

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  
25  
26  
27  
28

Case No. CV 04-1292 AHM (CTx)

**DECLARATION OF THADDEUS  
M. POPE IN SUPPORT OF  
PLAINTIFF VERISIGN, INC.'S  
OPPOSITION TO DEFENDANT  
ICANN'S MOTION TO STRIKE**

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; and [Proposed]  
Order concurrently filed and lodged  
herewith]

1 I, THADDEUS MASON POPE, declare:  
2

3 1. I am an attorney duly admitted to practice law in the State of California and  
4 an associate in the law firm of Arnold & Porter LLP, counsel of record in this action for  
5 plaintiff VeriSign, Inc. ("VeriSign"). I am one of the Arnold & Porter attorneys  
6 actively participating in this action on behalf of VeriSign, and I make this declaration in  
7 support of VeriSign's Opposition of the Internet Corporation for Assigned Names and  
8 Numbers' ("ICANN's") Special Motion to Strike.

9 2. I have personal knowledge of the matters stated herein and, if called upon as  
10 a witness, I could and would testify competently thereto.  
11

12 **I. VERISIGN'S NEED FOR DISCOVERY**

13 3. VeriSign filed its Complaint against ICANN on February 26, 2004.  
14 ICANN's special motion to strike was filed on April 20, 2004. Due to the early stage  
15 of the proceedings, counsel for the parties have not yet scheduled or held a Rule 26  
16 conference, nor is there any agreement between the parties that discovery may  
17 commence prior to that conference. Consequently, neither party has served or  
18 responded to any discovery.

19 4. As described below, VeriSign seeks leave to conduct limited discovery that  
20 is essential to its opposition of ICANN's special motion to strike. Specifically,  
21 VeriSign requests the opportunity to depose ICANN, pursuant to Federal Rule of Civil  
22 Procedure 30(b)(6) and to serve one set of document requests. True and correct copies  
23 of VeriSign's proposed deposition notice and document requests are submitted,  
24 collectively, as Exhibit 54 to VeriSign's Appendix of Exhibits filed concurrently  
25 herewith. VeriSign anticipates that, absent unforeseen circumstances, this discovery  
26 could be completed in ninety days.

27 5. Without the benefit of any discovery, VeriSign lacks facts essential to its  
28 defense that the anti-SLAPP statute does not apply to ICANN's October 3, 2003

1 Suspension Ultimatum letter (the "October 3 letter"). Specifically, VeriSign lacks facts  
2 as to whether ICANN's October 3 letter was made with a good faith belief in a legally  
3 viable claim against VeriSign, and whether ICANN was seriously contemplating such a  
4 lawsuit, because these facts are exclusively within ICANN's control. Specifically,  
5 VeriSign seeks facts through the deposition of ICANN and documents concerning:  
6 (i) ICANN's consultations with legal counsel prior to sending the October 3 letter;  
7 (ii) any legal investigation regarding the viability of its alleged claims against VeriSign  
8 prior to October 3; and (iii) communications with its Board of Directors and officers  
9 between August 1 and October 3 concerning a potential lawsuit against VeriSign. If  
10 ICANN, in fact, consulted with legal counsel and discussed a potential lawsuit against  
11 VeriSign with its officers and directors, such information exists and could readily be  
12 discovered through deposition testimony and document requests, such as those  
13 submitted concurrently as Exhibit 54 to VeriSign's Appendix of Exhibits. Moreover,  
14 VeriSign contends that the October 3 letter was sent in bad faith and based on  
15 information that ICANN knew to be false. Such facts would demonstrate that the  
16 litigation privilege and anti-SLAPP statute do not apply to the October 3 letter or,  
17 consequently, to VeriSign's second through fourth claims for relief.

