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ASSIGNED NAMES AND NUMBERS
11

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 VERISIGN, INC., a Delaware
corporation,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
19 ASSIGNED NAMES AND NUMBERS, a
California corporation,

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

**DEFENDANT INTERNET
CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS' SECOND
SUPPLEMENTAL REQUEST
FOR JUDICIAL NOTICE**

[Concurrently filed with Notice of
Motion and Motion to Dismiss
Plaintiff's Amended First, Second,
Third, Fourth, Fifth, and Sixth
Claims for Relief Pursuant to Rule
12(B)(6) of the Federal Rules of
Civil Procedure; and Memorandum
of Points and Authorities]

Date: August 23, 2004
Time: 10:00 a.m.
Honorable A. Howard Matz

1 PLEASE TAKE NOTICE that, pursuant to Federal Rule of Evidence 201,
2 defendant Internet Corporation for Assigned Names and Numbers ("ICANN")
3 hereby respectfully requests that, in considering its concurrently-filed motion to
4 dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court take
5 judicial notice of the following documents:

6 (K) **Statement of Claim to the Defendant Internet**
7 **Corporation for Assigned and Numbers in *Pool.com,***
8 ***Inc. v. Internet Corporation for Assigned Names and***
9 ***Numbers*, Court File No. 03-CV-24621 (Sup. Ct. of**
10 **Justice, Ontario, Canada Jul. 8, 2003), a true and correct**
11 **copy of which is attached hereto as Exhibit K;**

12 (L) **Bylaws for ICANN**, as amended effective
13 February 12, 2002, a true and correct copy of which is
14 attached hereto as Exhibit L;

15 (M) **VeriSign, Inc.'s Memorandum of Points and**
16 **Authorities in Support of Motion to Dismiss Plaintiff's**
17 **First Amended Complaint in *RegisterSite.com v.***
18 ***Internet Corporation for Assigned Names and Numbers***
19 ***et. al.*, Case No. CV 04-1368 ABC (CWx) (C.D. Cal. July**
20 **12, 2004) (hereinafter "VeriSign's RegisterSite Motion") a**
21 **true and correct copy of which is attached hereto as**
22 **Exhibit M; and**

23 (N) **September 22, 2003 Message from Security and**
24 **Stability Advisory Committee ("SSAC") to ICANN**
25 **Board**, a true and correct copy of which is attached hereto
26 as Exhibit N.

27 These documents constitute facts not reasonably subject to dispute.
28 Accordingly, they may be properly considered in connection with the Court's
consideration of ICANN's Rule 12(b)(6) Motion to Dismiss.

LEGAL STANDARD

"[A] district court ruling on a motion to dismiss may consider a document the
authenticity of which is not contested, and upon which the plaintiff's complaint
necessarily relies." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998); *see*
Van Buskirk v. CNN, 284 F.3d 977, 980 (9th Cir. 2002) (under the Ninth Circuit's
"incorporation by reference" rule, a court may look beyond the pleadings without
converting the Rule 12(b)(6) motion into one for summary judgment). This

1 includes documents that are integral to plaintiff's claim but not explicitly
2 incorporated in the complaint. *Id.* See also *Neilson v. Union Bank of Cal., N.A.*,
3 290 F. Supp. 2d 1101, 1114 (C.D. Cal. 2003) (taking judicial notice of signed
4 contracts relied upon in the complaint but not incorporated); *In re Northpoint*
5 *Communs. Group, Inc., Sec. Litig.*, 221 F. Supp. 2d 1090, 1095 (N.D. Cal. 2002)
6 ("In ruling on a motion to dismiss, a court may take judicial notice of a document if
7 it is relied on in the complaint (regardless of whether it is expressly incorporated
8 therein) and its authenticity is not disputed.")

