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ASSIGNED NAMES AND NUMBERS
11

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14
15 VERISIGN, INC., a Delaware
corporation,

16 Plaintiff,

17 v.

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

20 Defendants.
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Case No. CV 04-1292 AHM (CTx)

**REPLY MEMORANDUM IN
SUPPORT OF DEFENDANT
INTERNET CORPORATION
FOR ASSIGNED NAMES AND
NUMBERS' SPECIAL
MOTION TO STRIKE
VERISIGN'S SECOND, THIRD,
FOURTH, FIFTH, AND SIXTH
CLAIMS AS STRATEGIC
LAWSUITS AGAINST PUBLIC
PARTICIPATION (CAL. CIV.
PROC. CODE § 425.16)**

[Concurrently filed with
Supplemental Declaration of John
O. Jeffrey]

Date: May 17, 2004
Time: 10:00 a.m.
Courtroom of the
Honorable A. Howard Matz

INTRODUCTION

VeriSign's opposition to ICANN's Special Motion to Strike, like its opposition to ICANN's motion to dismiss, is dominated by VeriSign's mischaracterizations of its complaint. Despite VeriSign's argument that its second, third, and fourth claims are not based on the letter that ICANN sent to VeriSign threatening litigation, VeriSign has not overcome ICANN's showing that the anti-SLAPP statute applies to ICANN's sending of the letter and those claims. Nor has VeriSign shown that the basis for VeriSign's fifth and sixth claims -- ICANN's assertion of its contract position through statements that include the October 3 letter -- are not covered by the anti-SLAPP statute.

Because ICANN has demonstrated that VeriSign's claims fall within the anti-SLAPP statute, the burden shifts to VeriSign to show a probability of succeeding on its claims. VeriSign must show -- but cannot as a matter of law -- that ICANN had some obligation to VeriSign that ICANN breached and that ICANN's October 3 letter is not protected by the litigation privilege. VeriSign's allegations and its arguments point almost entirely to ICANN's assertions of ICANN's *interpretation* of the contract, not to ICANN's *actions* with respect to the contract.

In submitting a mountain of evidence trying to show that its interpretation of the parties' contract is correct, VeriSign misses the point entirely: VeriSign's *seventh* claim for declaratory relief is the claim that will require an interpretation (by this or some other Court) of the parties' contract. Because VeriSign cannot prevail on its second through sixth claims, those claims should be dismissed under the anti-SLAPP statute, and the Court should award ICANN its attorneys' fees.

I. THE ANTI-SLAPP STATUTE APPLIES TO VERISIGN'S SECOND, THIRD, AND FOURTH CLAIMS.

VeriSign's arguments that the anti-SLAPP statute does not apply to its second, third, and fourth claims seriously mischaracterize the allegations in

1 VeriSign's complaint and misconstrue the threshold showing required to invoke the
2 statute.¹ Without question, ICANN has satisfied its threshold burden of showing
3 that VeriSign's second, third, and fourth claims are claims "arising from any act of
4 [ICANN] in furtherance of [ICANN]'s right of petition or free speech under the
5 United States or California Constitution in connection with a public issue." Cal.
6 Code Civ. Proc. § 425.16(b)(1).

7 **A. The Second, Third, and Fourth Claims Arise from ICANN's**
8 **Sending of the October 3 Letter.**

9 VeriSign argues that its second, third, and fourth claims do not "arise from"
10 the October 3 letter, and that VeriSign's claims instead are based on a "three-year"
11 course of dealing. Opp. 6:10-15. This is nonsense. Those claims for relief, each
12 approximately one page, make clear that the act that forms the basis for the claims
13 is the sending of the October 3 letter, referred to as the "Suspension Ultimatum"
14 throughout the complaint. No *other* act is even referenced.² See, e.g., Compl.
15 ¶¶ 94, 101 ("ICANN issued the Suspension Ultimatum demanding the suspension
16 of Site Finder without any proper ground therefor"); Compl. ¶ 107 ("ICANN's
17 conduct with respect to Site Finder, including, without limitation, its issuance of the
18 Suspension Ultimatum, as alleged in this Complaint, was designed and intended to
19 disrupt this contractual relationship.").

20 ¹ In its introduction, VeriSign's opposition accuses ICANN of "abusing" the
21 anti-SLAPP statute, but the statutory provision VeriSign quotes is not applicable
22 here. That provision prohibits anti-SLAPP motions only in actions that are:
23 (i) "brought solely in the public interest or on behalf of the general public" for relief
benefiting plaintiff commonly with the public or a class, or (ii) "brought against a
person primarily engaged in the business of selling or leasing goods or services" for
trade disparagement. See Cal. Code Civ. Proc. § 425.17(b), (c).

