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VERISIGN, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

REGISTERSITE.COM, an Assumed Name of ABR PRODUCTS INC., a New York Corporation, et al.,

Plaintiffs,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation; VERISIGN, INC., a Delaware Corporation; NETWORK SOLUTIONS, INC., a Delaware Corporation; ENOM, INC., a Washington Corporation; ENOM FOREIGN HOLDINGS CORPORATION, a Washington Corporation; and DOES 1-10, inclusive,

Defendants.

Case No. CV 04-1368 ABC (CWx)

REPLY MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANT VERISIGN, INC. TO DISMISS PLAINTIFFS' ELEVENTH CLAIM FOR RELIEF FOR IMPROPER VENUE

Date: July 12, 2004
Time: 10:00 a.m.
Courtroom: 680 – Roybal Fed. Bldg.
Hon. Audrey B. Collins

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **Page(s)**

STATE CASES

RULES

Defendant VERISIGN, INC. ("VeriSign") submits this Reply Memorandum in support of its Motion To Dismiss Plaintiffs' Eleventh Claim for Relief for Improper Venue (the "Motion").

I. INTRODUCTION

In their Opposition, Plaintiffs attempt to complicate VeriSign's legally and factually straightforward Motion by focusing on *ICANN*'s agreements with various registrars and on *ICANN*'s contract with VeriSign, which have absolutely no bearing on the Eleventh Claim for Relief. Plaintiffs' Eleventh Claim concerns a *single* contract — the Registry-Registrar Agreement (the "RRA") between Plaintiffs and *VeriSign* — containing a *single* forum selection clause.

By inappropriately focusing on ICANN's multiple, irrelevant agreements, Plaintiffs attempt to cloud the only issues that are relevant to the determination of VeriSign's Motion, almost none of which Plaintiffs have actually addressed, much less disputed. For example, Plaintiffs do not dispute, and therefore *concede*, the following dispositive legal and factual issues:

- Plaintiffs freely entered into and are bound by the RRA. (Mot. at 2; FAC ¶ 15.3, Ex. A.)
- Plaintiffs were aware of and agreed to the Virginia forum selection clause in the RRA. (FAC ¶ 15.3, Ex. A.)
- The Eleventh Claim for Relief is subject to the Virginia forum selection clause. (Mot. at 4-6.)
- Forum selection clauses are *prima facie valid* and Plaintiffs bear a "heavy burden of proof" to show why the RRA's forum selection clause should not apply. (*Id.*)
- The RRA was *not* procured by fraud or overreaching. (*Id.* at 6-8.)
- The RRA did *not* result from "overweening bargaining power" on the part of VeriSign. (*Id.* at 7-8.)
- Subjecting all disputes relating to the standardized RRA to a single forum applying a single body of law promotes consistency and predictability in the interpretation and enforcement of the Agreement, to the benefit of *all* registrars and VeriSign. (*Id.* at 3, 11-12.)

- Neither Plaintiffs nor their counsel reside in California; therefore, litigating the Eleventh Claim in Virginia is no less convenient than litigating it in California. (*Id.* at 8-9.)
- The RRA's forum selection clause is reasonable and comports with public policy. (*Id.* at 9-12.)

These concessions alone warrant the granting of VeriSign's Motion.

Plaintiffs' diversionary tactic of focusing on ICANN's agreements, which are not at issue in the Eleventh Claim, should not deter the Court from ruling in VeriSign's favor on the clear-cut issue presented by this Motion. Nor do Plaintiffs' arguments under the aegis of "judicial economy" alter this outcome because, as a matter of law, they are not a proper basis for ignoring a contractually agreed upon forum selection clause. Moreover, enforcement of the RRA's forum selection clause will not improperly undermine judicial economy.

Consequently, if the Eleventh Claim is not dismissed pursuant to VeriSign's accompanying motion under Federal Rule 12(b)(6), it should be either dismissed under Rule 12(b)(3) for improper venue or severed and transferred to the Eastern District of Virginia.