18 6. In addition, because no discovery has occurred, VeriSign also lacks facts  
19 relevant to its tortious interference claim regarding ICANN's knowledge of VeriSign's  
20 agreement with a third party and ICANN's intent to disrupt that agreement by  
21 demanding suspension of VeriSign's Site Finder service. Although ICANN's  
22 knowledge and intent are matters within ICANN's sole control, VeriSign has identified  
23 postings on ICANN's Internet website which reference VeriSign's contract with a third  
24 party in connection with Site Finder. While no substitute for direct discovery from  
25 ICANN regarding its knowledge or intent, these postings support an inference that  
26 ICANN knew about VeriSign's contract and, thus, discovery on this issue would lead to  
27 relevant and admissible evidence. (See Turner Decl. ¶ 97; App. Exs. 39-40.)  
28 Specifically, VeriSign seeks discovery regarding: (i) communications concerning the

1 existence of a contract between VeriSign and a third party in connection with  
2 VeriSign's Site Finder service; and (ii) ICANN communications addressing the impact  
3 of ICANN's demand that VeriSign suspend its Site Finder service upon this contract.  
4 (See App. Exs. 39-40.) This information could be readily obtained through deposition  
5 testimony and document requests. *Id.* Moreover, evidence concerning ICANN's  
6 knowledge of VeriSign's contract with a third party and its intent to disrupt that  
7 agreement could be critical to VeriSign's opposition of the anti-SLAPP motion  
8 because, if the Court determines that the anti-SLAPP statute applies to this claim,  
9 VeriSign must make a prima facie showing on these elements.

10         7. Likewise, VeriSign also requires discovery in connection with its claim for  
11 breach of the implied covenant of good faith and fair dealing which is incorporated into  
12 its second, third, fifth, and sixth claims for relief. As alleged in VeriSign's Complaint,  
13 ICANN repeatedly has conditioned, in bad faith, its performance of its contractual  
14 obligations on VeriSign's assent to regulation by ICANN of matters outside the scope  
15 of the parties' agreement. (See Complaint ¶¶ 31, 45-47, 60-63, 94, 101, 115, 124.) To  
16 prove this claim, VeriSign must establish, among other elements, that ICANN engaged  
17 in conduct separate and apart from the performance of obligations under the agreement  
18 without good faith. Evidence reflecting ICANN's good faith with respect to the  
19 registry agreement is solely within ICANN's control. Specifically, VeriSign seeks facts  
20 concerning: (i) ICANN's interpretation of the term "Registry Services," as defined in  
21 the parties' registry agreement; (ii) ICANN's refusal to authorize VeriSign's  
22 deployment of the Internationalized Domain Names ("IDNs"); (iii) ICANN's  
23 imposition of conditions on VeriSign's Wait List Service ("WLS"); (vi) ICANN's basis  
24 for demanding changes to VeriSign's Marketing Promotion Program; and  
25 (iv) ICANN's basis for demanding amendments to the parties' registry agreement in  
26 connection with VeriSign's ConsoliDate service. (See App. Ex. 54.) As part of its  
27 record keeping in the ordinary course of business, ICANN likely maintains memoranda,  
28 correspondence, analyses, and comments reflecting this information and this

1 information could be readily obtained through deposition testimony and document  
2 requests. *Id.* Moreover, evidence concerning ICANN's good faith behind its course of  
3 performance under the registry agreement may be necessary to VeriSign's opposition of  
4 the anti-SLAPP motion because if the Court determines that the anti-SLAPP statute  
5 applies, VeriSign must make a prima facie showing on these elements.  
6

## 7 **II. ICANN'S GENERAL COUNSEL**

8 8. Submitted concurrently as Exhibit 55 to VeriSign's Appendix of Exhibits is  
9 a true and correct copy of an ICANN Announcement, dated September 10, 2003,  
10 available at [www.icann.org/announcements/announcement-10sep03.htm](http://www.icann.org/announcements/announcement-10sep03.htm), in which  
11 ICANN announces the appointment of John Jeffrey as ICANN's new General Counsel,  
12 and explains that ICANN's corporate legal matters had been handled by Esme Smith  
13 during ICANN's search for a new general counsel. According to an ICANN  
14 Announcement dated May 29, 2003, its prior General Counsel, Louis Touton, was  
15 scheduled to resign from ICANN in late June 2003. A true and correct copy of this  
16 announcement is available at [www.icann.org/announcements/announcement-](http://www.icann.org/announcements/announcement-22may03.htm)  
17 [22may03.htm](http://www.icann.org/announcements/announcement-22may03.htm), and is submitted concurrently as Exhibit 56 to VeriSign's Appendix of  
18 Exhibits.  
19

