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7 NAMES AND NUMBERS

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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11 **COALITION FOR ICANN
TRANSPARENCY INC.,**

12 **Plaintiff,**

13 v.

14 **VERISIGN, INC.; AND INTERNET
15 CORPORATION FOR ASSIGNED
NAMES AND NUMBERS,**

16 **Defendants.**

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Case No. 05-4826 (RMW)

**DEFENDANT ICANN'S REQUEST FOR
JUDICIAL NOTICE ISO MOTION TO
DISMISS CFIT'S AMENDED
COMPLAINT**

**[Filed Concurrently with Notice of Motion
and Motion to Dismiss; Memorandum of
Points and Authorities; and [Proposed]
Order]**

**Date: June 9, 2006
Time: 9:00 a.m.
Location: Courtroom 6**

The Honorable Ronald M. Whyte

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

1 (A) **ICANN Bylaws**, as amended effective February 28, 2006, a
2 true and correct copy of which is attached hereto as Exhibit A;

3 (B) **Original 1998 Memorandum of Understanding between**
4 **ICANN and the United States Department of Commerce**
5 **subsequent amendments thereto (Amendment 1, effective**
6 **November 10, 1999; Amendment 2, effective September 7, 2000;**
7 **Amendment 3, effective May 25, 2001; Amendment 4, effective**
8 **September 24, 2001; Amendment 5, effective September 19,**
9 **2002; and Amendment 6 effective September 17, 2003)**
10 (hereinafter “MOU” and “Amendments”), true and correct copies of
11 which are attached hereto as Exhibits B-H.

12 CFIT references both of these documents within its Amended Complaint without raising
13 any question as to the authenticity of the documents. Further, these documents constitute facts
14 not reasonably subject to dispute. Accordingly, they may be properly considered in connection
15 with ICANN's Motion.¹

16 LEGAL STANDARD

17 When ruling on a motion to dismiss, a district may properly consider documents referred
18 to in a complaint though not attached thereto, so long as neither party questions the authenticity of
19 those documents. *In re Silicon Graphics Securities Litigation*, 183 F.3d 970, 986 (9th Cir. 1999)
20 (considering SEC filings referenced within a complaint when ruling on a 12(b)(6) motion to
21 dismiss); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (on motion to dismiss, court
22 may consider documents not attached to complaint yet crucial to claim); *Branch v. Tunnell*, 14
23 F.3d 449, 453-54 (9th Cir. 1994) (approving of consideration of documents mentioned in
24 complaint when ruling on a 12(b)(6) motion). This includes documents that are integral to a
25 plaintiff's claim but not explicitly incorporated in the complaint. *Parrino*, 146 F.3d at 706.

26 A district court may also consider matters that are properly the subject of judicial notice
27 when ruling upon a motion to dismiss without converting the motion into one for summary
28 judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). Under Federal Rule of Evidence

¹ In its Motion, ICANN also refers to the four documents attached to CFIT's Amended Complaint: the 2001 .COM Agreement; the 2001 .NET Agreement; the 2005 .NET Agreement and the 2006 .COM Extension. As these documents were all submitted with the complaint and referred to and relied upon therein to support CFIT's claims, they are properly before this Court to be considered when ruling on ICANN's Motion. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1989) (document attached to pleading appropriately considered in evaluating motion to dismiss).

1 201, a fact is judicially noticeable when it is not subject to reasonable dispute and is capable of
2 accurate and ready determination by resort to sources whose accuracy cannot reasonably be
3 questioned. Information obtained from a website where neither party questions the authenticity
4 of the site or the document meets the definition of Fed. R. Evid. 201 and is a proper subject of
5 judicial notice. *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 978 (E.D. Cal. 2000) (taking
6 judicial notice of website printout referenced in complaint when ruling on motion to dismiss).

7 ARGUMENT

8 **A. ICANN's Bylaws (Exhibit A)**

9 CFIT cites to ICANN's Bylaws in Paragraph 33 and 64 of its Amended Complaint. In
10 addition, CFIT's Sherman Act and Cartwright Act claims necessarily rely on ICANN's Bylaws in
11 that the claims are premised on ICANN's acts of approving – and eventual – implementation of
12 the 2006 .COM Registry Agreement or in the introduction of new registry services. ICANN's
13 Bylaws clearly demonstrate that the Board of Directors is the exclusive decision-making body of
14 ICANN for all matters involving the organization – including the approval of Registry
15 Agreements and consideration of proposed registry services. (*See* RJN, Ex. A (Bylaws), Art. II
16 § 11). Significantly, VeriSign has not yet sought consideration from the ICANN Board of the
17 registry services CFIT contends that VeriSign intends to implement. (Am. Comp. ¶ 93.)
18 ICANN's Bylaws are pertinent to CFIT's claims, not subject to reasonable dispute, and are
19 publicly available on ICANN's web site. (*See* [http://www.icann.org/general/archive-
20 bylaws/bylaws-28feb06.htm](http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm).) Therefore, ICANN's Bylaws may be considered in the
21 determination ICANN's Motion. *Parrino*, 146 F.3d at 706.

22 **B. The MOU and Amendments (Exhibits B-H)**

23 Though not attaching it to the Amended Complaint, CFIT references the MOU between
24 ICANN and the Department of Commerce in numerous paragraphs. (*See* Am. Comp. ¶¶ 59-63,
25 65, 85.) CFIT has not raised any questions as to the authenticity of the MOU or the amendments
26 thereto, and in fact directly quotes from the documents in the Amended Complaint. (Am. Comp.
27 ¶¶ 60, 61, 63.) The MOU and Amendments are central to plaintiff's claim, as CFIT attempts to
28 base ICANN's liability in part on CFIT's interpretation of the terms of the MOU. (*See id.* at 85-

1 87.) Further, the MOU and Amendments are facts not subject to reasonable dispute and are
2 capable of accurate and ready determination by resort to sources whose accuracy cannot
3 reasonably be questioned. Indeed, ICANN posts a copy of the MOU and each amendment thereto
4 on its web site. See <http://www.icann.org/general/icann-mou-25nov98.htm> (Memorandum of
5 Understanding); <http://www.icann.org/nsi/amend1-jpamou-04nov99.htm> (Amendment 1);
6 <http://www.icann.org/general/amend2-jpamou-07sep00.htm> (Amendment 2);
7 <http://www.icann.org/general/amend3-jpamou-25may01.htm> (Amendment 3);
8 <http://www.icann.org/general/amend4-jpamou-24sep01.htm> (Amendment 4);
9 <http://www.icann.org/general/amend5-jpamou-19sep02.htm> (Amendment 5)
10 <http://www.icann.org/general/amend6-jpamou-17sep03.htm> (Amendment 6). Moreover, the fact
11 that anyone can verify the contents of these documents by visiting ICANN's web site is an
12 independent basis for taking judicial notice of the existence and contents of the documents. See
13 *Pollstar*, F. Supp. 2d at 978.

14 **CONCLUSION**

15 For the foregoing reasons, ICANN respectfully requests that the Court take judicial notice
16 of Exhibits A-H attached hereto.

17 Dated: April 13, 2005

Respectfully submitted,

JONES DAY

19 By: /s/ Jeffrey A. LeVee
20 Jeffrey A. LeVee

21 Counsel for Defendant
22 INTERNET CORPORATION FOR
23 ASSIGNED NAMES AND NUMBERS