II. ARGUMENT

A. Plaintiffs' Generalized Discussion Of "Judicial Economy" Is Irrelevant In The Face Of A Valid Forum Selection Clause

Plaintiffs do not dispute that the *Bremen* standard for enforcing forum selection clauses, which has been uniformly followed by California federal and state courts, is the controlling legal standard for this Motion. Under the *Bremen* standard, forum selection clauses are *prima facie valid* and *should be enforced* unless the resisting party meets its heavy burden of showing that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

The Ninth Circuit, applying the *Bremen* standard, has held that a forum selection clause is unenforceable only where "(1) its incorporation into the contract was the result

of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so 'gravely difficult and inconvenient' that the complaining party will 'for all practical purposes be deprived of its day in court'; or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought." *R.A. Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (internal citations omitted). (*See generally* Mot. at 5-6.)

In their Opposition, Plaintiffs do *not* dispute, and thereby concede, that (1) the Virginia forum selection clause was *not* fraudulently included in the RRA due to concealment or other wrongdoing by VeriSign (Mot. at 6-7); (2) VeriSign did *not* exercise "overweening bargaining power" by including the forum selection clause in its form agreement with all registrars (*id.* at 7-8); and (3) Plaintiffs and their counsel, none of whom resides in California, will not be "gravely" inconvenienced by adjudicating their Eleventh Claim for Relief in Virginia as they had contractually agreed to do in the RRA (*id.* at 8-9). Indeed, Plaintiffs totally ignore these dispositive *Bremen* factors and, instead, base their Opposition solely on a misguided "judicial economy" argument that they "support" by misapplying the governing case law and by failing to acknowledge the different subject matter and the separate issues raised by their Eleventh Claim.

Specifically, Plaintiffs postulate that their Eleventh Claim for Relief arises from the same nucleus of operative facts as their other claims (Opp'n at 1, 6, 15-16), and from that supposed premise, they argue that it would "thwart the policy of judicial economy and consistency" (*id.* at 9) to litigate their Eleventh Claim in Virginia. However, Plaintiffs' simple-sounding syllogism is both legally and factually flawed. It is legally flawed because controlling legal authority *directly contradicts* Plaintiffs' argument, which rests on case law that is inapposite and easily distinguished. It is factually flawed because, contrary to their assertion, Plaintiffs' Eleventh Claim raises issues that are separate and distinct from their other claims, and, accordingly, that claim could be dismissed, or severed and transferred, without "thwarting" judicial economy or raising the specter of inconsistency or substantial duplication between the two courts.

1. The Court Should Apply *Tokio Marine* and *Vogt-Nem* in Deciding this Motion

In their Opposition, Plaintiffs argue that enforcement of the RRA's forum selection clause would result in two lawsuits relating to the same facts and possibly to inconsistent findings. (Opp'n at 1, 9, 11.) However, as discussed in VeriSign's Motion (at 9), and ignored by Plaintiffs, the courts in *Tokio Marine* and *Vogt-Nem* flatly rejected the *exact* arguments Plaintiffs assert here. *Tokio Marine & Fire Ins. Co. v. Nippon Express U.S.A. (Ill.), Inc.*, 118 F. Supp. 2d 997, 1000 (C.D. Cal. 2000); *see also Vogt-Nem, Inc. v. M/V Tramper*, 263 F. Supp. 2d 1226, 1232-33 (N.D. Cal. 2002) (enforcing forum selection clause even though doing so could result in litigation of the issues in three different fora).[1]

In *Tokio Marine*, for example, the court *specifically* considered the impact on judicial economy of enforcing the forum selection clause. Even though the court expressly recognized that enforcement of the forum selection clause "would result in two trials, in different districts, of the same operative facts, resulting in increased cost and risk of inconsistent factual findings," *Tokio Marine*, 118 F. Supp. 2d at 1000, the court nonetheless concluded that "while the potential for duplicative litigation is a real one, that fact does not outweigh the strong policy favoring enforcement of forum selection clauses," *id.*[2] *Vogt-Nem* is to the identical effect. *Tokio Marine* and *Vogt-Nem*

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[1] Contrary to Plaintiffs' assertion (Opp'n at 14), the court's comment about "litigation . . . in three fora" was not dicta but, in fact, part of its holding. The court rejected the plaintiff's argument that litigating in multiple fora was inconvenient and deprived it of its day in court, in favor of enforcing the forum selection clause agreed upon by the parties. *Vogt-Nem*, 263 F. Supp. 2d at 1232-33.