9 A court may also properly take notice of "matters of public record" pursuant
10 to Federal Rule of Evidence section 201, to the extent they are not subject to
11 reasonable dispute. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).
12 This includes allegations made in pleadings and other documents filed in other
13 lawsuits. See *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*,
14 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of pleadings filed in
15 state court action); *MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th
16 Cir. 1986) (taking judicial notice of allegations made in motion to dismiss and
17 supporting memorandum filed in different federal court action); *Kent v.*
18 *DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208, 1219 (N.D. Cal. 2002) (taking
19 judicial notice of legal memorandum filed in state court action). Judicial notice of
20 matters of public record will not convert a Rule 12(b)(6) motion to a summary
21 judgment motion. *Lee*, 250 F.3d at 688; *Mir v. Little Co. of Mary Hospital*, 844
22 F.2d 646, 649 (9th Cir. 1988) (same); *Neilson v. Union Bank of Cal., N.A.*, 290 F.
23 Supp. 2d 1101, 1112 n. 37 (C.D. Cal. 2003) (same).

24 ARGUMENT

25 The allegations in VeriSign's First Amended Complaint ("FAC") are
26 inextricably intertwined with the following three documents that this court may
27 judicially notice. Judicial notice of these documents is necessary to give the Court
28

1 a more complete understanding of the facts upon which VeriSign's entire FAC
2 rests.

3 **Statement of Claim in *Pool.com* (Exhibit K)**

4 VeriSign contends that ICANN was "captured" by certain members of its
5 Registrar Constituency, including Pool.com, and that, as a result of this "capture,"
6 ICANN delayed introduction of VeriSign's proposed Wait List Service ("WLS").
7 *See, e.g.*, FAC ¶¶ 39-46, 90. The fact that ICANN is currently defending itself in
8 litigation concerning the steps it has taken toward *approving* VeriSign's
9 implementation of WLS proves the lie to VeriSign's allegations regarding the
10 notion that some group of conspirators has exercised improper or anticompetitive
11 "control" of ICANN's Board of Directors. *Id.* at ¶ 90. In the *Pool.com* litigation,
12 Pool.com contends that ICANN is a proponent of VeriSign's WLS and that
13 ICANN's conduct with regard to the WLS has constituted a breach of its
14 accreditation agreements with registrars. *See* Exhibit A ¶¶ 12-14.

15 The *Pool.com* Statement of Claim is a record of the Superior Court of Justice
16 in Ontario, Canada ("Ontario Court") and is being offered to show the existence of
17 the litigation, the identity of the parties and the subject of the dispute. The
18 *Pool.com* litigation is not a fact subject to reasonable dispute and is maintained by
19 the clerk of the Ontario Court. Therefore, the *Pool.com* claim may be judicially
20 noticed. *Lee*, 250 F.3d at 689.

21 **ICANN's Bylaws (Exhibit L)**

22 VeriSign's Sherman Act Section 1 claim expressly relies on, and incorporates
23 by reference, the ICANN Bylaws in effect at the time of the alleged wrongdoing by
24 ICANN. *See, e.g.*, FAC ¶ 102. The foundation of VeriSign's claim is premised on
25 the notion that ICANN's Board was captured and controlled by the alleged co-
26 conspirators. However, in its attempt to show this alleged "control", VeriSign
27 severely misrepresents the language of the Bylaws, incorrectly asserting that the
28 ICANN Board was "bound to accept" the recommendations of the DNSO, one of

