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14 VERISIGN, INC.

15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA

17 VERISIGN, INC., a Delaware
18 corporation,

19 Plaintiff,

20 v.

21 INTERNET CORPORATION FOR
ASSIGNED NAMES AND
22 NUMBERS, a California corporation;
DOES 1-50,

23 Defendants.
24

Case No. CV 04-1292 AHM (CTx)

**DECLARATION OF PHILIP L.
SBARBARO IN OPPOSITION TO
SPECIAL MOTION TO STRIKE
OF DEFENDANT INTERNATIONAL
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS**

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

[Memorandum of Points and Authorities;
Evidentiary Objections; Appendix of
Exhibits; Declarations; and [Proposed] Order
concurrently filed and lodged herewith]

1 I, PHILIP L. SBARBARO, pursuant to 28 U.S.C. § 1746, hereby declare as
2 follows:

3
4 1. I have personal knowledge of the matters set forth in this declaration
5 and, if called and sworn as a witness, would testify competently thereto.

6 2. I am an attorney duly admitted and in good standing to practice law in
7 the State of California (since 1977) and before this Court (since 1979). I am also
8 licensed to practice law in the Commonwealth of Virginia and the District of
9 Columbia.

10 3. Before joining VeriSign, Inc.'s ("VeriSign's") in-house legal
11 department, I was a partner in the Washington, D.C. law firm of Hanson & Molloy,
12 where I represented VeriSign's predecessor, Network Solutions, Inc. ("NSI"), as
13 NSI's outside General Counsel on all legal matters beginning in April 1996 through
14 November 1997. From December 1997 through July 2000, I represented NSI as its
15 outside Chief Litigation Counsel on all litigation matters.

16 4. From August 2000 until July 2003, I was Vice President and Deputy
17 General Counsel for VeriSign, where I continue to work on a part-time basis.

18 5. I understand that one of the disputed issues in the above-captioned
19 matter is the meaning of the term "Registry Services," as defined in the 2001 .com
20 Registry Agreement between VeriSign and the Internet Corporation for Assigned
21 Names and Numbers ("ICANN"). As discussed in greater detail below, I directly
22 participated in negotiating the 2001 .com Registry Agreement, as well as all of the
23 earlier related agreements, on behalf of NSI and later, VeriSign. In this declaration, I
24 describe some of the historical context and certain events in the negotiating history
25 that led to the definition of "Registry Services" as it appears in the 2001 .com
26 Registry Agreement, at section I.9.

The Cooperative Agreement

1
2 6. On December 31, 1992, the National Science Foundation ("NSF")
3 entered into Cooperative Agreement NCR 92-18742 (the "Cooperative Agreement")
4 with NSI to provide certain services for the registration and dissemination of domain
5 names. The Cooperative Agreement provided that NSI had primary responsibility for
6 ensuring the quality, timeliness, and effective management of the registration services
7 provided under the agreement. (Cooperative Agmt., art. 6, § A. The Cooperative
8 Agreement is posted on ICANN's website at [http://www.icann.org/nsi/coopagmt-](http://www.icann.org/nsi/coopagmt-01jan93.htm)
9 [01jan93.htm](http://www.icann.org/nsi/coopagmt-01jan93.htm). A copy of the agreement, without amendments, is submitted
10 concurrently as Exhibit 4.)

11 7. The Cooperative Agreement also provided that to the extent that the NSF
12 did not reserve specific responsibility for accomplishing the purpose of this
13 agreement, by either special or general condition, all such responsibilities remained
14 with NSI. (Ex. 4, art. 6, § A.)

15 8. The NSF did not "regulate" NSI or domain name registration. The
16 Cooperative Agreement called for NSI to follow certain technical guidelines, but
17 placed NSI in the operational role as the provider of all registration services.