[2] In attempting to distinguish *Tokio Marine* and *Vogt-Nem* (Opp'n at 13-14), Plaintiffs sidestep the holdings in those cases. The courts in *Tokio Marine* and *Vogt-Nem* did not, as Plaintiffs assert (*id.* at 14), "order[] that a single court would resolve the entire action in one forum." To the contrary, the *Tokio Marine* court transferred all the claims governed by the forum selection clause to New York and retained jurisdiction over related claims against another defendant that was not bound by the clause. *Tokio Marine*, 118 F. Supp. 2d at 1001. Similarly, the *Vogt-Nem* court dismissed the case on forum non conveniens grounds so that the action could be resolved in the Netherlands (potentially in *both* Rotterdam and Amsterdam), which was consistent with the parties' contractual forum selection clauses. *Vogt-Nem*, 263 F. Supp. 2d at 1234.

illustrate the overwhelming strength of the presumption in favor of enforcing forum selection clauses. Plaintiffs' argument regarding judicial economy fails to accord proper weight and deference to the admittedly applicable and valid forum selection clause in the RRA and, therefore, flies in the face of *Tokio Marine* and *Vogt-Nem.*

2. The Cases Plaintiffs Cite in Support of Their Judicial Economy Argument Are Clearly Distinguishable

a. Forum selection clause cases

Plaintiffs' citation to four irrelevant, out-of-state cases (Opp'n at 9-12) does not alter the controlling law in the Ninth Circuit as reflected in *Tokio Marine* and *Vogt-Nem.* Two of Plaintiffs' cases — *Stotler* and *Ex Parte Leasecomm* — are out-of-state (and out of circuit) *state court* cases, which are hardly binding on this Court, and they are factually distinguishable from this case in any event.

For example, *Stotler* was an unusually "procedurally complex" case involving over 100 parties, more than 90 cross-claims, and multiple counterclaims. *Personalized Mktg. Serv., Inc. v. Stotler & Co.*, 447 N.W.2d 447, 448-50 (Minn. Ct. App. 1989). This case does not involve anything approaching that level of numerosity or procedural complexity. In addition, unlike in this case in which the Plaintiffs are dispersed throughout the country and the world, *all* of the parties in *Stotler* except one, and much of the evidence, were located in the state where the suit was brought. *Id.* at 451-52.

Also, the forum selection clause in the *Stotler* case related only to the cross-claims and the plaintiff (unlike Plaintiffs here) was not a signatory to the forum selection clause. *Id.* at 449, 453. As a result, claims involving the plaintiff could not be transferred. Since all or most of the cross-claims were in the nature of indemnity claims that depended upon the outcome of the plaintiff's claims, enforcement of the forum selection clause in *Stotler* would have raised a possibility of duplication and inconsistency not present here. *Id.* at 453.

In the final analysis, the *Stotler* court was influenced by Minnesota state policies and practices, including those articulated by the Minnesota Supreme Court in

Prestressed Concrete, Inc. v. Adolfson & Peterson, Inc., 308 Minn. 20, 22-23, 240 N.W.2d 551, 553 (1976), and by the fact that resolution of the transferred claims would be delayed five years due to docket conditions in the transferee forum. *Stotler*, 447 N.W.2d at 451, 453. No comparable concern exists in connection with a transfer of the Eleventh Claim to Virginia. *Stotler* simply has no precedential value in this Court.

Ex Parte Leasecomm is similarly distinguishable. There, the plaintiffs brought the relevant claims against *multiple* defendants, with whom the plaintiffs had entered into separate agreements containing conflicting forum selection clauses. *Ex Parte Leasecomm*, 2003 WL 22753454, at *1, *2, *4 (Ala. Nov. 21, 2003). The plaintiffs and their material witnesses were all located, and the alleged misconduct took place, in the state in which the suit was brought. *Id.* at *3. In material contrast, Plaintiffs' Eleventh Claim is brought by Plaintiffs *only* against VeriSign and implicates only *one* forum selection clause — the clause by which both Plaintiffs and VeriSign agreed to litigate the enforcement of the RRA in Virginia. Moreover, as VeriSign discussed in its Motion (at 8-10), and Plaintiffs do not dispute (because they have alleged this themselves), none of the plaintiffs (nor their counsel) is located in California; the material witnesses are located in Virginia; and the .com and .net Registries (the source of the alleged wrongdoing) are operated out of Virginia. (Declaration of Barbara Knight ("Knight Decl.") ¶ 5.)