1 ICANN's supporting organizations. *Id.* at ¶ 95. The bylaws in effect at the time
2 make clear that the Board had the final authority to accept or reject a
3 recommendation from its supporting organizations and advisory committees. RJN
4 Ex. L (Feb. 12, 2002 Bylaws); Art. VI § 2(b) ("The Supporting Organizations shall
5 serve as advisory bodies to the Board"); *Id.* at §2(e) ("No recommendation of a
6 Supporting Organization shall be adopted unless the votes in favor of adoption
7 would be sufficient for adoption by the Board without taking account of either the
8 Directors selected by the Supporting Organizations or their votes"); *Id.* at §2(g)
9 ("Nothing in this Section 2 is intended to limit the powers of the Board or the
10 Corporation...") Moreover, in enumerating the powers of the supporting
11 organizations, the Bylaws explicitly give the Board the ability to reject a
12 recommendation of a supporting organization. Indeed, there are certain instances
13 where the Board must *not* accept the recommendation of a supporting organization.
14 *See id.* at Art. VI, § 2(e), (f). ICANN's Bylaws are not a fact subject to reasonable
15 dispute, and they are publicly available on ICANN's web site. *See*
16 <http://www.icann.org/general/archive-bylaws/bylaws-12feb02.htm>. Therefore,
17 ICANN's Bylaws may be judicially noticed. *Parrino*, 146 F.3d at 706.

18 **VeriSign's RegisterSite Motion (Exhibit M)**

19 In its FAC, VeriSign alleges the existence of a new secondary domain name
20 market that VeriSign contends is an appropriate relevant product market for
21 antitrust purposes. FAC ¶ 106. This allegation comes as quite a surprise
22 considering the fact that VeriSign itself explained, in concurrently pending
23 litigation, why this proposed new relevant market does not exist. *See* Exhibit C at
24 21:10:17. In the *RegisterSite* litigation, plaintiffs brought an action against
25 VeriSign and ICANN before Judge Collins, seeking to stop the introduction of
26 WLS. VeriSign argued that WLS does not involve a distinct market from the
27 services for the registration of all domain names. *Id.* VeriSign's RegisterSite
28 Motion, which VeriSign filed in response to the plaintiff's First Amended

1 Complaint in that case, is a record of this Court and is being offered for the
2 existence of the arguments VeriSign made to this Court, not for the truth or
3 accuracy of those arguments. *MGIC*, 803 F.3d at 504-5. VeriSign's RegisterSite
4 Motion is a fact not subject to reasonable dispute and is maintained by the clerk of
5 this Court. Therefore, VeriSign's RegisterSite Motion may be judicially noticed.
6 *Lee*, 250 F.3d at 689.

7 **SSAC September 22, 2003 Message to ICANN Board (Exhibit N)**

8 VeriSign contends that certain alleged members of ICANN's Security and
9 Stability Advisory Committee ("SSAC") captured and controlled SSAC's processes
10 with respect to VeriSign's wildcard product (which it calls Site Finder). FAC ¶ 130.
11 As evidence of this alleged capture, VeriSign points to a September 22, 2003
12 message from SSAC to the ICANN Board regarding VeriSign's wildcard product
13 ("SSAC Message"). VeriSign asserts that ICANN "took action based on the SSAC
14 message and that the "report does not include any facts concerning the effects of
15 Site Finder or any analysis supporting the report's opinions and recommendations
16 that the service be immediately terminated." FAC ¶¶ 134, 136. However, the
17 SSAC simply does not support this allegation. The SSAC Message is not a final
18 report documenting SSAC's findings, analysis and conclusions. Indeed it is not a
19 "report" at all. The message was posted shortly after VeriSign deployed its
20 wildcard. It contains background information regarding the wildcard and its effect
21 on the internet; details regarding SSAC's ongoing examination of the situation; and
22 SSAC's preliminary opinions and recommendations. The document in no way
23 supports VeriSign's conspiracy theory. Where, as here, the "plaintiff fails to
24 introduce a pertinent document as part of his pleading, [the] defendant may
25 introduce the exhibit as part of his motion attacking the pleading." *Branch v.*
26 *Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled on other grounds*, (citing
27 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*
28 § 1327, at 762-63 (2d ed. 1990)). The SSAC Message is a fact not subject to

1 reasonable dispute and it is publicly available on ICANN's website. *See*
2 <http://www.icann.org/correspondence/secsac-to-board-22sep03.htm>.

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Dated: July 6, 2004

JONES DAY

By: _____
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS