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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) **REPLY IN SUPPORT OF DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' REQUEST FOR JUDICIAL NOTICE** [Concurrently filed with Reply in Support of ICANN's Motion to Dismiss; Supplemental Request for Judicial Notice] Date: May 17, 2004 Time: 10:00 a.m. Honorable A. Howard Matz

Plaintiff VeriSign, Inc. ("VeriSign") does not oppose the Court taking

judicial notice of Exhibits E-F. However, Verisign objects to defendant Internet

Corporation for Assigned Names and Numbers' ("ICANN") Request for Judicial

Notice ("Request") of Exhibits A-D. ICANN continues to believe that judicial

notice is appropriate for all of ICANN's requests.

ARGUMENT

The *Dotster* Order (Exhibit A) Is Relevant

VeriSign's opposition to ICANN's Request for Judicial Notice of the Court's

order in *Dotster, Inc. v. ICANN*[1] concedes that the order is a proper subject for

judicial notice. RJN Opp. 3:10-4:5. Instead, VeriSign argues that the order should

not be considered because the judicially noticeable facts within it are irrelevant to

ICANN's motion to dismiss. *Id.* The *Dotster* order, however, sheds considerable

light on the actions of others to prevent ICANN's approval of VeriSign's Wait

Listing Service ("WLS") proposal and the significant efforts ICANN has

undertaken to overcome those obstacles. These facts are relevant to VeriSign's

averments regarding the reasons for delay in WLS implementation, cannot

reasonably be questioned by VeriSign, and are proper subjects of judicial notice.

While "a court cannot take judicial notice of another court's *determination* of

the *truth* of *disputed facts*," a court may take judicial notice of undisputed facts in

the decision. *United States v. Southern Cal. Edison Co.*, 300 F. Supp. 2d 964, 975

(2004) (emphasis added). Undisputed facts are routinely noticed by courts. *See,*

e.g., Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001) (taking

judicial notice of a hearing, its subject matter and purpose, and the participants).

Indeed, courts often take judicial notice of court opinions for far greater reasons

than ICANN requests. *See, e.g., In re Stac Electronics Sec. Litig.*, 89 F.3d 1399,

1405 (9th Cir. 1996) (district court properly took judicial notice of related judgment

[1] Shortly after ICANN filed its Request, the *Dotster* decision was published
at 296 F. Supp. 2d 1159 (C.D. Cal. 2003).

for patent infringement in other district in determining that patent information in prospectus was not misleading); *United States v. Author Serv., Inc.*, 804 F.2d 1520, 1523 (9th Cir. 1986), *overruled on other grounds, United States v. Jose*, 131 F.3d 1325, 1329 (9th Cir. 1997) (upholding district court's denial of evidentiary hearing based on judicial notice of facts developed at its recent hearing on same issue in related case); *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) (court did not abuse discretion in taking judicial notice of unpublished orders from same judicial district finding defendant's standardized limitation provisions reasonable where court used orders to identify relevant policy considerations); *Beliveau v. Caras*, 873 F. Supp. 1393, 1394-95 (C.D. Cal. 1995) (taking judicial notice of pleadings and records prior to removal to federal court); *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585, 591 (E.D. Cal. 1991) (taking judicial notice of pleading filed in unrelated action that interpreted similar statute).

ICANN's Motion references the *Dotster* order for the *undisputed fact* that ICANN was a defendant in *Dotster*, the *undisputed fact* that the *Dotster* plaintiffs sought a preliminary injunction prohibiting ICANN from allowing VeriSign to implement WLS, and the *undisputed fact* that ICANN successfully opposed the preliminary injunction. See Mot. 2, n.1. These facts are of obvious relevance to, among others, VeriSign's Sherman Act section 1 claim, which alleges that ICANN has "conspired" with others to delay implementation of new services, including WLS. Compl. ¶ 85. VeriSign cannot avoid the *Dotster* decision simply because it contradicts VeriSign's allegations.[2] *Oceanic Cal., Inc. v. City of San Jose*, 497 F. Supp. 962, 964 (N.D. Cal. 1980) ("the court is not bound to ignore legally significant facts disfavorable to plaintiff which appear on the face of the complaint

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[2] Indeed, VeriSign itself recently asked the court in *Syncalot v. VeriSign, et al.*, Case No. C 03-04378 MJJ (N.D. Cal. Apr. 13, 2004) to rely upon the *Dotster* decision for the fact that Judge Walter "explicitly rejected plaintiff's suggestion that a third party can control modification of the Registry Agreement." *See* Exhibit G to ICANN's Supplemental Request for Judicial Notice (VeriSign's Motion to Dismiss), 13:20-14:2.

1 or which are proper subjects of judicial notice…."); *Saxton v. McDonnell Douglas*

2 *Aircraft Co.*, 428 F. Supp. 1047, 1049 n.5 (C.D. Cal. 1977) (holding that a court

3 may "take judicial notice of things which are contrary to the pleadings and give

4 them the same effect as if they had been set up as a defense in the answer and the

5 proof were plenary").

6   The *Dotster* decision speaks for itself, and the Court is at liberty to utilize the

7 fact of the decision and the undisputed facts within it to evaluate VeriSign's claims.

8 <u>**ICANN's Bylaws (Exhibit "B") Are Relevant and a**</u>

9 <u>**Proper Subject for Judicial Notice**</u>

10   VeriSign argues that the Court should not take judicial notice of ICANN's

11 Bylaws because they are irrelevant (RJN Opp. 5:9-11) and should not be considered

12 for the truth of their contents (RJN Opp. 4:8-5:8). VeriSign's argument not only

13 ignores the allegations in the Complaint, but is contrary to the law.

14   Where a document's authenticity is not in dispute, and the document is

15 "integral to [] plaintiff's claim[]," though "not explicitly incorporated in [the]

16 complaint," it is a proper subject of judicial notice under the doctrine of

17 incorporation by reference. *Parrino v. FHP, Inc.*, 146 F.3d 699, 706, 706 n.4 (9th

18 Cir. 1998). A court may consider, in its entirety, a document that meets this

19 standard.[3] *In re Northpoint Communs. Group Inc., Secs. Litig. & Consol. Cases*,

20 221 F. Supp. 2d 1090, 1994 (N.D. Cal. 2002) ("When ruling on a motion to dismiss,

21 the district court may consider the facts alleged in…documents relied upon but not

22 attached to the complaint when authenticity is not contested….") (citing *Parrino*,

23 146 F.3d at 705-06).

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26   [3] The two cases cited by VeriSign (RJN Opp. 4:14-16) are inapposite because they do not involve a document incorporated by reference. VeriSign's citation to

27 *Skinner v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 2003 WL 23174478, at * 3 (N.D. Cal. Dec. 29, 2003), is not instructive because *Donaldson* simply found that

28 the NYSE bylaws were "irrelevant to the issues before [that] court." *Id.* Clearly, the same cannot be said here, as explained in ICANN's motion papers.

ICANN's Bylaws should be judicially noticed under the doctrine of incorporation by reference. ICANN's Bylaws are integral to VeriSign's Sherman Act section 1 claim -- particularly as VeriSign attempted via its opposition brief to re-write that claim -- because VeriSign directly implicates ICANN's corporate structure (including whether it has "members") and the authority and composition of the ICANN Board. Compl. ¶ 85; Opp. 8:14-9:2, 9:8-10:3 *See* RJN 5.[4] The Complaint also implicates ICANN's governing principles, electorate, alleged affiliates, and its overall corporate purpose. *See, e.g.*, Compl. ¶¶ 18-19. VeriSign's failure to attach the Bylaws to its Complaint in support of these allegations cannot prevent the Court from relying on them to assess whether VeriSign's claims are legally plausible.

The MOU (Exhibit C) and Amendment 6 to the MOU (Exhibit D) are Relevant and are Proper Subjects for Judicial Notice

VeriSign argues that the Memorandum of Understanding ("MOU") between ICANN and the U.S. Department of Commerce ("DOC") and its Amendment 6 should not be judicially noticed because VeriSign has not incorporated these documents by reference into its Complaint. Even though an express reference is not a prerequisite to judicial notice, *Parrino v. FHP, Inc.*, 146 F.3d at 706 n.4, VeriSign has expressly referenced the MOU.