24 ² VeriSign's second, third, and fourth claims are fundamentally unlike those
25 at issue in *Kajima Engineering & Construction, Inc. v. City of Los Angeles*, 95 Cal.
26 App. 4th 921 (2002), *Santa Monica Rent Control Bd. v. Pearl St., LLC*, 109 Cal.
27 App. 4th 1308 (2003), and *City of Cotati v. Cashman*, 29 Cal. 4th 69 (2002), which
28 held that lawsuits *not* substantively based on protected conduct are not subject to
the anti-SLAPP statute simply because they were claimed to be triggered by, or in
retaliation for, the conduct. Similarly, the holding of *Gallimore v. State Farm Fire
& Casualty Ins. Co.*, 102 Cal. App. 4th 1388 (2002)—that a case alleging statutory
violations did not "arise from" a report filed with the Department of Insurance
which disclosed and alerted the plaintiff to the violations—is inapplicable here.

1 **B. ICANN Sent the October 3 Letter in Furtherance of Its Right to**
2 **Free Speech or Right of Petition in Connection with a Public Issue.**

3 VeriSign next argues that for ICANN "to satisfy its threshold burden that the
4 anti-SLAPP statute applies to VeriSign's claims, ICANN *must first demonstrate,*
5 through admissible evidence, that its October 3 letter falls within California's
6 litigation privilege." Opp. 8:26-9:3. VeriSign is wrong.³ On an anti-SLAPP
7 motion, the litigation privilege is a substantive defense relevant to *VeriSign's*
8 burden of showing a probability of success on the merits (discussed *infra*); it is not
9 relevant to *ICANN's* threshold burden. *See eCash Technologies, Inc. v. Guagliardo,*
10 210 F. Supp. 2d 1138, 1154 (C.D. Cal. 2001) (litigation privilege relevant to
11 evaluation of *plaintiff's* burden of showing probability of success); *Kashian v.*
12 *Harriman*, 98 Cal. App. 4th 892 (2002) (same); *Dove Audio, Inc. v. Rosenfeld,*
13 *Meyer & Susman*, 47 Cal. App. 4th 777, 784-85 (1996) (same).

14 Instead, to satisfy its burden that the anti-SLAPP statute applies to VeriSign's
15 claims, ICANN must demonstrate that it sent the October 3 letter in furtherance of
16 its right to free speech or right of petition in connection with a public issue. *Batzel*
17 *v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003); *Equilon Enterprises, LLC v.*
18 *Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002). The California Supreme Court
19 "has definitively held [that] statements in relation to pending or upcoming litigation
20 (a 'public issue') are covered by Section 425.16." *eCash Technologies*, 210 F.
21 Supp. 2d at 1154 (citing *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal.

22 ³ VeriSign cites *Shropshire* for the proposition that a defendant must prove its
23 conduct falls within the litigation privilege in order to satisfy its threshold burden
24 that the anti-SLAPP statute applies, but the *Shropshire* court based its analysis upon
25 a misapplication of the court's holdings in *Dove Audio*. *See Shropshire v. The Fred*
26 *Rappoport Co.*, 294 F. Supp. 2d 1085, 1099-1100 (N.D. Cal. 2003). In *Dove*
27 *Audio*, the court first ruled on the defendant's motion to dismiss. Then, when it
28 evaluated the anti-SLAPP motion, the court held that the communication met the
defendant's threshold burden *before* it found that the litigation privilege would
prevent plaintiff from establishing a probability of prevailing. *Dove Audio*, 47 Cal.
App. 4th at 784. ICANN does not contend, as VeriSign suggests at Opp. 8:24-26,
that the litigation privilege is relevant to an evaluation of ICANN's prima facie
showing. Opp. 8:24-26. There is not a single reference to the litigation privilege in
ICANN's Special Motion to Strike.

1 4th 1106, 1123 (1999); *see Equilon Enterprises*, 29 Cal. 4th at 67; *Dove Audio*,
2 *Inc.*, 47 Cal. App. 4th at 783; *see also* Mot. 7:6-9:26. For such communications,
3 there is no "separate requirement that they be shown to be 'an issue of public
4 significance.'" *eCash Technologies*, 210 F. Supp. 2d at 1154.