## 20 **III. ICANN'S FAILURE TO ENTER AGREEMENTS WITH ccTLDs**

21 9. Submitted concurrently as Exhibit 57 to VeriSign's Appendix of Exhibits is  
22 ICANN's *Preliminary Budget – Fiscal Year 2003-2004 (FY04)*, dated March 17, 2003,  
23 available at [www.icann.org/financials/preliminary-budget-15mar03.htm](http://www.icann.org/financials/preliminary-budget-15mar03.htm), in which  
24 ICANN states "Since there are relatively few agreements with ccTLDs, most ccTLDs  
25 are under no legal obligation to support ICANN financially."  
26

27 10. Submitted concurrently as Exhibit 58 to VeriSign's Appendix of Exhibits is  
28 a true and correct copy of a report, titled *Report by ICANN to the United States  
Department of Commerce Re: Progress Toward Objectives of Memorandum of*

1 *Understanding*, dated June 30, 2003, available at [www.icann.org/general/status-report-](http://www.icann.org/general/status-report-30jun03.htm)  
2 30jun03.htm, in which ICANN states that it has entered into a total of thirteen  
3 agreements with ccTLDs.

4 11. Submitted concurrently as Exhibit 59 to VeriSign's Appendix of Exhibits is  
5 a true and correct copy of a page from ICANN's website, titled *ccTLD Agreements*,  
6 available at [www.icann.org/cctlds/agreements.html](http://www.icann.org/cctlds/agreements.html), which lists six ccTLD  
7 "Sponsorship Agreements" and four ccTLD "MOUs." The page shows that eight of the  
8 ten agreements listed were entered after 2001.

9 12. Submitted concurrently as Exhibit 60 to VeriSign's Appendix of Exhibits is  
10 a true and correct copy of the testimony of Nancy J. Victory, Assistant Secretary of the  
11 Department of Commerce, before the United States Senate Subcommittee on  
12 Commerce, Science, and Transportation, dated July 31, 2003, available at  
13 <http://commerce.senate.gov/hearings/061102victory.pdf>, in which she states that "much  
14 is still to be done" and that "ICANN needs to establish stable agreements with the  
15 country-code top-level domain operators."

16 13. In the July 31<sup>st</sup> hearing, the relevant portion of the transcript to which is  
17 submitted concurrently as Exhibit 60, Senator Conrad Burns stated to Secretary Victory  
18 "You pointed out in your testimony that developing agreements with country-code top-  
19 level domains such as .cn for China has been slow." Senator Burns stated "We've still  
20 got a lot of work to do." To which, Secretary Victory responded, "Yes, we do."  
21

#### 22 **IV. ICANN'S FAILURE TO ESTABLISH AN INDEPENDENT REVIEW** 23 **PANEL**

24 14. Submitted concurrently as Exhibit 61 to VeriSign's Appendix of Exhibits is  
25 a true and correct copy of ICANN's bylaws in effect at the time the 2001 .com Registry  
26 Agreement was entered on May 25, 2001, dated July 16, 2000, available at  
27 <http://www.icann.org/general/archive-bylaws/bylaws-16jul00.htm#III>, in which  
28 ICANN states "The Initial Board shall, following solicitation of input from the

1 Advisory Committee on Independent Review and other interested parties and  
2 consideration of all such suggestions, adopt policies and procedures for independent  
3 third-party review of Board actions alleged by an affected party to have violated the  
4 Corporation's articles of incorporation or bylaws." (Exhibit 61 art. III § 4(b).)