18 9. The primary functions performed by NSI included (1) second-level
19 domain name registration services for .com, .org, .net, .edu, and .gov top-level
20 domains ("TLDs"), as well as registration services for all of the registries world-wide
21 which acted as registries for country code TLDs ("ccTLDs"); (2) secure, real-time,
22 on-line mechanisms for payment of registration and renewal fees; (3) registration
23 services in the .us ccTLD through a sub-contract with the Information Sciences
24 Institute at the University of Southern California; (4) operation and daily updating of
25 the Domain Name System's primary server ("A") for the Domain Name System's
26 Root Zone; (5) maintenance of the master file ("TLD Zone File") for each of the
27 following TLDs: .com, .org, .net, .edu, .gov, and IN-ADDR.ARPA; (6) and
28 operation of the machines which disseminated the information from these TLD Zone

1 Files world-wide. NSI, during the early years of its Cooperative Agreement (1993-
2 1996), also was operationally responsible for assigning Internet Protocol ("IP")
3 numbers.

4 10. At the request of the NSF, NSI transferred its responsibilities for the
5 assignment of IP numbers to a separate entity which NSI incorporated, funded, and
6 spun out as an independent entity, known as the American Registry for Internet
7 Numbers ("ARIN").

8 11. In September 1998, responsibility for the Cooperative Agreement was
9 transferred from the NSF to the Department of Commerce (more specifically, the
10 National Telecommunication and Information Administration ("NTIA")).

11 Separation of Registry and Registrar Services

12 12. On or about October 7, 1998, NSI agreed to Amendment 11 of the
13 Cooperative Agreement, under which, among other things, NSI agreed to develop a
14 protocol and associated software to support a system that would permit multiple
15 registrars to provide second-level domain name registration services within the .com,
16 .net, and .org TLDs. NSI would continue to be the registry, but under the "Shared
17 Registration System" to be developed at NSI's cost, new registrars, along with NSI as
18 a registrar, would offer such services to the public. I was one of the individuals who
19 negotiated the amendment to the Cooperative Agreement with the DOC.

20 13. In November 1999, the DOC entered into a Memorandum of
21 Understanding with ICANN for ICANN to perform certain technical coordination
22 functions in connection with the domain name system. At the same time, through
23 Amendment 19 to the Cooperative Agreement, NSI agreed with the DOC to enter
24 into a "Registry Agreement" and a separate "Registrar Accreditation Agreement"
25 with ICANN. I was one of the individuals who negotiated Amendment 19 with the
26 DOC. (Amendment 19 is posted on ICANN's website at
27 <http://www.icann.org/nsi/amendment19.htm>. A copy of the amendment is submitted
28 concurrently as Exhibit 5.) NSI and the DOC further agreed that "NSI's obligations

1 under the Cooperative Agreement with respect to Registry Services and Registrar
2 Services shall be satisfied by compliance with the Registry Agreement and the
3 Registrar Accreditation Agreement, respectively, for so long as those Agreements . . .
4 are in effect.” (Ex. 5 § I.B.2.A.)

5 14. NSI and the DOC defined “Registry Services” in Amendment 19 as
6 follows:

7 “Registry Services” means all services provided under this Cooperative
8 Agreement of the type provided by NSI under the Registry Agreement.
9 (Ex. 5 § I.A.11.)

10 The 1999 Registry Agreement

11 15. As contemplated by Amendment 19, NSI and ICANN entered into a
12 Registry Agreement in November 1999, in accordance with which NSI would
13 continue to operate the registries for the .com, .net, and .org TLDs. I personally
14 participated on NSI’s behalf in the negotiations for the 1999 Registry Agreement,
15 along with outside counsel David Johnson. (The 1999 Registry Agreement is posted
16 on ICANN’s website at [http://www.icann.org/nsi/nsi-registry-agreement-](http://www.icann.org/nsi/nsi-registry-agreement-04nov99.htm)
17 [04nov99.htm](http://www.icann.org/nsi/nsi-registry-agreement-04nov99.htm). A copy of that agreement is submitted concurrently as Exhibit 6.)

18 16. On June 8, 2000, NSI became a wholly-owned subsidiary of VeriSign
19 and VeriSign succeeded to the registry business of NSI, operating the registries for
20 the .com, .net, and .org TLDs, among others, and NSI continued to serve as a registrar
21 of second-level domain names in these TLDs.

22 17. VeriSign and ICANN’s legal relationship is, and always has been, purely
23 contractual. Both are wholly private, *non-governmental*, *non-quasi-governmental*
24 entities. Neither corporation has any authority over the other beyond what their
25 contracts confer upon it. This contractual relationship was a goal of the Clinton
26 Administration espoused on numerous occasions by Ira Magaziner. The
27 infrastructure of the Internet was self-governed, contractually based, not regulatory
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1 based. The government, according to the Administration, had no interest in
2 regulating or (at the time) taxing this new phenomenon.