5 The circumstances here clearly demonstrate that the October 3 letter was
6 written in anticipation of litigation to be filed by ICANN, thus meeting ICANN's
7 threshold burden. The face of the letter shows as much, closing with a threat "to
8 seek promptly to enforce VeriSign's contractual obligations" if VeriSign did not
9 suspend the changes it had made.⁴ Under § II.16(A) of the Registry Agreement,
10 ICANN could only enforce VeriSign's obligations by first obtaining a judgment or
11 arbitration award that VeriSign's behavior violated its obligations under the
12 agreement. Indeed, VeriSign's complaint affirmatively alleges that in the letter
13 ICANN "threatened VeriSign that, unless Site Finder was suspended forthwith,
14 ICANN would initiate legal proceedings against VeriSign, thereby threatening
15 VeriSign's operation of the .com registry." Compl. ¶ 37. And, finally, the
16 declarations of ICANN's General Counsel confirm that the letter was written in
17 contemplation of litigation. *See* Jeffrey Decl., ¶ 11; Supp. Jeffrey Decl., ¶ 4.

18 **II. THE ANTI-SLAPP STATUTE APPLIES TO THE FIFTH AND** 19 **SIXTH CLAIMS AS WELL.**

20 **A. The Fifth and Sixth Claims Arise from ICANN's Assertion of** 21 **its Contract Position.**

22 VeriSign argues that its fifth and sixth claims are not subject to ICANN's
23 Special Motion to Strike because these claims do not arise from ICANN's public
24 statements regarding the parties' agreement. Opp. 11:10-11. VeriSign's sole
25 argument is that two of the eight alleged statements identified at pages 4-5 of

26 ⁴ *See eCash Technologies*, 210 F. Supp. 2d at 1153-54 (on its face, letter
27 regarding litigation over "eCash" mark "clearly fits within the conduct that is
28 subject to the protections of the 'Anti-SLAPP' law."); *Dove Audio*, 47 Cal. App. 4th
at 784 (on its face, letter seeking support for petition to Attorney General for an
investigation of royalty payments to charities entitled to 425.16 protection).

1 ICANN's Motion from VeriSign's complaint do not form the gravamen of
2 VeriSign's fifth and sixth claims.⁵ However, the complaint clearly alleges that
3 ICANN has committed these "acts and omissions" and "repudiation" through
4 statements asserting its contract positions. Compl. ¶¶ 37; 44; 45; 52; 53; 67.

5 In its opposition, VeriSign mischaracterizes its complaint and tries to bring it
6 within the holdings of courts that have denied anti-SLAPP motions because the
7 claims arose from specific wrongful acts, none of which were in furtherance of the
8 movant's right to petition or free speech. Opp. at 6:11-14. However, in each of the
9 cases cited by VeriSign, the complaints survived an anti-SLAPP motion because
10 they alleged *specific conduct* that occurred *independent of* any protected speech.⁶
11 In contrast to these cases, VeriSign's complaint and ICANN's Motion make clear
12 that the "contractual dealings" of which VeriSign complains is ICANN's assertion
13 of contract positions, each of which falls into one or both of two protected
14 categories: statements made in relation to pending or upcoming litigation or
15 statements concerning matters of public interest.

16 For example, VeriSign alleges that ICANN's statements are wrongful
17 because the statements constitute a "repudiation" of the Registry Agreement. This
18 is precisely the type of allegation covered by the anti-SLAPP statute. Where, as

19 ⁵ VeriSign argues that the anti-SLAPP statute does not apply to any of the six
20 other alleged statements because ICANN "does not, because it cannot, allege that
21 these other statements were made in a public forum and thus within the scope of the
22 anti-SLAPP statute." Opp. 11, n.13. VeriSign misunderstands the statute. There is
23 no public forum requirement to section 425.16(e)(4), which protects "any other
24 conduct in furtherance of the exercise of the constitutional right of petition or the
25 constitutional right of free speech in connection with a public issue or an issue of
26 public interest." As described in more detail, *infra*, ICANN's technical
27 coordination of the DNS, which is the subject of these statements and VeriSign's
28 fifth and sixth claims, is both a public issue and an issue of public interest.

24 ⁶ See *Martinez v. Metabolife Int'l, Inc.*, 113 Cal. App. 4th 181, 188 (2003)
25 (anti-SLAPP statute did not apply because defendant's "commercial speech,
26 although mentioned in the complaint, is largely unrelated to and entirely distinct
27 from the wrongful, injury-causing conduct by [defendant] on which Plaintiffs'
28 claims are based."); *Scott v. Metabolife Int'l, Inc.*, 115 Cal. App. 4th 404, 416
(2004) (same); *Kajima Engineering & Construction, Inc.*, 95 Cal. App. 4th 921
(claims did not arise from defendant's statements or protected conduct); *Gallimore*
102 Cal. App. 4th 1388 (same); *Santa Monica Rent Control Bd.*, 109 Cal. App. 4th
1308 (same); *City of Cotati*, 29 Cal. 4th 69 (same).

