's breach of the .com Registry Agreement and, on the Court's review of an anti-SLAPP motion, there is clearly no danger of misleading a jury. (FRE 403) Moreover, the probative value clearly outweighs any "undue prejudice" given that a court's decision on an anti-SLAPP motion is not admissible for any other purpose. (*See* Cal. Civ. Proc. Code § 425.16(b)(3) ("If the court determines that the plaintiff has

Ex. No.	Description	Evidentiary Objections	Response
			established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.")))
39	Sept.-Oct. 2003 E-mails from gnso.icann.org regarding VeriSign and third party provider	Objection: Irrelevant. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 401, 402]	This document is relevant to VeriSign's prima facie showing; the document evidences, among other things, the existence of a third-party relationship upon which VeriSign's tortious interference claim is based, and ICANN's knowledge of that relationship. (FRE 401, 402)

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
18	Pursuant to the 2001 .com Registry Agreement, ICANN recognized VeriSign as the "sole operator" of the .com gTLD registry, and VeriSign undertook to operate the .com gTLD registry in accordance with	Objection: The document speaks for itself; improper lay opinion (draws a legal conclusion) re: VeriSign's compliance with agreement obligations.	Evidence sufficient to support a finding of personal knowledge has been laid. (*See* Turner Decl. ¶¶ 2, 3; FRE 602) This is permissible opinion from a lay witness because it is rationally based on the perception of the witness

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	the terms of the 2001 Registry Agreement and to pay certain registry-level fees to ICANN. Since a registry maintains the authoritative database of second level domain names and IP addresses within a TLD, there necessarily can be only one registry for each TLD. VeriSign is that sole registry for the .com gTLD. Based on my job responsibilities, I am in a position to know of VeriSign's performance of its obligations under the 2001 .com Registry Agreement. To the best of my knowledge VeriSign has fully performed and continues to perform all of its obligation under that agreement.	[FRE 701, FRE 704]	and would help the Court (1) have a clear understanding of Turner's testimony and (2) determine whether VeriSign has satisfied its obligations under the .com Registry Agreement. (FRE 701)
84	On or about September 12, 2003, I was present when a VeriSign colleague briefed ICANN President Paul Twomey about ICANN's intended launch of Site Finder. Mr. Twomey stated that it was not an issue and raised no objections to deployment of a wildcard either on that occasion or immediately	Objections: Subjective intent; Hearsay; Lacks personal knowledge. This statement is inadmissible hearsay. It reflects the subjective intent of the declarant, not admissible evidence. Lacks personal knowledge (of what	The statement of Paul Twomey is admissible nonhearsay because it is an admission of a party opponent. (FRE 801(d)(2)) Evidence sufficient to support a finding of personal knowledge has been laid. (*See* Turner Decl. ¶¶ 2, 3, 84; FRE 602)

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	after the launch. He evidently did not consider Site Finder to be a "registry service" under the 2001 .com Registry Agreement.	Twomey considered Site Finder to be). [FRE 602, FRE 802]	Statement is admissible as a present sense impression and state of mind. (FRE 803(1), (3))
85	VeriSign launched Site Finder in the .com TLD on September 15, 2003. The clear market demand for Site Finder was demonstrated by the extent, to which users immediately utilized the navigation tools of the Site Finder service. During its first week of operation, between September 15, 2003, and September 21, 2003, Internet users visited the Site Finder page more than 62 million times. Users used the "Did you mean" tool 1.5 million times, and they used the search tool more than 13 million times.	Objections: Subjective intent; Lack of foundation; Irrelevant. This statement reflects the subjective intent of the declarant, not admissible evidence. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 401, 402, 602]	This paragraph is relevant to VeriSign's prima facie showing; the paragraph is pertinent to, among other things, elements of VeriSign's breach of contract and tortious interference claims. (FRE 401, 402) Evidence sufficient to support a finding of personal knowledge has been laid. (*See* Turner Decl. ¶¶ 2, 3; FRE 602)