3 18. The 1999 Registry Agreement defined "Registry Services," specifically
4 listing the core functions of an entity that acts as a registry. These services obviously
5 described some, but not all, of the "registration services" NSI had previously
6 provided under the Cooperative Agreement. In particular, the definition limited
7 Registry Services to four core functions of registry operation: (1) receipt of
8 registration information from registrars; (2) provision of domain name status
9 information to registrars; (3) operation of the TLD zone servers; and
10 (4) dissemination of TLD Zone Files. In the words of the agreement itself:

11 "Registry Services" means operation of the registry for the Registry
12 TLDs and shall include receipt of data concerning registrations and
13 nameservers from registrars, provision of status information to
14 registrars, operation of the registry TLD zone servers, and dissemination
15 of TLD zone files.

16 (Ex. 6 § I.A.8.)

17 The 2001 .com Registry Agreement

18 19. On or about May 25, 2001, VeriSign entered into a written .com
19 Registry Agreement with ICANN, which superseded the 1999 Registry Agreement. I
20 was responsible for negotiating the language of the 2001 .com Registry Agreement
21 on behalf of VeriSign. I personally participated in those negotiations along with
22 outside counsel, David Johnson. (The 2001 .com Registry Agreement is posted on
23 ICANN's website at <http://www.icann.org/tlds/agreements/verisign/com-index.htm>.
24 A copy of that agreement is submitted concurrently as Exhibit 7.)

25 20. Representatives for ICANN and VeriSign began preliminary discussions
26 for the 2001 .com Registry Agreement in the Fall of 2000. One of VeriSign's key
27 objectives in negotiating the 2001 .com Registry Agreement, which I (and others)
28 communicated to ICANN, was to ensure that VeriSign remained free to provide new

1 services to registrars, registrants, and end-users of the Internet, including various add-
2 on services then contemplated by VeriSign. During the negotiations, ICANN
3 proposed certain changes in the definition of Registry Services. Representatives of
4 VeriSign, including me, indicated our willingness to make certain changes in the
5 definition, so long as there was no misunderstanding that the definition of Registry
6 Services applied only to those four functions necessary and essential to the operation
7 of the registry. As a result of these discussions the agreement was modified so that
8 (i) the part of the definition of Registry Services that read "means operation of the
9 registry for the Registry TLDs" was changed (ii) to cover only services "provided as
10 an integral part of the Registry TLD." ICANN's attorney, Joe Sims, responded that
11 ICANN did not object to this change, and the new language became a part of the
12 working draft and final agreement.

13 21. Joe Sims, in consultation with Louis Touton, the then general counsel of
14 ICANN, proposed that the definition of Registry Services include those registries that
15 added "subdomains in which Registered Names are registered," "dissemination of
16 contact and other information concerning domain name and nameserver registrations"
17 in the .com TLD (*i.e.*, "WhoIs" service), and other services that ICANN might
18 eventually require following its "Consensus Policies" process, and we agreed. We
19 further wanted it clarified that "the provision of nameservice for a domain used by a
20 single entity under a Registered Name registered through an ICANN-Accredited
21 Registrar" was not to be included within the definition of Registry Services, and Joe
22 Sims agreed. The latter provision was added at the end of the definition.

23 22. However, in late May 2001, just before the planned signing of the 2001
24 .com Registry Agreement, Louis Touton attempted to introduce an entirely new
25 definition of Registry Services. The complete definition, with the new language in
26 italics requested by Mr. Touton, was as follows:

27 "Registry Services" means services provided as an integral part of the
28 operation of the Registry TLD, including all subdomains in which

1 Registered Names are registered. *In determining whether a service is*
2 *integral to the operation of the Registry TLD, consideration will be*
3 *given to the extent to which the Registry Operator has been materially*
4 *advantaged in providing the service by its designation as such under this*
5 *Agreement. The development of technology, expertise, systems, efficient*
6 *operations, reputation (including identification as Registry Operator),*
7 *financial strength, or relationships with registrars and third parties*
8 *shall not be deemed an advantage arising from the designation.*

9 Registry services include: receipt of data concerning registration of
10 domain names and nameservers from registrars, provision to registrars
11 of status information relating to the Registry TLD, dissemination of
12 TLD zone files, operation of the Registry TLD zone servers,
13 dissemination of contact and other information concerning domain-name
14 and nameservers registrations in the Registry TLD, and such other
15 services required by ICANN in the manner provided in Subsections 4.3
16 through 4.6. Registry Services shall not include the provision of
17 nameservice for a domain used by a single entity under a Registered
18 Name registered through an ICANN-Accredited Registrar.

