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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

VERISIGN, INC., a Delaware corporation,

Plaintiff,

v.

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

Defendants.

AND RELATED CROSS-ACTIONS.

Case No. BC 320763

[Assigned for all purposes to Judge Rolf M. Treu]

OBJECTION BY VERISIGN, INC. TO REPLY DECLARATION OF LOUIS TOUTON

Date: January 18, 2005
Time: 8:30 a.m.
Department: 58

Complaint filed: Aug. 27, 2004
ICANN Cross-Compl. filed: Nov. 12, 2004
VeriSign Cross-Compl. filed: Dec. 28, 2004

Plaintiff VERISIGN, INC. ("VeriSign") respectfully submits this Objection to the Declaration of Louis Touton served by Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") on January 10, 2005, as part of its Reply papers in support of its Motion to Stay Litigation Pending Arbitration.

ICANN has attempted to "sandbag" VeriSign through the belated introduction, with its reply, of *new* "evidence" and arguments (in Mr. Touton's thirteen-page declaration and its multiple appendices) that (if ICANN wanted to present them at all) necessarily had to be included in ICANN's initial moving papers. Through the *new* "evidence" ICANN seeks impermissibly to alter the unambiguous language of the 2001 .net Agreement in contravention of the parol evidence rule. The Court should not condone such a maneuver.

The central premise of ICANN's motion to stay – namely, that the .net "arbitration" will allegedly resolve most, if not all, of the issues in the present action by operation of collateral estoppel (Mot. at 7:1-5) – could hold true *only* if the result of the .net "arbitration" were binding. Yet, at the time ICANN filed its motion, and despite the fact that ICANN bears the burden of persuasion on the motion, ICANN submitted *no evidence* to support its contention that the .net "arbitration" would be binding. Instead, it held back its purported "evidence" and novel arguments regarding the .net arbitration's supposed binding effect until it filed its *reply* papers, thereby denying VeriSign any reasonable opportunity to respond.[1]

In light of the obvious prejudice to VeriSign that ICANN's hide-the-ball strategy has caused, the Court should decline to consider, as courts routinely do under these circumstances, the newly presented "evidence" and arguments on reply contained in the Touton Declaration. *See Reichardt v. Hoffman*, 52 Cal. App. 4th 754, 764 (1997) (refusing to consider new issues raised in

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[1] In its reply, ICANN notes that VeriSign did not submit a declaration regarding the negotiating history of the dispute resolution provision in the 2001 .net Agreement with its opposition. However, that fact underscores the impropriety of ICANN's filing the Touton Declaration in reply. The Touton Declaration, in fact, is not replying to any declaration VeriSign provided; rather, it is intended to support the premise of the motion and, therefore, was required to be filed, if at all, with the moving papers.

reply brief); *Am. Drug Stores, Inc. v. Stroh*, 10 Cal. App. 4th 1446, 1453 (1992) ("Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument."); *cf. San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.*, 102 Cal. App. 4th 308, 310, 312 (2002) (reversing summary judgment where the moving party submitted for the first time with its reply papers a supplemental declaration containing new facts).

Furthermore, not only was the Touton Declaration wrongfully submitted as part of ICANN's *reply* papers, it also is subject, on its face, to sweeping evidentiary objections. Among other things, the declaration (i) lacks foundation because Mr. Touton does not state that he attended each (or any) of the numerous negotiations that he purports to describe, (ii) improperly states Mr. Touton's personal opinions, and (iii) is impermissibly argumentative and speculative. In addition to these evidentiary objections, the Touton Declaration should be rejected because it improperly introduces parol evidence in an effort to contradict the plain and unambiguous language of the "arbitration" provision contained in the 2001 .net Agreement.

Under the parol evidence rule, the Court should decline to consider Mr. Touton's description of negotiations leading up to the 2001 .net Agreement, and his discussion of prior drafts of the "arbitration" clause contained in that agreement, because this extrinsic evidence cannot vary the plain contractual language contained in the final, signed agreement itself, which makes clear that the .net "arbitration" is not binding. *See* Civ. Code § 1625 ("The execution of a contract in writing . . . supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."); Civ. Proc. Code § 1856(a) ("Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement . . . ."); *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 344 (2004) ("The [parol evidence] rule as applied to contracts is simply that as a matter of substantive law . . . the act of embodying the complete terms of an agreement in writing (the 'integration'), *becomes the contract of the parties*. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement.") (emphasis in original).

Because ICANN failed to file the Touton Declaration with its initial moving papers, thereby depriving VeriSign of a meaningful opportunity to respond to it, and in light of the declaration's gross evidentiary shortcomings, the Court should decline to consider the Touton Declaration and should strike it from the record.[2]

DATED: January 13, 2005.

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[2] Even if the Court were to consider the Touton Declaration, the declaration is not dispositive of the issues raised by ICANN's motion. It does *not* address the waiver and collateral estoppel issues raised by VeriSign in its opposition, which defeat the motion whether or not the .net "arbitration" provision contemplates binding arbitration. And, more importantly, even assuming the .net "arbitration" were binding, as ICANN contends, staying the current .com litigation pending a separate .net arbitration would be antithetical to the parties' clearly expressed intent to submit disputes relating to the .com Agreement to *litigation* rather than to arbitration (in the absence of mutual consent of the parties). ICANN never questions that that is the intent of the .com Agreement, and it is reason alone for denying the motion to stay.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed by First Legal Support Services in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1511 W. Beverly Blvd., Los Angeles, California 90026. On **January 13, 2005,** I served a document described as: **OBJECTION BY VERISIGN, INC. TO REPLY DECLARATION OF LOUIS TOUTON** on the following interested party in this action by personally delivering a copy to:

☒ by placing true copies thereof enclosed in sealed envelopes addressed as stated below:

Jeffrey A. LeVee
John S. Sasaki
Christina Coates
Sean W. Jaquez
JONES DAY
555 West Fifth Street, Suite 4600
Los Angeles, California 90013-1025

☒ **BY PERSONAL SERVICE** I caused such envelope to be delivered by hand to the office of the addressee. Executed on **January 13, 2005** at Angeles, California.

☐ **BY MAIL** I placed such envelope with postage thereon prepaid in the United States Mail at 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. Executed on _____ at Los Angeles, CA.

☐ **BY FEDERAL EXPRESS** I am readily familiar with Arnold & Porter LLP's business practices of collecting and processing items for pickup and next business day delivery by Federal Express. Under said practices, items to be delivered the next business day are either picked up by Federal Express or deposited in a box or other facility regularly maintained by Federal Express in the ordinary course of business on that same day with the cost thereof billed to Arnold & Porter LLP's account. I placed such sealed envelope for delivery by Federal Express to the offices of the addressee(s) as indicated on the attached mailing list on the date hereof following ordinary business practices. Executed on _____at Los Angeles, California.

☒ **STATE** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

GERI GOMEZ

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