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24 **UNITED STATES DISTRICT COURT**
25 **CENTRAL DISTRICT OF CALIFORNIA**

26 VERISIGN, INC., a Delaware
27 corporation,

28 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
OPPOSITION TO DEFENDANT'S
REQUEST FOR JUDICIAL
NOTICE**

Date: May 17, 2004
Time: 10:00 a.m.
Courtroom: 14 – Spring Street Bldg.
Hon. A. Howard Matz

Plaintiff VeriSign, Inc. (“VeriSign”) submits this opposition to the Request for Judicial Notice filed by defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) in support of its Motion To Dismiss the first through sixth claims for relief pursuant to Federal Rule of Civil Procedure 12(b)(6).

1 VeriSign objects to ICANN’s request that the Court take judicial notice of
2 ICANN Exhibits A, B, C, and D.

3 **Argument**

4 **The Scope Of Judicial Notice Is Limited**

5 ICANN Exhibits A, B, C, and D either are not subject to judicial notice, or
6 cannot be judicially noticed for the purposes to which ICANN seeks to put them in its
7 motion, or both. Were the Court to take judicial notice of these exhibits, VeriSign
8 should be permitted to introduce contrary evidence outside the pleadings.

9 A court may not take judicial notice of a fact unless it is “one not subject to
10 reasonable dispute in that it is either (1) generally known within the territorial
11 jurisdiction of the trial court or (2) capable of accurate and ready determination by
12 resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
13 201(b). With regard to judicial notice of documents, courts distinguish between taking
14 judicial notice of the fact that a document *exists*, is *authentic*, or *contains* certain
15 statements, on the one hand, and taking judicial notice of the *truth* of the statements
16 contained in the document, on the other hand. For example, “[o]n a Rule 12(b)(6)
17 motion to dismiss, when a court takes judicial notice of another court’s opinion, it may
18 do so ‘not for the truth of the facts recited therein, but for the existence of the opinion,
19 which is not subject to reasonable dispute over its authenticity.’” *Lee v. City of Los*
20 *Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (quoting *S. Cross Overseas Agencies, Inc. v.*
21 *Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426-27 (3d Cir. 1999)).

22 As a general rule, “documents are judicially noticeable only for the purpose of
23 determining what statements are contained therein, not to prove the truth of the contents
24 or any party’s assertion of what the contents mean.” *United States v. S. Cal. Edison*
25 *Co.*, 300 F. Supp. 2d 964, 975 (E.D. Cal. 2004). Thus, even though a document may be
26 a matter of public record, “[a] court may not take judicial notice of one party’s opinion
27 of how [the document] should be interpreted.” *Id.* at 974.

1 Finally, even if a document is otherwise in a form proper for judicial notice (*e.g.*,
2 a public record), courts decline to take judicial notice if the document is not relevant to
3 the subject dispute. *E.g.*, *Pac. Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1025-
4 26 (N.D. Cal. 2002) (declining to take judicial notice of stipulated judgment and
5 settlement documents in related action on relevancy grounds); *Plevy v. Haggerty*, 38 F.
6 Supp. 2d 816, 821 (C.D. Cal. 1998) (“Although an analysts’ report may be proper
7 subject matter for judicial notice, the Court does not believe that these exhibits are
8 relevant to Defendants’ motion to dismiss.”).

9 **Exhibit “A” Is Irrelevant To ICANN’s Motion**

10 ICANN asks the Court to take judicial notice of a slip opinion in another lawsuit
11 between ICANN and others, *Dotster, Inc. v. ICANN*, No. CV 03-5045-JFW (MANx), to
12 which VeriSign was not even a party. In its Request for Judicial Notice, ICANN asserts
13 that the order “is simply being offered for the existence of the order, the identity of the
14 named parties, and the subject of the dispute.” (ICANN’s RJN at 5.) If that is the
15 purpose for which ICANN submitted the order, then the order is irrelevant to any issue
16 presented by ICANN’s motion to dismiss, and the Court should decline to take judicial
17 notice of it on that basis.

18 It is clear, however, that ICANN seeks to place the order before the Court for a
19 far broader, and plainly improper, purpose. In its Request for Judicial Notice, as well as
20 its Memorandum of Points and Authorities in Support of Its Motion To Dismiss,
21 ICANN contends that its defense of the *Dotster* case is *evidence* that ICANN has not
22 conspired with others to interfere with VeriSign’s Wait Listing Service (“WLS”). (*Id.*;
23 Mot. at 2 & n.1.) Indeed, ICANN unabashedly asserts that the *Dotster* order “provides
24 strong reason why VeriSign’s claims are *false*.” (ICANN’s RJN at 5 (*italics added*)).
25 Thus, ICANN’s true objective in placing the order before the Court is to advance “one
26 party’s [*i.e.*, ICANN’s] opinion of how a matter of public record should be interpreted.”
27 *United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d at 974. Because judicial notice for
28 that purpose is improper, *id.*, the Court should decline to consider the *Dotster* order.

1 Furthermore, as ICANN knows, its defense of the *Dotster* case does not itself
2 manifest any sympathy for VeriSign’s right to offer WLS. The plaintiffs in *Dotster*
3 assailed ICANN’s decision-making structure and processes, and, had their lawsuit
4 succeeded, they would have forced ICANN fundamentally to overhaul the way it
5 operates. ICANN therefore had its own reasons for defending those claims.