1 here, the defendant has demonstrated that plaintiff's claims arise, in part or *in toto*,
2 from protected activities, the defendant's threshold anti-SLAPP burden has been
3 met. *See Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 308
4 (2001).

5 **B. The Operation of the Domain Name System is a Matter of**
6 **Public Interest.**

7 VeriSign argues that the anti-SLAPP statute does not apply to VeriSign's
8 fifth and sixth claims because ICANN's statements "concern ICANN's breach of its
9 contract with VeriSign and interference with VeriSign's contract with a third party."
10 Opp. 13:6-9. VeriSign argues that "[s]uch private issues between contracting
11 parties do not constitute matters of public interest to which the anti-SLAPP statute
12 was intended to apply." *Id.* 13:9-11. VeriSign is wrong.

13 The anti-SLAPP statute applies to breach of contract claims and extends to
14 private conversations about public issues. As the California Supreme Court
15 explained in *Navellier v. Sletten*, 29 Cal. 4th 82 (2002), whether the anti-SLAPP
16 statute applies turns on the *activity* alleged and not whether the claim asserted is for
17 a breach of contract or a tort. *Id.* at 92-93. Even "private" conversations regarding
18 a public issue are protected by the anti-SLAPP statute. Cal. Civ. Code Proc.
19 § 425.16(e)(4); *see Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 18 (1995);
20 *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 821-23 (1994).

21 VeriSign's complaint and the documents presented for judicial notice
22 demonstrate that ICANN's alleged activities pertain to a matter of great public
23 significance -- the operation of the Internet's Domain Name System (DNS).⁷

24 ⁷ ICANN and VeriSign are not "commercial competitors." Therefore,
25 VeriSign's citations to *MCSi, Inc. v. Woods*, 290 F. Supp. 2d 1030, 1034 (N.D. Cal.
26 2003), and *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp.
27 2d 1127, 1130 (N.D. Cal. 1999), are irrelevant, and *Weinberg v. Feisel*, 110 Cal.
28 App. 4th 1122 (2003) and *Consumer Justice Center v. Trimedica Int'l, Inc.*, 107
Cal. App. 4th 595 (2003) are distinguishable. The operation of the .com registry is
a far more publicly significant issue than whether Weinberg was wrongly accused
of stealing collectible tokens or whether Trimedica's cosmetic claims for its herbal
supplement were misrepresentations.

1 VeriSign's complaint alleges that many persons, entities and foreign governments
2 are involved in these issues. *See, e.g.*, Compl. ¶ 18. Further, the close interaction
3 between the ICANN-VeriSign Registry Agreement and the Department of
4 Commerce's parallel agreements with VeriSign and ICANN shows that the federal
5 government has a continuing interest in ensuring proper operation of the .com
6 registry. *See* RJN, Ex. C; *see also* Supp. Jeffrey Decl., ¶ 2, Exs. 1, 2 (MOU
7 amendments 1 and 3) (DOC right to approve modifications to Registry Agreement);
8 Exs. 3, 4 (Cooperative Agreement amendments 19 and 24) (DOC retention of
9 residual authority).

10 Several Department of Commerce press releases demonstrate the federal
11 government's continuing assessment of the .com registry as a public matter. *See*
12 Supp. Jeffrey Decl., ¶ 2, Exs. 5-8. The fact that the general public also considers
13 the operation of the .com registry a matter of public interest is illustrated, for
14 example, by the widespread press coverage that ensued when, unannounced,
15 VeriSign inserted a wildcard into the .com zone. *See id.*, ¶ 3, Exs. 9-11.

16 **III. VERISIGN HAS NOT SHOWN A PROBABILITY OF SUCCESS**
17 **ON THE MERITS OF ITS CLAIMS.**

18 Once ICANN's threshold showing has been made, VeriSign must
19 demonstrate that it has a probability of succeeding on the merits of its claims.
20 *Batzel*, 333 F.3d at 1024; *see* Cal. Code Civ. Proc. § 425.16(b)(1). Because
21 VeriSign's complaint and the documents presented for judicial notice demonstrate
22 that VeriSign cannot prevail on its claims as a matter of law, ICANN's Special
23 Motion to Strike should be granted. *See Rogers v. Home Shopping Network, Inc.*,
24 57 F. Supp. 2d 973, 980 (C.D. Cal. 1999).