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
86	On September 19, 2003, based on purported and unsubstantiated expressions of concern from the Internet community, ICANN asked VeriSign to "voluntarily suspend" Site Finder. ICANN also requested advice from its Security and Stability Advisory Committee and from the IAB with respect to Site Finder. ICANN then posted this request as an *Advisory Concerning VeriSign's Deployment of DNS Wildcard Service* to its website at www.icann.org/announcements/advisory-19sep03.htm.	Objections: Hearsay; Lack of foundation/lacks personal knowledge; Improper lay opinion; The document speaks for itself. Turner's interpretation is inadmissible hearsay. This statement lacks proper foundation/ personal knowledge (re: unsubstantiated expressions of concern) and reflects an improper lay opinion by Turner. [FRE 602, 701, 802]	The statements by ICANN referenced in paragraph 86 are admissible nonhearsay because they are admissions of a party opponent. (FRE 801(d)(2)) No statement in this paragraph constitutes hearsay. An interpretation/mental impression of a witness is not hearsay. (FRE 801(c)) Evidence sufficient to support a finding of personal knowledge has been laid. (*See* Turner Decl. ¶¶ 2, 3; FRE 602) This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court (1) have a clear understanding of Turner's testimony and (2) determine whether ICANN breached the .com Registry Agreement. (FRE 701)
87	Because ICANN's request was completely unsubstantiated, VeriSign declined to suspend the service, explaining that "it would be premature to	Objections: Hearsay; Lack of foundation/lacks personnel knowledge; Improper lay opinion; The document speaks	No statement in this paragraph constitutes hearsay. An explanation regarding why VeriSign acted as it did is not hearsay. (FRE 801(c))

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	decide on any course of action until we first have had an opportunity to collect and review the available data." A copy of a letter from Russell Lewis to Paul Twomey, the President of ICANN, dated September 21, 2003, is available at www.icann.org/correspondence/lewis-to-twomey-21sep03.htm and submitted as Exhibit 34.	for itself. Turner's interpretation is inadmissible hearsay. This statement lacks proper foundation/personal knowledge (re: ICANN's request was completely unsubstantiated) [FRE 602, 701, 802]	Evidence sufficient to support a finding of personal knowledge has been laid. (*See* Turner Decl. ¶¶ 2, 3; FRE 602) This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court (1) have a clear understanding of Turner's testimony and (2) determine whether ICANN breached the .com Registry Agreement. (FRE 701)
88	Also on September 19, 2003, just four days after VeriSign had launched Site Finder, the Chairman of ICANN's Security and Stability Advisory Committee ("SECSAC"), Steve Crocker, circulated to committee members a draft report entitled *Recommendations Regarding VeriSign's Introduction of Wild Card Response to Unregistered Domains within .com and .net,* a copy of which is submitted concurrently as Exhibit 35. This draft	Objections: Hearsay; Document speaks for itself; Lack of personal knowledge; Improper lay opinion. Turner's interpretation is inadmissible hearsay. Lack of personal knowledge (re: SECSAC reached its conclusion first) and an improper lay opinion (as to "what the comment made clear"). [FRE 602, 701, 802]	The statements in the SECSAC Report are admissible nonhearsay because, among other things, they are statements by a Chairman of an ICANN committee adopted by ICANN and, thus, are admissions of a party opponent. (FRE 801(d)(2)) This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court (1) have a clear understanding of Turner's

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	report already includes the committee's supposed opinions and recommendations, but no facts, evidence, or analysis. Indeed, a bracketed comment contained in the draft report reads, "This is where we need to include the factual information to support the opinions and recommendations that follow. PAUL VIXIE and SUZANNE AMONG OTHERS, please dump stuff into this section." The comment makes perfectly clear that SECSAC reached its "conclusion" first and was going to look for evidence to support it later.		testimony and (2) determine whether ICANN breached the .com Registry Agreement. (FRE 701) Evidence sufficient to support a finding of personal knowledge has been laid. (*See* Turner Decl. ¶¶ 2, 3; FRE 602)
89	SECSAC issued its report from the above-referenced draft on September 22, 2003, and Posted it at http://www.icann.org/correspondence/secsac-to-board-22sep03.htm. A copy of this report is submitted concurrently as Exhibit 36. This report side-steps the issue of "facts" altogether. Apparently because SECSAC was unable to	Objections; Improper lay opinion; Improper legal conclusions. Improper lay opinion (that the report side-steps the issue of "facts"); Improper legal conclusions ("These actions were not open and transparent, but rather staged and arbitrary.").	This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court (1) have a clear understanding of Turner's testimony and (2) determine whether ICANN breached the .com Registry Agreement. (FRE 701)