6 **Exhibit “B” Is Improper Subject Matter For Judicial**
7 **Notice And Is Irrelevant To ICANN’s Motion To Dismiss**

8 ICANN asks the Court to take judicial notice of its bylaws for the improper
9 purpose of “proving” that its structure and processes contradict VeriSign’s conspiracy
10 allegations. (RJN at 5-6; Mot. at 2-4, 10:16-24, 12:9-22.) Because ICANN is offering
11 its bylaws not merely for the fact of their existence or “for the purpose of determining
12 what statements are contained therein,” but rather “to prove the truth of the contents” –
13 *i.e.*, that ICANN *in fact* is organized and operates as the bylaws describe – the Court
14 should decline this request as improper. *United States v. S. Cal. Edison Co.*, 300 F.
15 Supp. at 975; *see also Skinner v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 2003 WL
16 23174478, at *3 (N.D. Cal. Dec. 29, 2003) (declining judicial notice of “documents
17 relating to the structure of NASD and its bylaws” as “not appropriate” for judicial
18 notice).

19 Indeed, ICANN’s request that the Court reach a factual conclusion, based solely
20 on judicial notice of ICANN’s bylaws, that ICANN has not conspired against VeriSign
21 is misleading and illustrates why courts are reluctant to judicially notice facts before
22 any discovery is conducted. Far from contradicting VeriSign’s allegations of
23 conspiracy, ICANN’s bylaws demonstrate that the restraints of trade alleged by
24 VeriSign could be effectuated by ICANN’s board of directors *and/or* by VeriSign’s
25 competitors acting through ICANN’s Supporting Organizations. (*See* ICANN Ex. B,
26 Annex A ¶ 13(b), at 74 (Names Council has power to cause board of directors to adopt
27 policies in certain circumstances); *id.* Ex. E § I.1. (Supporting Organization Councils
28 have power to block adoption of ICANN policies).) Moreover, the “facts” ICANN

1 would introduce through its bylaws are not accurate. For example, while ICANN asks
2 the Court to take notice that it has fifteen voting board members (Mot. at 13), its
3 website currently lists only thirteen. See <http://www.icann.org/general/board.html>, last
4 accessed Apr. 21, 2004. And although ICANN created an ombudsperson position under
5 its bylaws in December 2002 (ICANN Ex. B, Art. V), it has yet to fill the position.
6 Finally, ICANN's attempt to introduce its current bylaws as evidence ignores the fact
7 that it had *other* bylaws in effect when it carried out certain of the alleged restraints of
8 trade.

9 Of course, were ICANN to offer its bylaws not for the truth of their contents, but
10 merely to show "what statements are contained therein," the bylaws would be irrelevant
11 to any issue presented by ICANN's motion to dismiss.

12 **Exhibits "C" And "D" Are Improper Subject Matter For**
13 **Judicial Notice And Irrelevant To ICANN's Motion To Dismiss**

14 Finally, ICANN asks the Court to take judicial notice of its "Memorandum of
15 Understanding" with the U.S. Department of Commerce (ICANN Ex. C, hereafter
16 "MOU") and Amendment 6 thereto (ICANN Ex. D), in an effort to inject extrinsic
17 evidence of ICANN's purported origins, mission, and relationship with DOC. (Mot. at
18 2-3.) It argues that because VeriSign made reference to the MOU in the Complaint, but
19 did not attach a copy, ICANN may introduce the MOU not merely to reveal its contents,
20 but for their truth. (ICANN's RJN at 6.) The Court should deny ICANN's request for
21 three reasons.

22 First, the MOU and Amendment 6 do not come within the rule that a court may
23 consider documents that are mentioned in a pleading but not attached. That rule allows
24 a district court to treat a document as part of the complaint only if "the plaintiff *refers*
25 *extensively* to the document or the document *forms the basis of the plaintiff's claim.*"
26 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (italics added). Here, the
27 Complaint's glancing references to the MOU do not satisfy this standard. VeriSign has
28 not "refer[red] extensively" to the MOU, nor does that document "form[] the basis of

1 [VeriSign]’s claim.” VeriSign has sued under the Sherman Act, its contract with
2 ICANN (*i.e.*, the .com Registry Agreement), and state tort law. It is not a party to the
3 MOU. It has not alleged that the MOU’s contents accurately describe ICANN’s
4 origins, mission, and relationship with DOC. Therefore, the MOU and all its contents
5 are not part of the Complaint, and cannot be considered on a Rule 12(b)(6) motion. Of
6 course, the Complaint does not even mention Appendix 6.

7 Second, the MOU and Appendix 6 are not relevant to any issue presented by
8 ICANN’s motion to dismiss.

9 Third, on its face the MOU incorporates “Attachments,” and both the MOU and
10 Appendix 6 refer to other documents that ICANN has not submitted and that are
11 necessary to fully understand these exhibits and better place them in context.
12 Therefore, VeriSign disputes the authenticity of these documents, as they are not true
13 *and complete* reproductions of the originals.

14 **Conclusion**

15 For the reasons stated herein, the Court should decline to take judicial notice of
16 ICANN Exhibits A, B, C, and D.

17
18 DATED: April 22, 2004.

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