The federal district court cases Plaintiffs cite are similarly out-of-circuit and distinguishable. In *Serpico*, the court held that enforcing the forum selection clause would "disserve judicial economy" because, unlike in this case, *four* cases involving multiple claims and parties had been consolidated before the court and the forum selection clause involved only one claim brought by one plaintiff. *Serpico v. Laborers' Int'l Union of N. Am. (LIUNA)*, 1995 WL 479569, at *1, *5 (N.D. Ill. Aug. 4, 1995). Likewise, in *Geldermann*, the court did not enforce the forum selection clause because the FSLIC, a public agency, was "litigating claims with public resources" and was not "absolutely bound by the forum selection clause." *Fed. Sav. & Loan Ins. Corp. v.*

Geldermann, Inc., 1989 WL 251206, at *2-*3 (W.D. Okla. Aug. 1, 1989). In contrast, this case involves sophisticated *private* parties who freely negotiated and *are* "absolutely bound by" the Virginia forum selection clause. In addition, unlike in *Geldermann*, *ICANN*'s contractual relationship with VeriSign is not at issue with respect to the Eleventh Claim for Relief, meaning that ICANN is *not* "so involved in the controversy to be transferred that partial transfer would require the same issues to be litigated in two places." (Opp'n at 10-11 (quoting *Geldermann*, 1989 WL 251206, at *2).)

Furthermore, the instant forum selection clause between Plaintiffs and VeriSign involves *policy* considerations not present in any of the cases cited and relied upon by Plaintiffs. One uncontradicted purpose of the selection clause here is to promote consistency in the adjudication of issues relating to interpretation and enforcement of the RRA, by submitting such issues to a single forum governed by a single body of law, regardless of which registrars may happen to bring suit on the RRA or where they may happen to do so. Thus, the identical selection clause is contained, not merely in the RRAs that Plaintiffs signed with VeriSign, but in the RRAs that *all* registrars signed with VeriSign. (Mot. at 10-12; *see also* Knight Decl. ¶¶ 6-8.) Plaintiffs have elected to assert the Eleventh Claim against VeriSign for alleged breach of the RRA; the consistency in contractual interpretation and enforcement to which VeriSign and all registrars agreed, and which *Bremen* and its progeny are intended to promote, would be undermined if these Plaintiffs could sidestep the selection clause entirely by the manner in which they framed their pleading. Plaintiffs' cases did not confront this important additional factor militating in favor of enforcement of the forum selection clause.

b. Judicial economy cases

In attempting to show that the RRA's forum selection clause should not apply, Plaintiffs scramble to piece together, from various legal doctrines that are irrelevant to this Motion (*e.g.*, pendent jurisdiction and joinder), favorable language about judicial economy, *in general*. (Opp'n at 12-13.) The cases Plaintiffs cite, including those that address "the question of whether to exercise pendent jurisdiction over state law claims

related to a federal claim" (*id.* at 12), have *nothing whatever to do* with the issue presented by this Motion — whether the Court should enforce a valid forum selection clause. It is undisputed that *this issue* is governed by the *Bremen* standard. *Not one* of the cases Plaintiffs cite even mentions a forum selection clause. These cases therefore cannot possibly guide the Court's implementation of *Bremen* or its determination of this Motion.

3. The Eleventh Claim for Relief Raises Distinct Issues from Plaintiffs' Other Claims

Plaintiffs' "judicial economy" argument is not only legally deficient, it is also factually flawed. Plaintiffs base this argument on the purported relatedness of their claims. However, Plaintiffs' Eleventh Claim is legally and factually distinct from their other claims. As Plaintiffs recognize, the Eleventh Claim is the *only* claim that requires interpretation of the RRA (Opp'n at 4 ("Plaintiffs' Eleventh cause of action . . . is the only claim under the Verisign-Registrar Agreement.")) — in particular, an interpretation of Plaintiffs' purported right under the RRA to "delete" domain names. Indeed, as is clear from the face of the First Amended Complaint, resolution of Plaintiffs' UCL, tort, and antitrust claims will not involve *any* contractual interpretation whatsoever. None of those claims mentions any provision of the RRA, much less the RRA itself, and none requires an interpretation of provisions in the RRA.