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	provide any supporting factual information, the report consists of opinions and scaled back, recommendations from the draft. The report does not include any facts concerning the effects of Site Finder or any analysis supporting the report's opinions and recommendations, and it even acknowledges that SECSAC would meet the following month to gather facts. Despite subsequent, repeated promises by SECSAC that another report would be issued in November 2003, after almost seven months, SECSAC has yet to issue that further report with facts to support its conclusions. These actions were not open and transparent, but rather staged and arbitrary.	[FRE 701]	
90	By October 3, 2003, as detailed more fully in the Declaration of Scott Hollenbeck, ICANN had not substantiated that Site Finder negatively impacted the operation of the Internet. Nevertheless, that same day, October 3,	Objections: Improper lay opinion; Improper legal conclusions; Lack of foundation; The document speaks for itself. Improper lay opinion and lack of foundation	This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court (1) have a clear understanding of Turner's testimony and (2) determine whether

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	2003, ICANN again insisted that VeriSign suspend Site Finder. It asserted in purely conclusory terms that Site Finder had had "a substantial adverse effect on the core operation of the DNS [and] on the stability of the Internet . . . . ICANN stated that unless VeriSign suspended Site Finder, "ICANN will be forced to take the steps necessary to enforce VeriSign's contractual obligations." A copy of the letter from Paul Twomey to Russell Lewis is available at www.icann.org/correspondence/twomey-to-lewis-03oct03.htm and is submitted as Exhibit 37. At about the same time, ICANN posted an *Advisory Concerning Demand to Remove VeriSign's Wildcard* to www.icann.org/announcements/advisory-03oct03.htm. A true and-correct copy of that advisory is submitted concurrently as Exhibit 38. VeriSign was not included in any ICANN "processes" leading to the October 3	(that ICANN had not substantiated that Site Finder negatively impacted the operation of the Internet); Improper legal Conclusions (ICANN's "processes" were hardly open and transparent). [FRE 602 701]	ICANN breached the .com Registry Agreement. (FRE 701) Evidence sufficient to support a finding of personal knowledge has been laid (*see* Turner Decl. ¶¶ 2, 3); statement also based on Turner's understanding after having reviewed the October 3 letter. (FRE 602)

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	suspension notice, and any such "processes" were hardly open and transparent.		
91	After receiving ICANN's October 3, 2003 letter, VeriSign concluded that it had no practical choice but to suspend Site Finder. Otherwise, VeriSign faced the risk of ICANN's utilization of self-help remedies, including a declaration of breach of the .com Registry Agreement and termination of the .com registry agreement. Since VeriSign's operation of the .com registry represents approximately 20% of VeriSign's total revenue, the termination of the .com registry agreement would have ruinous financial effects for the company, and VeriSign therefore could not take the risk of continuing to operate Site Finder.	Objections; Lack of foundation; Prejudicial. This document lacks proper foundation (for the belief that ICANN would utilize self-help remedies). The language also states a legal conclusion. Prejudicial language ("ruinous financial effects") is inadmissible. [FRE 403, 602]	This evidence has strong probative value because it is relevant to proving damages and the harm VeriSign suffered, and, on the Court's review of an anti-SLAPP motion, there is clearly no danger of misleading a jury. (FRE 403) Moreover, the probative value clearly outweighs any "undue prejudice" given that a court's decision on an anti-SLAPP motion is not admissible for any other purpose. *See* Cal. Civ. Proc. Code § 425.16(b)(3) ("If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that

Declaration of Benjamin R. Turner			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
			determination."). This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court (1) have a clear understanding of Turner's testimony and (2) determine whether ICANN breached the .com Registry Agreement. (FRE 701)
92	VeriSign did orally request of ICANN a few day extension of its stated deadline for the suspension of Site Finder, so that Site Finder could be decommissioned in an orderly fashion. However, ICANN flatly rejected that request.	Objections: Irrelevant. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 401,402]	This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, ICANN's breach of the .com Registry Agreement. (FRE 401, 402)

Declaration of Mark Mandolia			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
3	On or about October 9, 2003, acting at the direction of James Ulam, Senior Vice President, general Counsel of	Objection: The document speaks for itself.	This paragraph provides foundation and authentication for the letter; admissible as a preliminary question.

