

1 Jeffrey A. LeVee (State Bar No. 125863)
Christina D. Coates (State Bar No. 206602)
2 Sean W. Jaquez (State Bar No. 223132)
JONES DAY
3 555 West Fifth Street, Suite 4600
Los Angeles, CA 90013-1025
4 Telephone: (213) 489-3939
Facsimile: (213) 243-2539

5 Joe Sims (admitted *pro hac vice*)
6 JONES DAY
51 Louisiana Avenue, N.W.
7 Washington, D.C. 20001-2113
Telephone: (202) 879-3939
8 Facsimile: (202) 626-1700

9 Attorneys for Defendant
INTERNET CORPORATION FOR
10 ASSIGNED NAMES AND NUMBERS

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13
14 VERISIGN, INC., a Delaware
15 corporation,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS, a
19 California corporation,

20 Defendant.

Case No. CV 04-1292 AHM (CTx)

**DEFENDANT INTERNET
CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS' THIRD
SUPPLEMENTAL REQUEST
FOR JUDICIAL NOTICE**

[Filed concurrently with Reply In
Support Of ICANN's Motion to
Dismiss Plaintiff's Amended First,
Second, Third, Fourth, Fifth, and
Sixth Claims for Relief]

Date: August 23, 2004
Time: 10:00 a.m.
Hon. A. Howard Matz

1 PLEASE TAKE NOTICE that, pursuant to Federal Rule of Evidence 201,
2 defendant Internet Corporation for Assigned Names and Numbers ("ICANN")
3 hereby respectfully requests that, in considering its motion to dismiss pursuant to
4 Federal Rule of Civil Procedure 12(b)(6), the Court take judicial notice of the July
5 12, 2004 transcript of proceedings in *RegisterSite.com, et. al., v. VeriSign, et. al.*,
6 CV 04-1368 ABC (CWx) (C.D. Cal.) ("RegisterSite Transcript"). A true and
7 correct copy of the RegisterSite Transcript is attached hereto as Exhibit O. The
8 document is a public record the existence of which is not subject to dispute.
9 Accordingly, it may be properly considered by the Court in connection with
10 ICANN's motion to dismiss.

11 ARGUMENT

12 In ruling on a motion to dismiss, a court may take notice of "matters of
13 public record" pursuant to Federal Rule of Evidence section 201, to the extent they
14 are not subject to reasonable dispute. *Lee v. City of Los Angeles*, 250 F.3d 668,
15 688-689 (9th Cir. 2001). This includes the transcripts of proceedings in other
16 actions. *Id.* at 689-690. Judicial notice of matters of public record will not convert
17 a Rule 12(b)(6) motion into a summary judgment motion. *Id.* at 689; *Mir v. Little*
18 *Co. of Mary Hospital*, 844 F.2d 646, 649 (9th Cir. 1988) (same); *Neilson v. Union*
19 *Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1112 n.37 (C.D. Cal. 2003) (same).

20 The RegisterSite Transcript is relevant to ICANN's motion to dismiss
21 because it establishes VeriSign's violation of the doctrine of judicial estoppel. With
22 regard to the market for domain names -- an issue in both this litigation and in the
23 *RegisterSite* litigation -- VeriSign advocated one definition of the market before the
24 court in the *Registersite* case and an entirely different and contradictory one before
25 the court in this litigation.

26 In the *RegisterSite* litigation, plaintiffs brought an action against VeriSign
27 and ICANN before Judge Collins, seeking to stop the introduction of VeriSign's
28 proposed Wait Listing Service ("WLS"). In its motion to dismiss RegisterSite's

1 complaint (RJN Ex. M (VeriSign's RegisterSite Motion to Dismiss) at 21:10-17)
2 and at the hearing on that motion (RJN Ex. O at 9:7-23), VeriSign argued that the
3 market in which WLS competes is the market for all domain names, including both
4 registered and unregistered names. *Id.* Here, however, VeriSign alleges that the
5 secondary domain name market "includes the market for registered (or existing)
6 domain names," but apparently does *not* include unregistered domain names. FAC
7 ¶ 106. This conduct -- advocating two contrary positions before two different
8 courts -- is expressly prohibited under the doctrine of judicial estoppel. That
9 doctrine is invoked "not only to prevent a party from gaining an advantage by
10 taking inconsistent positions, but also because of general considerations of the
11 orderly administration of justice and regard for the dignity of judicial proceedings,'
12 and to 'protect against a litigant playing fast and loose with the courts.'" *Hamilton*
13 *v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (*quoting Russell*
14 *v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). To enforce this doctrine, a court is
15 entitled to consider -- indeed it must consider -- pleadings filed by parties in other
16 litigation.

17 The RegisterSite Transcript is a record of this Court and is being offered for
18 the existence of the arguments VeriSign made to the Court, not for the truth or
19 accuracy of those arguments. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-
20 5 (9th Cir. 1986). Accordingly, it may be judicially noticed. *Lee*, 250 F.3d at 689.

22 Dated: August 12, 2004

JONES DAY

24 By: _____
25 Jeffrey LeVee

26 Attorneys for Defendant
27 INTERNET CORPORATION FOR
28 ASSIGNED NAMES AND NUMBERS