19 23. ICANN's proposed definition would have made the meaning of Registry
20 Services unclear and, to a substantial degree, left it up to ICANN's discretion to
21 determine, on a going-forward basis, whether any new service constituted a Registry
22 Service, rather than specifying the complete universe of Registry Services in the
23 agreement itself. Under ICANN's proposed revision, ICANN could deem any new
24 service a "Registry Service," even if it did not alter the essential operation of the
25 registry, if ICANN decided that VeriSign was "materially advantaged in providing
26 the service" by virtue of its position as the exclusive registry operator. In effect, this
27 provision potentially would have given ICANN enormous latitude to attempt to
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1 restrict and/or to set the pricing for any new service, whether or not that service
2 affected the essential operation of the registry.

3 24. ICANN's proposed, expanded definition was brought to my attention by
4 Joe Sims in a telephone call to my office at VeriSign on or about May 22, 2001, and I
5 specifically recall immediately and categorically declining to accept or even discuss
6 the language as a further modification of the definition.

7 25. VeriSign was categorically unwilling to accept ICANN's proposed
8 definition of "Registry Services" because it could have jeopardized VeriSign's right
9 to provide new services already contemplated. Accordingly, I immediately
10 responded to ICANN that VeriSign would not agree to ICANN's proposed change
11 and self-expansion of the definition of "Registry Services." ICANN's counsel, Mr.
12 Sims, during that telephone call, agreed that ICANN would not attempt to deal
13 further with the never-before-seen definition at the then final stage of the
14 negotiations, and withdrew it.

15 26. ICANN and VeriSign executed the 2001 .com Registry Agreement two
16 or three days later, on or about May 25, 2001. The agreement, as executed, defines
17 "Registry Services" as follows:

18 "Registry Services" means services provided as an integral part of the
19 Registry TLD, including all subdomains. These services include: receipt
20 of data concerning registrations of domain names and nameservers from
21 registrars; provision to registrars of status information relating to the
22 Registry TLD zone servers, dissemination of TLD zone files, operation
23 of the Registry zone servers, dissemination of contact and other
24 information concerning domain name and nameserver registrations in
25 the Registry TLD, and such other services required by ICANN through
26 the establishment of Consensus Policies as set forth in Definition 1 of
27 this Agreement. Registry Services shall not include the provision of
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1 name service for a domain used by a single entity under a Registered
2 Name registered through an ICANN-accredited registrar.

3 (Ex. 7 § I.9.)

4 27. Like the 1999 Registry Agreement definition, the 2001 .com Registry
5 Agreement definition confirms that, at the time, both parties agreed on what were the
6 basic, core services provided by the registry. The definition also demonstrates the
7 recognition on the part of both parties that services would be offered by the registry
8 in the future that would not be considered Registry Services under the definition.

9 28. I would not have agreed to any definition of Registry Services that
10 would have included add-on, value-added, or other optional services that were not
11 integral to what the parties both clearly understood to be the core registry functions
12 identified in the definition of Registry Services. The ability of a registry to provide
13 add-on services, at prices the registry chooses, had been specifically provided for in
14 the original 1998 Green Paper, which expressly states: "The registry will be permitted
15 to provide and charge for value-added services, over and above the basic services
16 provided to registrars." (The Green Paper was published as *Improvement of*
17 *Technical Management of Internet Names and Addresses* in the Federal Register,
18 Volume 63, No. 34, on Friday, February 20, 1998. A copy of that proposed rule is
19 submitted concurrently as Exhibit 8 (§VII.B).)