25 **A. VeriSign's Contract Claims Do Not Allege a Breach of any**
26 **ICANN Obligation.**

27 VeriSign fails to show a probability that it will prevail on its breach-of-
28 contract claims because it does not identify a *breach by ICANN* of any obligation

1 ICANN has under the Registry Agreement. The record shows stark differences
2 between the parties about the extent of *VeriSign's obligations*, but under contract
3 law those disagreements do not constitute breaches of *ICANN's obligations*.

4 For example, VeriSign's second and third claims are based on ICANN's
5 sending of the October 3 letter. But that act cannot form the basis for a breach of
6 contract *by ICANN*: VeriSign inserted a wildcard in the .com registry on
7 September 15, 2003; eighteen days later, ICANN sent a letter to VeriSign accusing
8 *VeriSign* of breaching the Registry Agreement and threatening to file a lawsuit.
9 There is no obligation in the Registry Agreement that requires ICANN to refrain
10 from sending letters to VeriSign expressing ICANN's position that VeriSign is
11 breaching the contract. As explained in more detail in ICANN's Rule 12 papers --
12 which ICANN incorporates by reference -- VeriSign cannot demonstrate a
13 probability of prevailing on these claims.

14 Nor do VeriSign's incantations of "repudiation" repair this fundamental flaw:
15 it is only a repudiation *of ICANN's obligations* -- none of which are alleged -- that
16 could conceivably give rise to a breach. VeriSign's argument that ICANN
17 "conditioned its further performance under the agreement on VeriSign's"
18 suspension of the wildcard (Opp. 18:5-7) is refuted by the October 3 letter, which
19 shows that ICANN did *not* condition *its performance* of the agreement on
20 VeriSign's suspension of the wildcard; ICANN simply threatened to file suit to
21 enforce *VeriSign's* obligations.

22 VeriSign tries to defend its fifth and sixth claims by arguing that ICANN has
23 breached certain "express" provisions in the Registry Agreement. Opp. 16:5-19:17;
24 20, n.21. But, as explained more fully in ICANN's Rule 12 papers, VeriSign's
25 arguments ignore the actual text of the agreement. For example, the Registry
26 Agreement requires only "appeal procedures," which may be met by an
27 independent review policy; it does *not* require ICANN to establish an Independent
28 Review Panel. Indeed, the agreement explicitly contemplates that ICANN may *not*

1 have an Independent Review Panel in place.⁸ See Reply Mem. on Mot. to Dismiss
2 10:11-11:20. Similarly, the Registry Agreement does *not* obligate ICANN to make
3 "substantial progress towards having entered into agreements with competing
4 registries"; rather, this is relevant to whether VeriSign can terminate the agreement
5 with Department of Commerce approval. *Id.* 11, n.13.

6 VeriSign also argues that ICANN failed to act in an open and transparent
7 manner and refrain from "unreasonably restraining competition" or singling out
8 VeriSign for disparate treatment regarding its proposed services. But VeriSign's
9 complaint alleges that these services "are not properly the subject of the .com
10 Registry Agreement." Compl. ¶ 73. In view of this allegation, VeriSign cannot
11 allege that ICANN had an obligation under the Registry Agreement to be open and
12 transparent, equitable, or refrain from "unreasonably restraining competition" in its
13 conduct respecting those services.⁹ Moreover, the Registry Agreement makes clear
14 that these "obligations," set forth in section II.4 of the Agreement, pertain to the
15 manner in which ICANN carries out *its responsibilities*, not the manner in which it
16 seeks to enforce *VeriSign's responsibilities*.

20 ⁸ VeriSign's argument that ICANN's alleged lack of an Independent Review
21 Panel left it without an appeal procedure "to seek relief from ICANN's actions and
22 potentially prevent damages that have flowed from those actions" (Opp. 16:14-17)
23 is specious. As the Supplemental Jeffrey Declaration makes clear, VeriSign *did* use
ICANN's Reconsideration process in connection with its WLS service and obtain a
modification through that appeal mechanism. See Supp. Jeffrey Decl., ¶ 5, Exs. 12,
13.

24 ⁹ Even if the obligations of section II.4 of the Registry Agreement did apply
25 to VeriSign's alleged "proposed services," VeriSign's misquote of the section
26 suggests an obligation that ICANN does not have. VeriSign argues that "ICANN
27 agreed in the Registry Agreement that it would not 'apply standards, policies,
28 procedures and practices arbitrarily, unjustifiably or inequitably and not single out
Registry Operator for disparate treatment.'" The clause in its entirety says that
ICANN will "not apply standards, policies, procedures or practices arbitrarily,
unjustifiably, or inequitably and not single out Registry Operator for disparate
treatment UNLESS JUSTIFIED BY SUBSTANTIAL AND REASONABLE
CAUSE;" (text omitted by VeriSign capitalized).