Moreover, the alleged impact of WLS on registrars', including Plaintiffs', right under the RRA to "delete" registrations of domain names is not even at issue in those other claims. For example, resolving whether WLS is an illegal lottery, or is sold as a form of "protection" to allegedly unsuspecting consumers, or warrants further disclosures in offers or advertising of the service, does not require, as resolution of the Eleventh Claim necessarily does, an interpretation of the RRA. Contrary to Plaintiffs' conjuring, therefore, dismissing or severing and transferring the Eleventh Claim would not result in significant substantive duplication or seriously open the door to inconsistent findings.

B. The RRA's Forum Selection Clause, And Only That Forum Selection Clause, Governs Plaintiffs' Eleventh Claim for Relief

Plaintiffs claim in their Opposition that this Court has been "asked to resolve . . . conflicting venue clauses." (Opp'n at 1.) That is a complete mischaracterization. There is only *one* contract, and hence *one* forum selection clause, that governs Plaintiffs' Eleventh Claim. On its face, the Eleventh Claim — which is directed only against VeriSign and which seeks a declaration that VeriSign is in breach of the Registry-Registrar Agreement — clearly arises under the RRA. (Prayer ¶ 9 (seeking a "declaratory judgment that Verisign will be in breach of the Registry-Registrar Agreements if it implements the WLS because Verisign is obligated by the Registry-Registrar Agreements to delete domain names from the registry at the direction of the sponsoring registrar").)

Nonetheless, in hopes of retaining their declaratory relief claim against VeriSign in California, Plaintiffs argue that the forum selection clauses included in (1) *ICANN*'s agreements with VeriSign (the "ICANN-VeriSign Agreements") and (2) *ICANN*'s agreement with Plaintiffs (the "ICANN-Registrar Agreement") should govern this claim, to which ICANN is not even a party. (Opp'n at 8.) This diversionary tactic of Plaintiffs in introducing agreements that have no connection with the *Eleventh Claim* has no merit for three reasons.

First, the Eleventh Claim is brought by Plaintiffs only against VeriSign; ICANN is not a party to this claim. Second, the Eleventh Claim seeks the Court's interpretation of the Registry-Registrar Agreement between VeriSign and Plaintiffs. The claim does not seek an interpretation of — or even mention — ICANN's agreements with VeriSign or ICANN's agreements with Plaintiffs. Third, the language of the ICANN agreements contradicts Plaintiffs' argument by providing that their venue clauses cover only actions relating to those agreements themselves: "In all litigation involving ICANN *concerning this Agreement* . . . jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California, USA. . . ." (FAC, Ex. B

§ 5.6 (emphasis added).) Thus, ICANN's forum selection clause is clearly limited to those claims against ICANN that directly concern the ICANN agreement.[3]

It is undisputed that the Registry-Registrar Agreement at issue in Plaintiffs' Eleventh Claim contains a valid and enforceable Virginia forum selection clause. Plaintiffs' attempt to avoid this fact by repeatedly claiming that there are "conflicting" venue clauses consequently must be rejected. Plaintiffs are sophisticated corporate parties, and do not dispute that their consent to the Virginia venue clause was knowing and valid. Plaintiffs may not hide behind wholly separate agreements governing their relationships with nonparties to the Eleventh Claim simply because they would now prefer to litigate the RRA in Los Angeles.

III. CONCLUSION

For all of the foregoing reasons and the reasons stated in VeriSign's opening memorandum on the Motion, the Court should enforce the forum selection clause contained in the Registry-Registrar Agreement and accordingly dismiss, or sever and transfer to the Eastern District of Virginia, Plaintiffs' Eleventh Claim for Relief on the basis of improper venue.

DATED: June 30, 2004

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[3] Citing to the agreement in their Opposition, Plaintiffs boldly claim that the ICANN-VeriSign Agreement chooses "Los Angeles as the exclusive forum for any litigation involving ICANN." (Opp'n at 3.) This is untrue, as the forum selection clause specifies that it only governs "litigation involving ICANN concerning this Agreement." The Eleventh Claim is not litigation against ICANN or litigation concerning the ICANN agreements. Moreover, ICANN has approved Virginia as the proper forum for litigation between VeriSign and registrars concerning the RRA. It has done so by expressly approving the form of the RRA in its agreement with VeriSign, which attaches the RRA as an exhibit.