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BY _____
JUN 30 3 38 PM '04
DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES

FILED

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

15 REGISTERSITE.COM, et al.,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
19 ASSIGNED NAMES AND
20 NUMBERS, et al.,

21 Defendants.

Case No. CV-04-1368 ABC (CWx)

**DEFENDANT INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS'
OPPOSITION TO PLAINTIFFS'
MOTION TO STRIKE PORTIONS
OF DEFENDANT'S MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM UNDER FRCP 12(B)(6)**

Date: July 12, 2004

Time: 10:00 a.m.

Dept: 680

Honorable Audrey B. Collins

1 **INTRODUCTION**

2 In an attempt to divert the Court's attention from their insufficient pleading,
3 Plaintiffs bring an extremely unusual Motion to Strike Portions of Defendant
4 Internet Corporation For Assigned Names and Numbers' ("ICANN") Motion to
5 Dismiss Certain Causes of Action for Failure to State a Claim Under Fed. R. Civ. P.
6 12(b)(6) ("Motion to Strike"). Plaintiffs' motion is frivolous and should be denied.

7 **ARGUMENT**

8 **I. PLAINTIFFS' MOTION TO STRIKE IS BASELESS AND**
9 **UNNECESSARY.**

10 Plaintiffs seek an order striking certain portions of ICANN's Motion to
11 Dismiss on the grounds that those portions are not supported by a declaration or
12 other written evidence. This request is baseless and Plaintiffs' filing is a gross
13 waste of time. The portions of ICANN's Motion that offend Plaintiffs are not
14 "factual contentions;" rather, they consist of argument, a case comparison, and
15 statements that flow logically or obviously from Plaintiffs' allegations.¹ These sorts
16 of statements are well within the scope of permissible argument and advocacy.
17 Plaintiffs make no effort to show that the referenced statements constitute facts as
18 opposed to argument.

19 Moreover, even if the statements were borderline factual in nature, Plaintiffs'
20 motion would still be unjustified. First, since a Rule 12(b)(6) motion must, as a

21 ¹ For example, the first two statements are taken from the introduction to the
22 brief. Both are arguments regarding what ICANN believes to be true. Mot. to
23 Strike at 2:15-17 ("Each of the four claims . . . arises entirely from that same WLS
24 Proposal and ICANN's failure to use its contracts with VeriSign to reject that
25 proposal"); *id.* at 2:18-20 ("this lawsuit was apparently filed merely as a tactic to try
to delay the implementation of WLS . . .").

26 The statements in the fourth paragraph follow logically and obviously from
27 the fact that VeriSign has exclusive control over the authoritative database of .com
28 domain name registrations (FAC ¶ 4.9). Because RegisterSite does control that
database it is simply not capable of giving someone the right to or access to a .com
domain name. Thus, it cannot offer a guarantee.

1 matter of law, be decided based solely on allegations in the complaint and matters
2 judicially noticed, the Court is already prohibited from considering any other
3 matters. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
4 2001); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).
5 Plaintiffs motion is, therefore, entirely superfluous because it asks the Court to do
6 that which it is already obligated to do. And Local Rule 7-6, the purported basis for
7 Plaintiffs' motion, has no application with respect to Rule 12(b)(6) motions; that
8 rule pertains to motions where declarations and written evidence are submitted and
9 the Court must consider facts.

10 Finally, to the extent that any of the statements that offend Plaintiffs is
11 factual or quasi-factual, its inclusion in the brief is harmless. None of the points is
12 dispositive of any issue. Virtually all briefs contain statements that one's opponent
13 could deem "factual contentions." Indeed, Plaintiffs' opposition to ICANN's
14 motion is vulnerable to such a challenge because plaintiffs make unsupported
15 assertions that are clearly false. Opp. at 10: 20-21("The WLS lottery would not
16 exist if ICANN had not authorized it"); *id.* at 17:21-22 ("Judge Walter[]
17 determin[ed] that the Dotster plaintiffs did a poor job of presenting their own
18 evidence"). But if every line of every brief was subject to a motion to strike, courts
19 would have to spend an inordinate amount of time parsing through briefs making
20 judgment calls about which statements deserve to be stricken and which can
21 remain. It is for this reason that motions to strike are given "disfavored status" and
22 "courts often require a showing of prejudice by the moving party" before granting
23 such motions. *State of California Dep't of Toxic Substances Control v. Alco Pac.,*
24 *Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002) (citation omitted). Plaintiffs
25 have made no showing of prejudice, and indeed there is none.

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CONCLUSION

For the foregoing reasons, ICANN respectfully requests that this Court deny Plaintiffs' Motion to Strike.

Dated: June 30, 2004

JONES DAY

By: 
Jeffrey A. LeVeque

Attorneys for Defendant INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

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PROOF OF SERVICE BY OVERNIGHT DELIVERY

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013-1025. On June 30, 2004, I deposited with Federal Express, a true and correct copy of the within documents:

**DEFENDANT ICANN'S OPPOSITION TO PLAINTIFFS'
MOTION TO STRIKE PORTIONS OF DEFENDANT'S
MOTION TO DISMISS FOR FAILURE TO STATE A
CLAIM UNDER FRCP 12(B)(6)**

in a sealed envelope, addressed as follows:

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Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

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.

Executed on June 30, 2004, at Los Angeles, California.


Elba B. Alonso de Ortega