1 **B. VeriSign Has Not Alleged a Valid Claim for Intentional**
2 **Interference with Contract.**

3 VeriSign cannot prevail on its fourth claim for interference with contract
4 because the claim is barred by the litigation privilege.¹⁰ The claim is based entirely
5 on ICANN's sending of the October 3 pre-litigation demand letter, which is a
6 privileged communication. A communication is privileged under California Civil
7 Code section 47(b) if made in, or in anticipation of, litigation by litigants or
8 authorized participants. *Rothman v. Jackson*, 49 Cal. App. 4th 1134, 1145 (1996)
9 (citing *Moore v. Conliffe*, 7 Cal. 4th 634, 641 (1994)). Pre-litigation demand letters
10 fall within the protection of the litigation privilege. *See Knoell v. Petrovich*, 76 Cal.
11 App. 4th 164, 166 (1999) (litigation privilege barred claim based on pre-litigation
12 demand letter).

13 VeriSign argues that whether the litigation privilege applies to the October 3
14 letter is a fact question that depends on whether it was sent while "an anticipated
15 lawsuit, based on a legally viable claim, was seriously contemplated in good faith."
16 Opp. 9:18-20. But where the operative facts are clear, courts apply the litigation
17 privilege as a matter of law. *Kashian*, 98 Cal. App. 4th at 913 (citing *Rothman*, 49
18 Cal. App. 4th at 1139-40). Several courts have held that the application of the
19 litigation privilege to pre-litigation demand letters is properly a matter for
20 resolution on the pleadings.¹¹ "Any doubt about whether the privilege applies is

21 ¹⁰ The litigation privilege is also a basis for dismissing VeriSign's breach of
22 contract claims. *See Laborde v. Aronson*, 92 Cal. App. 4th 459, 463-465 (2001)
23 (litigation privilege provided complete defense to all claims, including breach of
24 contract claims); *Pollock v. Superior Court*, 229 Cal. App. 3d 26, 29-30 (1991)
25 (issuing writ sustaining demurrer to breach of contract claim without leave to
26 amend based on litigation privilege).

27 ¹¹ *See, e.g., eCash Technologies*, 210 F. Supp. 2d at 1154 (dismissing claims
28 because litigation privilege applied to pre-litigation letter); *Knoell*, 76 Cal. App. 4th
at 166 (affirming dismissal because litigation privilege applied to pre-litigation
letter); *Dove Audio, Inc.*, 47 Cal. App. 4th 777 (same); *Larmour v. Campanale*, 96
Cal. App. 3d 566 (1979) (same); *Lelette v. Dean Witter Organization, Inc.*, 60 Cal.
App. 3d 573, 577-78 (1976) (same).

 The cases VeriSign cites all involved serious doubts (not present here) as to
whether the pre-litigation communication was in good faith and made in serious
contemplation of litigation. *See Shropshire*, 294 F. Supp. 2d 1085 (factual dispute

1 resolved in favor of applying it." *Kashian*, 98 Cal. App. 4th at 913 (citing *Adams v.*
2 *Superior Court*, 2 Cal. App. 4th 521, 529 (1992)).

3 VeriSign's complaint and the documents presented for judicial notice make
4 clear that ICANN *was* seriously and in good faith contemplating its legally viable
5 claims against VeriSign when it sent the October 3 letter:

- 6 • The October 3 letter states that the introduction of the wildcard
7 violated the Registry Agreement, that VeriSign must suspend the
8 change, and that failure to suspend would cause ICANN "to seek
9 promptly to enforce VeriSign's contractual obligations." *See* RJN
10 Ex. F (October 3 letter).
- 11 • The complaint alleges that the October 3 letter constituted a
12 "Suspension Ultimatum," by which ICANN "threatened VeriSign that,
13 unless Site Finder was suspended forthwith, ICANN would initiate
14 legal proceedings against VeriSign, thereby threatening VeriSign's
15 operation of the .com registry. Compl. ¶ 37.
- 16 • VeriSign alleges that "[a]s a direct result of the Suspension Ultimatum
17 and related actions by ICANN, VeriSign was forced to suspend Site
18 Finder." *See* Compl., ¶ 37; *see also* ¶¶ 32-34, 94, 101, 107.

19 Although VeriSign alleges that ICANN issued its October 3 letter on
20 "grounds known by it to be false and baseless," and "without any proper ground
21

22 _____
(continued...)