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21 **ICANN's Expansion of "Registry Services" in**
22 **Other Agreements for New TLDs**

23 29. At the time we were negotiating the 2001 .com Registry Agreement with
24 Joe Sims, I was aware that ICANN also was negotiating registry agreements with
25 operators of newly-established TLDs. Based on my communications with
26 representatives from the newly-formed TLDs, I also was aware that ICANN was
27 seeking authority from these new operators to regulate non-core services offered by
28 these operators, by broadly defining "Registry Services" in their registry agreements.

1 30. Although I was not aware of the specific language, I was aware that as
2 the result of ICANN's efforts, the .info TLD registry agreement contained the
3 definition of "Registry Services" that includes the "materially advantaged" language
4 reproduced in paragraph 22 above. (The .info registry agreement, which was
5 executed in May 2001, is posted on ICANN's website at
6 <http://icann.org/tlds/agreements/info>. A copy of that agreement is submitted
7 concurrently as Exhibit 9.)

8 31. I am now aware that the .aero, .biz, .coop, .museum, .name, and .pro
9 registry agreements, all of which were executed in 2001 or 2002, also contain the
10 definition of "Registry Services" that includes the "materially advantaged" language.
11 (I have reviewed these agreements, all of which are posted on ICANN's website at
12 <http://www.icann.org/registries/agreements.htm>. Copies of the agreements are
13 submitted concurrently as Exhibits 10-15.)

14 **ICANN's Attempts To "Rewrite" the 2001 .com Registry Agreement**

15 32. Although, as described above, VeriSign refused to agree to the unlimited
16 definition of "Registry Services" that ICANN proposed at the close of negotiations
17 for the 2001 .com Registry Agreement, ICANN seems to analyze and to react to
18 every new service proposed by VeriSign as though the agreement actually gave
19 ICANN the broader authority that the rejected definition would have conferred on it.

20 33. For example, I have reviewed an April 2002 analysis by ICANN's then
21 general counsel, Louis Touton, prepared for the ICANN Board of Directors, in which
22 Mr. Touton analyzed VeriSign's proposed new Wait Listing Service ("WLS").
23 (ICANN posted Mr. Touton's analysis on its website at
24 <http://www.icann.org/minutes/report-vgrs-wls-17apr02.htm>. A true and correct copy
25 of Mr. Touton's April 2002 analysis is submitted concurrently as Exhibit 16.) In the
26 analysis, Mr. Touton opines that WLS is a "Registry Service" under the 2001 .com
27 Registry Agreement on the basis of the following reasoning:
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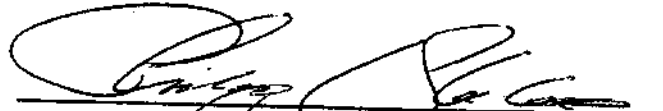
1 Registry Services are defined as those that are “provided as an integral
2 part of the operation of the Registry TLD”. *In essence, “Registry*
3 *Services” are those that a registry operator is enabled to provide on a*
4 *sole-source basis by virtue of its appointment as such by ICANN, rather*
5 *than services that are provided on a freely competitive basis.* The
6 proposed WLS is a registry service because, unlike the wait-listing
7 services provided competitively by registrars, it is implemented by
8 bypassing the normal return of deleted names to the available pool and
9 by instead assigning them to the registrar and customer holding the
10 reservation. In this way, the proposed WLS would become *integrated*
11 into the operation of the .com and .net registries.

12 (Ex. 16 at § 3 (emphasis added).)

13 34. Mr. Touton, in analyzing whether WLS is a Registry Service, thus
14 expressly focused on VeriSign’s supposed “sole-source” capability “by virtue of its
15 appointment . . . by ICANN” as the operator of the .com TLD, despite the fact that
16 VeriSign was not “appointed” by ICANN and that VeriSign had rejected, and the
17 parties had agreed not to incorporate, that analysis of “Registry Services” in the 2001
18 .com Registry Agreement.

19 35. In sum, after VeriSign declined to accept ICANN’s proposed and
20 expanded definition of “Registry Services,” ICANN still entered into the agreement
21 without the language it had proposed. Nevertheless, ICANN has conducted itself
22 with VeriSign as though the parties had adopted the very language that they
23 intentionally and expressly left out of the agreement.
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1 I declare under penalty of perjury under the laws of the United States of America
2 that the foregoing is true and correct. I executed this declaration on this 28th day of
3 April 2004, at Dulles, Virginia.
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6 PHILIP L. SBARBARO
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