The MOU and the relationship between ICANN and the DOC are referenced several times in the Complaint. Compl. ¶¶ 19, 20, 87, 129. Indeed, the Complaint *quotes* from the MOU in an attempt to support VeriSign's allegations. Compl. ¶ 19 ("the MOU explicitly prohibits ICANN from acting arbitrarily or unjustifiably to

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[4] VeriSign's opposition "requests" that the Court take judicial notice of two facts on ICANN's website that it contends are inconsistent with ICANN's Bylaws, but these facts are *not* inconsistent with ICANN's Bylaws. RJN Opp. 5:1-5:5. First, ICANN's current Bylaws specifically provide that the two Board seats VeriSign refers to "shall remain vacant" until "the ccNSO Council is constituted." RJN, Ex. B, Art. XX, § 4, ¶ 5. ICANN's website clearly indicates that nominations for the ccNSO Council are currently in progress. Second, ICANN's website clearly indicates that ICANN is actively seeking to fill the Ombudsperson vacancy.

injure any person or entity, or from 'singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause.'"). VeriSign's Opposition to ICANN's Motion to Dismiss also devotes a footnote to the MOU, listing specific contractual rights and obligations granted to ICANN under the MOU. Opp. 1, n.1. VeriSign's depth of citation to these documents far exceeds that in *Branch v. Tunnell*, where the Ninth Circuit adopted the doctrine of incorporation by reference.[5] 14 F.3d 449, 453 (9th Cir. 1994) (referencing a number of documents multiple times in one paragraph of the complaint was sufficient to invoke the doctrine of incorporation by reference).

Amendment 6 to the MOU, which replaces most of Section 5 (Responsibilities of the Parties), is the most recent amendment to the MOU. *Compare* RJN, Ex. C (MOU) § 5 *to* RJN, Ex. D (Amendment 6). VeriSign's contention that Amendment 6 should not be judicially noticed because it was not explicitly mentioned is not supported by the case law. Because the MOU has been incorporated by reference, the whole of the current MOU is subject to introduction, including the current language of Section 5. Fed. R. Evid. § 106; *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (considering entire corporate disclosure statement where only portions were mentioned in the complaint); *Nursing Home Pension Fund v. Oracle Corp.*, 242 F. Supp. 2d 671, 677 (N.D. Cal. 2002) ("[T]he district court may consider full texts of documents the complaint quotes only in part."). Amendment 6 is necessary to show how Section 5 now reads.

VeriSign's opposition to Amendment 6 is also troubling in light of VeriSign's argument that irrelevant and immaterial "Attachments" to the MOU should be considered. RJN Opp. 6:9-13. While ICANN initially chose not to include them because ICANN felt it was appropriate to spare the court file of additional

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[5] VeriSign's reliance on *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003), is misleading. The court simply held that a complaint mentioning "that Ritchie [] sent a petition to the DEA," was not a sufficient reference to notice the handwriting on an envelope in which the petition was mailed to the DEA. *Id.*

1 immaterial pages, ICANN has attached to its Supplemental Request for Judicial

2 Notice VeriSign's desired "Attachments" to the MOU.[6] Given that VeriSign does

3 not dispute the existence or authenticity of the MOU or its Amendment 6, both

4 documents are proper subjects for judicial notice by incorporation by reference.

5   **CONCLUSION**

6   For all of these reasons, as well as the reasons set forth in its Request,

7 defendant ICANN respectfully requests that this Court grant its Request in full.

8 Dated: May 3, 2004   JONES DAY

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10   By:_____
                                                    Jeffrey A. LeVee
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                                               Attorneys for Defendant
12   INTERNET CORPORATION FOR
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27   [6] *See* Supplemental Request for Judicial Notice, Ex. H (Statement of Policy,
   Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (1998)); Ex. I
28 (ICANN's Articles of Incorporation, dated Nov. 21, 1998); Ex. J (ICANN's
   Bylaws, dated Nov. 21, 1998).