23 as to whether defendant's threat to sue a third party, not plaintiff, in separate action
24 was in good faith and serious consideration of litigation); *Edwards v. Centex Real*
25 *Estate Corp.*, 53 Cal. App. 4th 15 (1997) (communications occurred more than five
26 years before action was filed and communications never stated an intent to sue);
27 *Aronson*, 58 Cal. App. 4th 254 (dispute existed over whether defendant's demand
28 letter to a third-party was withdrawn prior to the third-party informing defendant
that it would concede to defendant's demands); *Fuhrman v. California Satellite*
Sys., 179 Cal. App. 3d 408, 422 (1986) (allegation that first pre-litigation letter was
sent to approximately 8,700 residents of the county demonstrated that "[p]laintiff's
complaint raise[d] serious question whether the letters [] were published in good
faith and serious contemplation of litigation.").

1 therefor" (Compl. ¶¶ 94, 101), VeriSign offers no *facts* in support of its allegations.
2 And, more importantly, the California Supreme Court has stated that a party's
3 motives for threatening litigation are not relevant to the analysis of whether the
4 litigation privilege applies. *See Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990);
5 *Kashian*, 98 Cal. App. 4th at 913 ("application of the privilege does not depend on
6 the publisher's 'motives, morals, ethics or intent.'" (quoting *Silberg*, 50 Cal. 3d at
7 220)).

8 Finally, the record is clear that ICANN was seriously and in good faith
9 contemplating filing suit against VeriSign. ICANN was in communication with
10 counsel, which had opined that ICANN had legally viable claims against VeriSign,
11 and ICANN's counsel worked with ICANN to draft the October 3 letter. *See*
12 Jeffrey Decl. ¶ 11; Supp. Jeffrey Decl. ¶ 4.¹²

13 **IV. NO DISCOVERY IS NECESSARY IN ORDER FOR THE**
14 **COURT TO RULE ON THE MOTION TO STRIKE.**

15 VeriSign argues that a decision on ICANN's anti-SLAPP motion should be
16 continued to allow VeriSign to conduct discovery. Opp. 23:20-24:1. The Ninth
17 Circuit has held, however, that a Special Motion to Strike should be granted
18 without discovery where it is unnecessary to the Court's ruling on the motion. *See*
19 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003); *eCash*
20 *Technologies*, 210 F. Supp. 2d 1138; *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F.
21 Supp. 2d 1261 (C.D. Cal. 2001).

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26 ¹² VeriSign has not demonstrated that, even if the October 3 letter constituted
27 an interference with a subsequent third-party contract at all, the interference was not
28 "such a minor and incidental consequence and so far removed from the defendant's
objective" that as against VeriSign the interference was not improper. *See*
Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 56 (1998); *see also* Mot.
to Dismiss at 21-23.

1 **A. A Special Motion To Strike Directed to the Pleadings Should**
2 **Be Decided on the Pleadings.**

3 Discovery is *not* appropriate prior to a Court's ruling on an anti-SLAPP
4 motion to strike directed to the pleadings. *See Vess*, 317 F.3d at 1110 (affirming
5 district court decision granting motion to strike because nonmovants could not
6 demonstrate probability of prevailing because they had already lost on a motion to
7 dismiss); *eCash Technologies*, 210 F. Supp. 2d at 1154 (granting motion to strike
8 for same reasons warranting grant of motion to dismiss); *Rogers*, 57 F. Supp. 2d at
9 983 (stating rule). As in *Vess* and *eCash Technologies*, ICANN has filed a motion
10 to dismiss and a motion to strike that attacks the pleadings. ICANN has made its
11 threshold showing, based solely on the complaint and documents of which the
12 Court may take judicial notice, that the anti-SLAPP statute applies to VeriSign's
13 second through sixth claims. VeriSign has not overcome the insufficiencies, as a
14 matter of law, of the allegations in its complaint. Therefore, the Court should grant
15 the anti-SLAPP motion without permitting needless discovery.

16 **B. VeriSign Has Not Shown What Discovery It Truly Needs**
17 **Before the Court Rules on ICANN's Anti-SLAPP Motion.**

18 VeriSign argues that it should be permitted to take discovery before the Court
19 rules on ICANN's motion to strike because "*issues of fact* exist with respect to both
20 the applicability of the anti-SLAPP statute to VeriSign's claims and VeriSign's
21 prima facie burden to show that its claims have merit." Opp. 23:20-24:1. VeriSign
22 then proposes a broad-ranging set of depositions and discovery requests that appear
23 designed to complete discovery for the entire litigation.