Declaration of Mark Mandolia			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	VeriSign, I transmitted by e-mail and facsimile to John Jeffrey, General Counsel of the Internet Corporation for Assigned Names and Numbers, the letter attached as Exhibit A to this declaration. In addition, on the same date I transmitted Exhibit A by e-mail to the members of the ICANN Board copied on the letter.		(FRE 104) This letter is relevant to VeriSign's prima facie showing; the letter describes, among other things, ICANN's breach of the .com Registry Agreement. (FRE 401, 402)

Declaration of Thaddeus Mason Pope			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
12	Submitted concurrently as Exhibit 60 to VeriSign's Appendix of Exhibits is a true and correct copy of the testimony of Nancy J. Victory, Assistant Secretary of the Department of Commerce, before the United States Senate Subcommittee on Commerce, Science, and	Objections: Incomplete document; Prejudicial. Incomplete/misleading/ prejudicial. [VeriSign does not mention other portions of the chart such as the portion stating, "Discussions underway regarding agreements	Victory's complete testimony is attached as Exhibit 60.[3]

[3] It appears that ICANN may have intended instead to object to Exhibit 58, which contains the referenced chart on page 5 of 21, paragraph 7. However, Exhibit 58 contains the entire document, including the chart, to which ICANN objects, so the Exhibit is not misleading or prejudicial.

Declaration of Thaddeus Mason Pope			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	Transportation, dated July 31, 2003, available at http://commerce.senate.gov/hearings/061102victory.pdf, in which she states that "much is still to be done" and that "ICANN needs to establish stable agreements with the country-code top-level domain operators."	with several additional ccTLD managers." (p.5 of 21 ¶ 7)] [FRE 106, 403]	
14	Submitted concurrently as Exhibit 61 to VeriSign's Appendix of Exhibits is a true and correct copy of ICANN's bylaws in effect at the time the 2001 com Registry Agreement was entered on May 25, 2001, dated July 16, 2000, available at http://www.icann.org/general/archive-bylaws/bylaws-16ju100.htm#III, in which ICANN states "The Initial Board shall, following solicitation of input from the Advisory Committee on Independent Review and other interested parties and consideration of all such suggestions, adopt policies and procedures for independent third-party review of Board actions alleged by an affected	Objection: Irrelevant. Irrelevant to the question before the Court on ICANN's Special Motion to Strike. [FRE 401, 402]	This document is relevant to VeriSign's prima facie showing; the document is pertinent to, among other things, ICANN's obligation under the .com Registry Agreement (§ II.4.D.) to establish independent review policies and adequate appeal procedures. (FRE 401, 402)

Declaration of Thaddeus Mason Pope			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	party to have violated the Corporation's articles of incorporation or bylaws." (Exhibit 61 art, III § 4(b).)		

Declaration of Charles A. Gomes			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
15	I have also had experience dealing with ICANN in the context of a promotional program VeriSign offered to com registrars in 2001, to encourage new domain name registrations in the com TLD. The program was scheduled to be in effect for two months. After the start of the program, I received a letter dated November 6, 2001, from Louis Touton, then Vice President and General Counsel of ICANN, in which he complains that the promotional program was improper and unauthorized, that it constituted a "registry service," and that it was implemented without notice to ICANN, among	Objections: Hearsay; Authentication. The opinion of what was written in the document authored by Louis Touton is inadmissible hearsay. The document should speak for itself. Lack of authentication (without attaching the letter there is no basis to rely on Gomes' recollection of what the letter contained]. [FRE 802, 901]	This is admissible nonhearsay because the statement is not admitted for the truth of the matter asserted, but rather, to show that the statement was made. (FRE 801(c)) Touton's statement also is admissible as a nonhearsay admission of a party opponent. (FRE 801(d)(2))

Declaration of Charles A. Gomes			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	other points.		
16	On the same day, ICANN's then President and Chief Executive Officer, M. Stuart Lynn, in an email to VeriSign's President, Stratton Sclavos, charged that the promotional program called in question VeriSign's commitment to the .com Registry Agreement, and threatened to hold VeriSign in breach, and possibly either to terminate or decline to renew the .com Registry Agreement, unless VeriSign made a "rapid and significant change in [its] operations." I received and read a copy of Mr. Lynn's email the day after he sent it. A true and correct copy of that email is submitted concurrently as Exhibit 1.	Objections: Hearsay; Document speaks for itself. This document is inadmissible hearsay. [FRE 802]	The document is admissible nonhearsay because it is an admission of a party opponent, M. Stuart Lynn. (FRE 801(d)(2))
17	On November 29, 2001, I caused a written response to be transmitted to Mr. Touton. A true and correct copy of that letter is submitted concurrently as Exhibit 2. The letter accurately reflects and	Objections: Hearsay; Document should speak for itself. This document is inadmissible hearsay. [FER 802]	The document is admissible nonhearsay because it is not offered for the truth of the matter asserted, but rather, for the fact that the letter was sent. (FRE 801(c)) The sending of the letter is

Declaration of Charles A. Gomes			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	states the facts regarding the promotional program and the position of VeriSign on the points Mr. Touton had raised. In the letter, I take strong exception to his assertion that the program was or could be a "registry service" under the 2001 .com Registry Agreement and explain that the promised incentive to participating registrars was payment for their aggressively advertising and promoting .com TLD registrations.		relevant to showing Gomes's knowledge and the effect of the letter on ICANN.
18	I subsequently received another letter from Mr. Touton regarding the program, this one dated December 3, 2001. A true and correct copy of that letter is submitted concurrently as Exhibit 3. In the letter, Mr. Touton expressly states that ICANN intended "to issue a formal notice of breach" with respect to the program. In response to that threat, VeriSign had to modify the program substantially in midcourse and at substantial cost to VeriSign, as I understand	Objection: The document speaks for itself.	Gomes's statement provides foundation and authentication for the letter; admissible as a preliminary question. (FRE 104)

Declaration of Charles A. Gomes			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	is being described in more detail in another declaration.		

Declaration of Scott A. Hollenbeck			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
40	Prior to [t]he publication of the SECSAC report on September 19, 2003, just four days after Site Finder had been launched, the committee's chairman Steve Crocker, circulated a draft report that already included the committee's opinions and recommendations but that requested facts to support those opinions and recommendations.	Objections: Improper lay opinion; Lack of authentication; Hearsay. Improper lay opinion about the contents of the draft report. The characterization of the draft report is inadmissible hearsay. The document should speak for itself. Lack of authentication (without attaching the letter there is no basis to rely on Hollenbeck's recollection of what the draft report contained). [FRE 701, 802, 901]	The full draft report is authenticated by the Turner Decl. ¶ 88, and is attached as Exhibit 35 to VeriSign's Appendix of Exhibits filed in opposition to ICANN's motion to strike. This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court (1) have a clear understanding of Hollenbeck's testimony and (2) determine whether ICANN breached the .com Registry Agreement. (FRE 701) The document is admissible nonhearsay because it is a statement by a Chairman of an ICANN committee

Declaration of Scott A. Hollenbeck			
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			adopted by ICANN and, thus, an admission of a party opponent. (FRE 801(d)(2)) Alternatively, Crocker's statement is nonhearsay because it is a statement against interest. (FRE 804(b)(3))
41	SECSAC did not present data to support its claims and conclusions in September 2003, and, as indicated by the absence of a report five months later, has apparently not been able to find such evidence.	Objections: Hearsay; Lack of personal knowledge; Lack of authentication; Improper lay opinion; Improper legal conclusions. This statement is inadmissible as hearsay. Lack of personal knowledge regarding the contents of the draft report contents. Improper lay opinion, speculating as to the lack of evidence. [FRE 602, 802, 901]	This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court (1) have a clear understanding of Hollenbeck's testimony and (2) determine whether ICANN breached the .com Registry Agreement. (FRE 701)
42	Prior to the issuance of the SECSAC report, SECSAC had declined VeriSign's offer to provide relevant data regarding Site Finder	Objections: Improper lay opinion; Prejudicial. Improper lay opinion	This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court

Declaration of Scott A. Hollenbeck			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
	report, and the report was published without the benefit of VeriSign's input. SECSAC and ICANN also cancelled scheduled meetings with VeriSign to discuss Site Finder.	that SECSAC and ICANN itself did not consider the information previously presented to it by VeriSign and the statement is, therefore, prejudice and inadmissible. [FRE 403, 701]	(1) have a clear understanding of Hollenbeck's testimony and (2) determine whether ICANN breached the .com Registry Agreement. (FRE 701) This evidence has strong probative value because it is relevant to proving ICANN's breach of contract, and, on the Court's review of an anti-SLAPP motion, there is clearly no danger of misleading a jury. (FRE 403) Moreover, the probative value clearly outweighs any "undue prejudice" given that a court's decision on an anti-SLAPP motion is not admissible for any other purpose. *See* Cal. Civ. Proc. Code § 425.16(b)(3) ("If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the

Declaration of Scott A. Hollenbeck			
Para. No.	**Description**	**Evidentiary Objections**	**Response**
			case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.").
43	The SECSAC's September 22, 2003 report was not produced in a fair, open and transparent manner.	Objection(s): Lack of foundation; Improper lay opinion; Draws an improper legal conclusion. [FRE 602, 701]	This is permissible opinion from a lay witness because it is rationally based on the perception of the witness and would help the Court (1) have a clear understanding of Hollenbeck's testimony and (2) determine whether ICANN breached the .com Registry Agreement. (FRE 701)

DATED: May 13, 2004

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