5 15. Submitted concurrently as Exhibit 62 to VeriSign's Appendix of Exhibits is  
6 a true and correct copy of ICANN's current bylaws, dated October 13, 2003, available  
7 at [www.icann.org/general/bylaws.htm](http://www.icann.org/general/bylaws.htm), in which ICANN states "ICANN shall have in  
8 place a separate process for independent third-party review of Board actions alleged by  
9 an affected party to be inconsistent with the Articles of Incorporation or Bylaws."  
10 (Exhibit 62 art. IV § 3(1).)

11 16. Submitted concurrently as Exhibit 63 to VeriSign's Appendix of Exhibits is  
12 a true and correct copy of *Seventh Status Report Under ICANN/US Government*  
13 *Memorandum of Understanding*, dated June 30, 2003, available at  
14 [www.icann.org/general/status-report-30jun03.htm](http://www.icann.org/general/status-report-30jun03.htm), in which ICANN states "During the  
15 second quarter, ICANN commenced a review of international arbitration providers that  
16 would be suitable to establish the Independent Review Panel."

17 17. Submitted concurrently as Exhibit 64 to VeriSign's Appendix of Exhibits is  
18 a true and correct copy of *Announcement: ICANN Announces Business Relationship*,  
19 dated March 26, 2004, available at [www.icann.org/announcements/announcement2-  
20 26mar04.htm](http://www.icann.org/announcements/announcement2-26mar04.htm), in which ICANN states "ICANN is nearing agreement to secure the  
21 services of an independent evaluation firm."

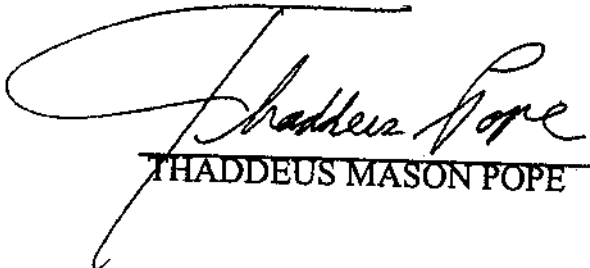
22 18. Submitted concurrently as Exhibit 65 to VeriSign's Appendix of Exhibits is  
23 a true and correct copy of *Report by ICANN to United States Department of*  
24 *Commerce Re: Progress Toward Objectives of Memorandum of Understanding*, dated  
25 April 7, 2004, available at [www.icann.org/general/status-report-07apr04.pdf](http://www.icann.org/general/status-report-07apr04.pdf), in which  
26 ICANN states "ICANN has in recent weeks closed an arrangement with a third party  
27 arbitration service to provide services and fulfill the requirements of the Independent  
28 Review Panel." (Exhibit 65 at 6.)

1           19. Submitted concurrently as Exhibit 66 to VeriSign's Appendix of Exhibits is  
2 a true and correct copy of *Resolutions Adopted at Special ICANN Board Meeting*, dated  
3 April 19, 2004, available at <http://www.icann.org/minutes/resolutions-19apr04.htm>, in  
4 which the ICANN Board states "the President and the General Counsel are authorized  
5 to engage the services of the ICDR [International Centre for Dispute Resolution] to  
6 provide independent review services in accordance with their proposal" and "that the  
7 President and the General Counsel are authorized to continue soliciting and negotiating  
8 with additional independent arbitration service providers."

9           20. Submitted concurrently as Exhibit 67 to VeriSign's Appendix of Exhibits is  
10 a true and correct copy of a page from ICANN's website, titled *Registry Agreements*,  
11 available at <http://www.icann.org/registries/agreements.htm>, which lists the gTLD  
12 registry agreements into which ICANN has entered since 2001.

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 29th day of April, 2004, at Dulles, Virginia.

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

  
THADDEUS MASON POPE

263094.1