24 Only if a defendant makes a Special Motion to Strike based on the plaintiff's
25 alleged failure of proof should the motion be treated in the same manner as a
26 motion under Rule 56 (except that the attorney's fees provision of § 425.16(c)
27 applies). *Rogers*, 57 F. Supp. 2d at 983. If the plaintiff's claims survive a motion to
28 dismiss, the Special Motion to Strike can then be used to test whether plaintiff

1 could support its claims with adequate evidence. *Id.* at 983-84. Therefore, only if
2 VeriSign's claims survive ICANN's motion to dismiss should any necessary
3 discovery be permitted, and that discovery must be limited to information essential
4 to the opposition. *See Metabolife*, 264 F.3d at 846 (limited "essential" discovery);
5 *Global Telemedia Int'l*, 132 F. Supp. 2d at 1271 (denying request for discovery);
6 *Rogers*, 57 F. Supp. 2d at 985 ("identified specific discovery").

7 VeriSign has failed to inform the Court of what discovery it truly needs
8 before the Court could rule on ICANN's anti-SLAPP motion. The mountain of
9 evidence that VeriSign has submitted thus far is irrelevant to the determination of
10 whether VeriSign can prevail on its breach of contract and tort claims. For
11 example, VeriSign provided the Court with several declarations setting forth its
12 factual interpretation of the Registry Agreement, including a declaration allegedly
13 describing how the critical phrase "Registry Services" was negotiated. Sbarboro
14 Decl., ¶¶ 20-35. But all of this evidence -- much of which is demonstrably wrong,
15 as ICANN will demonstrate in due course -- misses the point. The issue on
16 ICANN's anti-SLAPP motion is not whether ICANN or VeriSign will prevail with
17 respect to their competing interpretations of the Registry Agreement (claim 7); the
18 issue is whether ICANN *breached* the agreement or committed a tort by asserting
19 its positions (claims 2-6).

20 VeriSign argues that discovery on claims 2-4 (only) is needed regarding,
21 first, "whether ICANN's October 3 letter was made with a good faith belief in a
22 legally viable claim against VeriSign, and whether ICANN was seriously
23 contemplating such a lawsuit" (Pope Decl. 2:1-4); however, VeriSign has not raised
24 any *legitimate* doubt on this issue.¹³ Second, VeriSign argues it needs discovery

25 ¹³ VeriSign significantly overreaches when it suggests that, to defend against
26 the anti-SLAPP motion, VeriSign might need discovery of "ICANN's consultations
27 with legal counsel prior to sending the Suspension Ultimatum" and "any legal
28 investigation regarding the viability of its alleged claims against VeriSign prior to
October 3." Contrary to VeriSign's argument (Opp. 25, n.30), *Fox v. California
Sierra Financial Services*, 120 F.R.D. 520, 530 (N.D. Cal. 1988), did not hold that
this information is the proper subject of discovery any time the litigation privilege
is at issue. *Fox*, 120 F.R.D. at 530 (in case where litigation privilege was not even

1 regarding "ICANN's knowledge of VeriSign's agreement with a third party and
2 ICANN's intent to disrupt that agreement by demanding suspension of VeriSign's
3 Site Finder service" (Pope Decl. 2:19-21), but VeriSign's tort claim is based on the
4 October 3 letter, which is protected as a matter of law by the litigation privilege,
5 and VeriSign has presented *no evidence* that alters the application of that privilege.
6 Third, VeriSign argues it needs discovery regarding whether "ICANN engaged in
7 conduct separate and apart from the performance of its obligations under the
8 agreement without good faith" (Pope Decl. 3:16-18), but this discovery is not
9 warranted under any articulation of the implied covenant of good faith and fair
10 dealing, as explained in ICANN's Rule 12 papers.

11 Thus, *none* of the discovery VeriSign seeks is necessary to the Court's
12 determination as to whether VeriSign has a probability of succeeding on its claims.

13 CONCLUSION

14 For the foregoing reasons, ICANN requests that the Court grant ICANN's
15 Special Motion to Strike VeriSign's second, third, fourth, fifth, and sixth claims for
16 relief and order VeriSign to pay ICANN's costs and attorneys' fees.

17 Dated: May 10, 2004

JONES DAY

18 By: _____

19 Jeffrey A. LeVee

20 Attorneys for Defendant
21 INTERNET CORPORATION FOR
22 ASSIGNED NAMES AND NUMBERS

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24 _____
(continued...)

25 at issue attorneys who testified before SEC and in other litigation produced
26 privileged documents and who did not assert the attorney-client privilege at the
27 time could not later assert it in a different suit). Moreover, under *Aronson*, that
28 information is only put at issue when there is a factual dispute as to whether a
movant intended to file suit and, even then, the information VeriSign seeks is
obviously privileged. *Aronson*, 58 Cal. App. 4th at 269 (attorney-client privilege
was not waived).

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