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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 04-1292 AHM (CTx) Dated: April 23, 2004

Title: Verisign, Inc. v. Internet Corp. for Assigned Names and Numbers ("ICANN")

==========DOCKET ENTRY==========

PRESENT: THE HONORABLE A. HOWARD MATZ, JUDGE

Stephen Montes	NONE
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANTS:

No Appearance

DOCKETED ON CM
APR 26 2004
BY 007

PROCEEDINGS: In Chambers

This matter is before the Court on Verisign's *ex parte* application to continue ICANN's motion to strike (pursuant to California's anti-SLAPP statute) to allow for discovery. The Ninth Circuit recognizes a motion to strike based on California's anti-SLAPP statute in federal court, although the federal court is not bound to apply procedural provisions of that law that would "'immediately put the plaintiff to his or her proof before the plaintiff can conduct discovery.'" *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845-47 (9th Cir. 2001) (quoting *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 980 (C.D. Cal. 1999)); *see also* Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Civ. Pro. Before Trial* (The Rutter Group 2004), §§ 1.63.5-1.63.9.

ICANN has noticed two motions for hearing on May 17, 2004: a motion to dismiss the first through sixth claims pursuant to Fed. R. Civ. P. 12(b)(6), and a motion to strike the second through sixth claims pursuant to California's anti-SLAPP statute. In order to prevail on the motion to strike, the moving party ("movant") must first make a prima facie showing that the claim is covered by the anti-SLAPP statute. *Batzel v.*

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Smith, 333 F.3d 1018, 1024 (9th Cir. 2003). If the movant -- here, ICANN -- can make that showing, then the burden shifts to the opponent (Verisign) to demonstrate a probability of prevailing on that claim. *Id.* Whether a court should continue an anti-SLAPP motion to strike in order to allow the opponent to conduct discovery may depend on whether the court and the opposing party need that discovery to determine if the claims arise out of protected activity or whether discovery is necessary to enable the nonmoving party to show a probability of prevailing on its claims. *See Metabolife, supra* (district court should have permitted nonmovant to conduct discovery on issue of falsity to support its defamation claims; district court's application of procedural provisions of California's anti-SLAPP law conflicted with Fed. R. Civ. P. 56); *Shropshire v. Fred Rappoport Co.*, 294 F. Supp. 2d 1085 (N.D. Cal. 2003) (denying motion to strike when discovery needed to determine if statement was protected speech in anticipation of litigation). In contrast, *cf. Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003) (affirming district court decision granting motion to strike because nonmovants could not demonstrate probability of prevailing since they had already lost on a motion to dismiss); *ECash Tech., Inc. v. Guagliardo*, 210 F. Supp. 2d 1138 (C.D. Cal. 2001) (granting motion to strike for same reasons warranting grant of motion to dismiss); *Global Telemedia Int'l, Inc. v. Doe*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001) (granting motion to strike because nonmovant's request for discovery concerned evidence that was irrelevant to its probability of prevailing on its claims).

Having quickly summarized most of the key decisions providing guidance, the Court DENIES Verisign's *ex parte* application to continue the motion to strike to allow for discovery. Although the Court is likely to address the motion to dismiss first, briefing on the motion to strike shall continue according to the schedule the parties agreed upon and the hearing remains set for May 17, 2004. *See* Decl. of Laurence J. Hutt, ¶ 7. Verisign's opposing brief should address the sufficiency of ICANN's prima facie showing that the anti-SLAPP statute applies to claims two through six. If ICANN's showing is deficient, that ends the analysis and moots the need for relief. Assuming ICANN's showing is sufficient, Verisign should address on the merits what will have become its burden of proving a likelihood of prevailing on its claims. In addition, however, if Verisign needs discovery to meet that burden, it may also incorporate into its opposing brief the equivalent of a

Rule 56(f) motion.[1] In that regard, Verisign should describe with greater specificity than it did in the *ex parte* application what issues require discovery, just what information it seeks, what type of discovery it reasonably anticipates will uncover that information, whether such discovery has been initiated and how much time such discovery will require.

IT IS SO ORDERED.

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Initials of Deputy Clerk

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[1] As stated in *Rogers*, *supra*, at 983,

> If a defendant makes a special motion to strike based on alleged deficiencies in the plaintiff's complaint, the motion must be treated in the same manner as a motion under Rule 12(b)(6) except that the attorney's fee provision of [the California anti-SLAPP statute] applies. If a defendant makes a special motion to strike based on the plaintiff's alleged failure of proof, the motion must be treated in the same manner as a motion under Rule 56 except that again the attorney's fees provision...applies.